

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* LABOR ORGANIZATIONS IN SUPPORT OF
AFFIRMANCE OF THE JUDGMENT BELOW**

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES
AMERICAN FEDERATION OF TEACHERS
AMERICAN GUILD OF MUSICAL ARTISTS
AMERICAN FEDERATION OF MUSICIANS
AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS
ASSOCIATION OF FLIGHT ATTENDANTS
CHANGE TO WIN
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UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING,
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STATEMENT OF INTEREST

Amici curiae are 19 major national and international labor organizations, which together represent over 16 million Americans working in a broad swath of jobs,¹ in businesses and in the public sector throughout the United States. Our central mission is to defend the economic security of all working families. We consider the economic rights of lesbian and gay Americans at work an important part of that overall mission.

The Defense of Marriage Act (DOMA) is a severe impediment to fair representation of all our workers who request, simply, equal treatment at their jobs. But DOMA commands the opposite: Its direct effect by intention and design ensures that all workers in marriages of same-sex couples earn less money, are taxed more on their wages and benefits, and have available to them fewer valuable benefits and less economic security than their counterparts in different-sex marriages. Work is the central means by which most Americans obtain economic security, and the defense of all workers' free opportunity to obtain such financial security for themselves and their families has long been a priority for the labor

¹ E.g., Letter carriers, journalists, copper miners, steelworkers, truck drivers and construction workers, educators, railroad and subway workers, bus drivers, actors and radio personalities, opera singers, ballet dancers, orchestra and band members, nurses and healthcare workers, janitors, aircraft mechanics, store cashiers, clerks and stockers, flight attendants and auto workers.

movement. Directly contravening our mission, DOMA has the effect of relegating an entire class of working families to lower-economic security.

The damage to American workers is not some abstraction of competing notions of what various cultures and religions have differently directed over the course of millennia; damage inflicted by DOMA as set out below is easily measured in dollars that our workers pay in higher taxes, in work-arounds to benefit denials (where possible) and in the number of U.S. border entry denials and deportations.

SUMMARY OF ARGUMENT

Most Americans, including families and children, secure benefits through a family member's employment because most employee benefits extended to American workers, in both private and public sector employment, are also extended to the worker's spouse and dependent children. Indeed, spousal and dependent benefits comprise a significant portion of the overall compensation package for most employees. These employee benefits, along with state and federal programs for working people, form the safety net upon which working families rely for retirement and in the event of illness, injury, disability or death. Because in many families only one adult works outside of the home or works for an employer that provides benefits, many families rely exclusively on workplace

benefits – including healthcare, retirement and Social Security – provided by the employer of one member of the family.

Section 3 of the Defense of Marriage Act (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. 1 U.S.C. § 7 (2006). Since marital status plays a role in determining eligibility for, and taxation of, a large number of workplace benefits, rights and privileges,² DOMA deprives same-sex married workers and their families of significant economic benefits associated with employment, effectively denying such families the right to the same economic security secured through employment as enjoyed by their coworkers in different-sex marriages. Indeed, federal employees who are married to same-sex spouses under the valid laws of their home state³ are denied spousal workplace benefits

² According to the U.S. Government Accounting Office, marital status plays a role in determining receipt of 1,138 federal benefits, rights, and privileges, many of which flow from employment status. U.S. Gov. Accountability Office, *Defense of Marriage Act: Update to Prior Report 1*, GAO-04-353R (2004), <http://www.gao.gov/new.items/d04353r.pdf>.

³ Six states, Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont, as well as the District of Columbia, currently grant marriage licenses to same-sex couples. In California, 18,000 marriages of same-sex couples that took place in 2008, following a state Supreme Court decision, remain valid under state law despite a subsequent amendment to the state constitution that prohibits marriage by same-sex couples. Maryland, New Mexico, and Rhode Island recognize marriages between two people of the same sex performed outside of the state. See National Conference of State Legislatures, *Same-Sex Marriage, Civil*

altogether. DOMA also allows employers in the private sector to reduce or withhold workplace benefits from the spouses and families of their same-sex married employees.

In this brief, *amici* labor organizations address four areas in which DOMA significantly limits the rights of workers married to a person of the same sex.

First, DOMA prevents or significantly restricts access to workers' spousal healthcare benefits. Federal employees are categorically denied access to such benefits altogether, while employees of private sector employers and state government employees are heavily taxed on such benefits in the event they are granted. Second, DOMA adversely affects married same-sex couples when a worker suffers a workplace injury, or otherwise becomes ill or infirm. Third, DOMA impinges on the ability of workers to plan for their retirement by mandating a complete denial of spousal Social Security benefits to a spouse of retired, elderly, or disabled workers and precludes covered spouses from taking advantage of tax laws intended to incentivize retirement savings in private retirement accounts. Fourth, DOMA cruelly circumscribes immigration and naturalization laws for married same-sex couples who simply seek to work and remain lawfully in the United States.

Unions and Domestic Partnerships (2011),
<http://www.ncsl.org/default.aspx?tabid=16430>.

ARGUMENT

I. DOMA Significantly Impairs Access of Married Same-Sex Spouses to Employer-Provided Healthcare Benefits

Employer-provided healthcare benefits are the most common source of medical insurance for working Americans and their families.⁴ The lack of access to employer-provided spousal health coverage can raise healthcare expenditures for married same-sex couples significantly, up to thousands of dollars annually.⁵ Further, the lack of spousal coverage often forces individuals to remain in the workforce when they might otherwise choose to stay home to care for children or to work part-time in a job that does not provide coverage. Even where the uncovered spouse qualifies for coverage through his or her own employer, the family often faces higher insurance costs or lower levels of coverage because coverage by a single plan for a couple or family is generally less expensive than coverage under two separate individual plans. In addition, the second spouse's

⁴ Carmen DeNavas-Walt, Bernadette D. Proctor, & Jessica C. Smith, U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2008* 23 (2009), <http://www.census.gov/prod/2009pubs/p60-236.pdf> (58.5% covered by employment-based health insurance plan for some or all of 2008). *See also* The Kaiser Family Foundation, *Employer Health Benefits 2010 Annual Survey 1* (2010), <http://ehbs.kff.org/pdf/2010/8085.pdf> (employer-sponsored insurance is U.S.'s leading source of health insurance, covering about 157 million nonelderly people).

⁵*See* Kaiser Family Foundation, *Employer Health Benefits 2010 Annual Survey* at 20.

employer-provided coverage may charge higher premiums or out-of-pocket costs than would be charged by employer-provided coverage through the first spouse's employer, denying same-sex married workers the economic right to choose which spouse's benefit plan is the most advantageous for their economic and health needs.⁶

A. Federal Employees Married to A Spouse of the Same-Sex are Denied Healthcare Coverage for Their Spouses and the Dependent Children of Their Spouse

Active and retired government employees receive several valuable health benefits for themselves and their family members. The Federal Employee Health Benefits Act (FEHBA) provides healthcare coverage to federal employees, retirees, their different-sex spouses, and their dependent children. 5 U.S.C. §§ 8901-8914. The federal government significantly subsidizes family coverage under FEHBA.⁷ Yet, FEHBA does not provide the same subsidy to workers with same-sex spouses,

⁶ State and local governments *may* provide coverage.

⁷ In 2008, the federal government contributed an average of \$8,100 for non-postal employees and \$9,600 for postal employees toward healthcare coverage for employees with families. Naomi G. Goldberg, Christopher Ramos, & M.V. Lee Badgett, The Williams Institute, The Fiscal Impact of Extending Federal Benefits to Same-Sex Domestic Partners 5 (2008)(“Fiscal Impact”), <http://wiwp.law.ucla.edu/wp-content/uploads/Badgett-Goldberg-Ramos-S2521FiscalAnalysis-Sept-2008.pdf>.

nor even to the children of such spouses,⁸ because DOMA dictates that FEHBA can only cover the different-sex spouses of federal employees and their dependent children.

DOMA similarly precludes the same-sex spouses of federal employees and their dependent children from enrolling in the Federal Employees Dental and Vision Insurance Program (FEDVIP). 5 U.S.C. §§ 8951-8962, 8981-8992. This program provides a particularly valuable benefit to employees' family members because the benefits and premiums have been jointly negotiated by a large consumer – the federal government – and can be paid with pre-tax dollars, thereby reducing significantly the cost of the insurance.⁹ Here too, DOMA has the effect of precluding FEDVIP family coverage to married employees with same-sex spouses.¹⁰

⁸ Children born to a covered worker would be covered automatically, but because of DOMA, coverage is denied unless the child is adopted. But adoption is sometimes impossible and always costly and slow. In the interim, the financial security of the entire family is undermined because it has to pay money for duplicate coverage or pay out of pocket.

⁹ See U.S. Office of Personnel Management, *2010 Guide to Federal Employees Dental and Vision Insurance Program* 3 (2009), <http://www.opm.gov/insure/health/planinfo/2010/guides/FEDVIP%20BK-1.pdf>.

¹⁰ See U.S. Office of Personnel Management, *Federal Flexible Spending Account Program* (2011), <http://www.opm.gov/insure/flexible/index.asp>.

Another healthcare benefit provided to federal employees, their spouses and dependent children is the Federal Flexible Spending Account Program (FSA), which permits federal employees to set aside a designated amount of earnings to pay for certain out-of-pocket health expenses. The money set aside in the FSA is not subject to federal income taxes, 26 U.S.C. § 125, therefore reducing the overall cost of healthcare to federal employees. However, DOMA precludes federal employees from setting aside money in an FSA account to cover the health expenses of same-sex spouses or the dependent children of those spouses.¹¹

According to the 2005-2006 American Community Survey (ACS), approximately 34,117 federal employees are members of same-sex couples including many individuals who are lawfully married under the state laws.¹² Nearly 90% of these federal workers are coupled with persons who are not federal employees and would, absent DOMA, be eligible for federal healthcare benefits through their spouses' employment. *Id.* It is estimated that almost half of these federal employees would likely enroll their same-sex partners and children of their partners in the federal health benefit program if provided the opportunity. But DOMA forces the same-sex spouses of federal employees and their (unadopted)

¹¹ See U.S. Office of Personnel Management, Federal Flexible Spending Account Program (2011), <http://www.opm.gov/insure/flexible/index.asp>.

¹² Goldberg, *Fiscal Impact*, *supra*, at 6.

dependent children to rely on coverage from another employer (if available), purchase costly or substandard private healthcare insurance, or go without healthcare insurance altogether.¹³

B. Although Some Private and Non-Federal Public Employers Extend Benefits to Same-Sex Spouses of Employees, DOMA Denies Those Employees Equal Access to Such Benefits

The vast majority of private and non-federal public employers extend healthcare benefits to their employees, their employee's spouses and their employees' dependent children as part of the employees' overall compensation package. In states that allow same-sex couples to join in marriage, such benefits generally include those spouses of employees of state, county and municipal governments.¹⁴ However, the application of DOMA to the federal tax code limits the ability of state and local governments to extend equal benefits to all married

¹³ Even though federal employee spousal benefits may cost the government money, the elimination of DOMA saves the government money. *See* 2004 CBO report: <http://www.glad.org/uploads/docs/cases/gill-v-office-of-personnel-management/cbo-report-6-21-04.pdf>.

¹⁴ Even in states that recognize marriage of same-sex couples, however, some state and local government agencies have taken the position that DOMA precludes them from extending such benefits to same-sex spouses without incurring tax penalties. *See, e.g., Dragovich v. U.S. Department of the Treasury*, 764 F.Supp. 2d 1178, 1179-81 (N.D. Cal. 2011) (California argued that it must deny long-term care insurance to same-sex partners of state employees because of federal tax implications).

employees by imposing disparate payroll and income tax requirements on both the employers and employees married to a person of the same sex.

The federal tax code provides a number of incentives to employers to provide health benefits to employees and their family members. Employees and their different-sex spouses, in turn, can take advantage of such benefits without paying tax on them, since federal law allows taxpayers to exclude from gross income the value of employer-provided health insurance coverage. 26 U.S.C. § 106(a). Under this provision, coverage provided by the employer to the employee, the employee's spouse, or the employee's dependents can all be excluded. Exclusion provides a significant tax advantage to the employee because health insurance benefits would otherwise be considered taxable as part of an employee's gross income. 26 U.S.C. § 63(a). Further, the federal tax code also permits employees to pay for health insurance premiums and many out-of-pocket healthcare costs incurred on behalf of themselves and family members with pre-tax dollars, thereby both lowering the actual cost of coverage and reducing the individual's taxable income. 26 U.S.C. § 125.

But due to DOMA, employees married to same-sex spouses do not qualify for the tax exclusions and benefits awarded to other married employees. *See* I. R. S. Priv. Ltr. Rul. 159315-04 (Mar. 17, 2005) (denying exclusion to same-sex domestic partners and concluding that fair market value of health benefits must be

imputed to recipient's gross taxable income).¹⁵ Consequently, employees who receive health benefits for a same-sex spouse are forced to report the fair market value of the employer-provided benefits as taxable. Further, employees cannot use pre-tax dollars to pay for healthcare expenses for such a spouse or the dependent children of a same-sex spouse, directly increasing the cost of benefits to workers with same-sex spouses and potentially moving workers into a higher tax bracket.

This unequal tax code treatment of employer-provided benefits directly increases healthcare costs to workers married to a same-sex spouse.¹⁶ The Tax Policy Center, in a study sponsored by the *New York Times*, quantified the discriminatory effect of DOMA on a hypothetical married same-sex couple living in New York State.¹⁷ The couple in the study is presumed to be married for 46 years, starting when both spouses are 35 years old and continuing until one spouse dies at age 81. Assuming the lower earning spouse's employer did not

¹⁵ This private letter ruling effectively overruled a previous ruling which held that, "The marital status of individuals as determined under state law is recognized in the administration of the Federal income tax laws." *See* Rev. Rul. 58-66 (1958).

¹⁶ One study calculated the average employee who receives domestic partner benefits pays \$1,069 more in taxes per year than a married employee with the same coverage. M.V. Lee Badgett, *The Williams Institute, Unequal Taxes on Equal Benefits The Taxation of Domestic Partner Benefits* (2007) 7-8 ("Unequal Taxes"), http://www.americanprogress.org/issues/2007/12/pdf/domestic_partners.pdf.

¹⁷ Tara Siegel Bernard & Ron Lieber, *The High Price of Being a Gay Couple*, N.Y. Times, October 2, 2009, at A1, <http://www.nytimes.com/2009/10/03/your-money/03money.html>.

provide health insurance and her spouse's employer did not cover married non-opposite sex couples, the married same-sex couple would pay up to an additional \$211,993 over a lifetime for healthcare coverage compared to another similarly situated married person. Assuming both spouses are individually eligible for employer-provided coverage, and that the higher-earner's employer provided healthcare benefits that covered the same-sex spouse for the five years the spouse stayed at home to care for their two children, healthcare coverage will cost the married same-sex couple at least \$28,595 more in insurance premiums over their lifetimes than it would cost a similarly situated different-sex couple. *Id.* Yet, this extra cost in premiums would still be cheaper than using domestic partnership coverage throughout the couple's lifetime because of the onerous tax implications.¹⁸ Thus, although married same-sex couples may be able to purchase substitutes for employer-provided benefits, such substitutes – when available – are often both inadequate and more expensive. Moreover, the funds spent on such coverage will no longer be available for other essential items, such as household expenses, emergencies, preparing for retirement, or college savings for children.

¹⁸ See Section I (B), *supra*.

C. DOMA Imposes Unequal Burdens on Workers That Receive Healthcare Benefits From Their Private Sector Employers

By allowing employers to exclude a class of employees, DOMA undermines the stated purpose of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001 et seq., which is to increase economic security for all workers and their families. Private sector employers that are self-insured can legally decline to extend spousal healthcare benefits to same-sex spouses in states that recognize marriage of same sex couples. Self-insured plans are regulated by ERISA rather than state insurance law. *Id.* Congress enacted ERISA to bring stability to employee benefit plans because they directly affect the well-being and security of millions of employees and their dependents. 29 U.S.C. § 1001. Yet, even in states that recognize marriage of same sex couples and prohibit discrimination against them, employers that self-insure are not required to extend the same benefits to same-sex married employees that they extend to employees married to different-sex spouses. *See, e.g.*, 29 U.S.C. § 1056.

D. DOMA Denies Workers Married to Same-Sex Spouses the Federal Guarantees of Uninterrupted Healthcare Coverage

The Consolidated Omnibus Budget Reconciliation Act (COBRA), 29 U.S.C. §§ 1161-1169, requires public and private employers with twenty or more employees to offer continued 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 an employee.¹⁹ The aim of COBRA is to maintain the portability of health coverage and ensure that employees who change jobs or become unemployed are not at risk of a coverage break without an opportunity to maintain coverage.²⁰ The effect of DOMA for same-sex married couples undermines this goal. Qualified COBRA beneficiaries are limited to the “spouse” of an employee, as that term is defined in Section 3 of DOMA. 29 U.S.C. § 1167(3) (defining “qualified beneficiary” as the “spouse” of the covered employee). Consequently, covered employers are not required to continue coverage for same-sex spouses. Even if an employer voluntarily extended such benefits to the same-sex spouse of an employee, the employer would remain free to terminate coverage at any time, exposing the families of same-sex married couples to precisely the economic insecurity ERISA was enacted to prevent.

Similarly, the Health Insurance Portability and Accountability Act (HIPAA) protects employees who lose eligibility in a group health coverage plan by allowing employees to enroll in other group health plans, including a plan provided by a spouse’s employer, during a special enrollment period. 29 U.S.C. §§ 1181-

¹⁹ <http://www.dol.gov/ebsa/faq-consumer-cobra.html>

²⁰ See U.S. Department of Labor, *An Employee’s Guide to Health Benefits under COBRA* 1-4 (2010), <http://www.dol.gov/ebsa/pdf/cobraemployee.pdf>.

1183. This provision of HIPAA furthers COBRA's goal of preserving the "portability" of healthcare coverage and eases transfer of coverage in the event of a change in family circumstances. Once again, DOMA obstructs this goal by preventing same-sex spouses from taking full advantage of the benefits available to workers in different-sex marriages. Due to DOMA, married couples of the same-sex are at an increased risk of loss of continuity in health coverage.

II. DOMA Denies Workers with Same-Sex Spouses Certain Benefits in the Event of Injury, Illness or Death That Are Available to Different-Sex Couples

Several federal programs provide monetary and other assistance to workers if the worker or his or her spouse becomes ill, 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. In addition, federal and public sector workers benefit from a number of programs that provide care for their spouses in the event the worker becomes injured or dies on the job. These benefits are not available to same-sex couples.

A. Workers in Marriages with Same-Sex spouses are Denied Social Security Survivor Benefits

The Social Security system provides a variety of disability and survivor benefits to spouses and surviving spouses of covered workers.²¹ Social Security provides benefits to some surviving spouses whose deceased spouses have paid into the system but have yet to retire. 42 U.S.C. § 402. This provision is particularly beneficial to a surviving spouse who earned less income than his/her deceased spouse, since Social Security Benefits are computed based on the lifetime earnings of an individual. 42 U.S.C. § 415. Surviving spouses may also be eligible for the “Lump-Sum Death Benefit,” if determined by the Commissioner of Social Security to be the widow or widower of the deceased and to have been living in the same household with the deceased at the time of death. 42 U.S.C. § 402(i). The surviving spouse may be eligible for the “Widower’s Insurance Benefit,” which grants the living spouse the insurance benefits of the deceased spouse under certain circumstances. 42 U.S.C. § 402(e)(f). But surviving same-sex spouses are automatically excluded from all Social Security benefits because of

²¹ According to the 2000 Census data, 28% of same-sex couples have at least one partner with a disability, and 7% of same-sex couples have one person who is 65 or older. Adam P. Romero *et al.*, The Williams Institute, *Census Snapshot: United States 3* (2007), <http://escholarship.org/uc/item/6nx232r4%23>. The Census does not distinguish between married and unmarried same-sex couples. Same sex-couple refers to two people of the same sex who live together and indicated on the Census survey that they are partners.

DOMA, thereby denying them the security and protection provided by these programs.

B. Married Workers with Same-Sex Spouses are Denied the Benefit of the Family Medical Leave Act

The Family and Medical Leave Act (FMLA), 5 U.S.C. § 6382(a); 29 U.S.C. § 2612(a), entitles employees of qualified employers up to twelve weeks' of unpaid leave to care for a spouse who has a serious health condition. Congress has made clear that the singular purpose of the FMLA is to “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.” 29 U.S.C. § 2601(b)(1). Section 3 of DOMA defines the term “spouse” for purposes of FMLA leave to mean only a different-sex spouse. As a result, employers are not required to provide FMLA leave to employees who need time off from work to care for a seriously ill same-sex spouse. Therefore, DOMA undermines the FMLA’s goal of protecting workers from loss of employment when a spouse falls ill.

C. Spouses of Federal Employees and Public Safety Officers with Same-Sex Spouses are Denied Survivor Benefits

The Federal Employee Retirement System (FERS) 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.²² Under FERS, when a federal employee dies before retirement and has worked for the federal government for a minimum of 18 months but less than 10 years, his or her different-sex spouse is entitled to a lump-sum payment of at least \$28,093.53.²³ If the deceased employee accrued 10 years of service, his or her different-sex spouse will also receive a monthly survivor benefit, in the form of 50% of the civil service annuity owed to the deceased employee.²⁴ Because of the application of DOMA to FERS, same-sex spouses of deceased federal employees can never qualify for any benefits under these programs.

Federal employees can also enroll in a basic life insurance plan with the Federal Employees' Group Life Insurance. The basic benefit under this plan is equal to the greater of (1) the employee's annual pay rounded to the nearest \$1,000, plus \$2,000, or (2) \$10,000.²⁵ An employee enrolled in basic life insurance also has the option of enrolling his or her spouse—but not a same-sex

²² See U.S. Office of Personnel Management, *Death of Employee Covered under the Federal Employees Retirement System (FERS)* (2011), <http://www.opm.gov/retire/pre/death/index.asp>.

²³ 5 U.S.C. § 8442(b)(1).

²⁴ *Id.*

²⁵ U.S. Office of Personnel Management, *Applying for Federal Employee Group Life Insurance* (2011), <http://www.opm.gov/pandemic/employees/benefits/fegli.aspx>.

spouse—for up to \$25,000 and each eligible dependent for up to \$12,500.²⁶

Although the federal government does not subsidize this coverage, DOMA nevertheless causes this employment benefit to be denied to employees with same-sex spouses.

The Federal Employees' Compensation Act provides federal employees injured in the performance of duty with workers' compensation benefits. Where an employee dies as a result of such injury, his or her surviving spouse is entitled to compensation of 50 to 75 percent of the employee's monthly pay.²⁷ Section 3 of DOMA denies this significant workers' compensation benefit to surviving same-sex spouses. Federal employees with same-sex spouses who desire such a benefit are required to purchase life insurance from a private vendor, a burden that is not shared by similarly situated federal employees with different-sex spouses.

DOMA further precludes the same-sex spouses of federal employees who work in particularly dangerous fields from qualifying for the same specialized workers' compensation benefits that similarly situated different-sex spouses receive. Federal, state and local public safety officers are covered by the federal Public Safety Officers' Benefits Program. If a married public safety officer dies or becomes permanently disabled as result of an injury sustained on duty, his or her

²⁶ *Id.*

²⁷ 5 U.S.C. § 8133(a); 20 C.F.R. § 10.410 (2010).

different-sex spouse receives a lump-sum death benefit, *currently* \$323,035, and may be eligible for financial assistance for education.²⁸ Because of DOMA, however, a same-sex spouse would not automatically be entitled to receive either the lump-sum death benefit, or the education benefit.²⁹

III. DOMA Has Far-Reaching Adverse Consequences for Retirement Benefits of Married Same-Sex Couples

Because of DOMA, employees of the federal government, state and local government agencies, and workers in the private sector who are married to a person of the same-sex are denied equal access to retirement and pension benefits available to those married to persons of a different sex.

A. DOMA Denies Federal Employees Married to Spouses of the Same Sex the Ability to Participate Equally in Retirement Plans

Federal employees in the Federal Employees Retirement System (FERS) may opt for a retirement annuity that provides a defined benefit to a surviving

²⁸ Similarly, while the Energy Employees Occupational Illness Compensation Program provides compensation of up to \$150,000 to the different-sex surviving spouse of a Department of Energy (“DOE”) employee, contractor, or sub-contractor who dies as a result of radiation-related cancer, DOMA precludes surviving same-sex spouses from receiving such compensation. 42 U.S.C. § 7384u. A DOE employee with a same-sex spouse would need to purchase extra life insurance to provide this same level of compensation,²⁸ 42 U.S.C. §§ 3796(a), 3796d-1.

²⁹ See 42 U.S.C. § 3796d-1; Office of Justice Programs, *Public Safety Officers’ Benefits (PSOB) Programs* (2011), http://www.ojp.usdoj.gov/BJA/grant/psob/psob_main.html.

spouse in the event the federal employee predeceases his or her spouse.³⁰ Under this plan, the retired federal employee receives a smaller retirement benefit payment while alive in order to ensure that his/her spouse continues to receive benefits after the retiree dies. Due to DOMA, however, federal employees are precluded from designating a same-sex spouse as a survivor beneficiary under FERS.

B. Same Sex Spouses of Married Employees are Denied Social Security Retirement Benefits Specifically Designed to Protect Spouses Who Did Not Participate in the Workforce or that Earned Less Income

Upon retirement, a married worker covered by Social Security may opt to receive the larger of either his/her own retirement benefit or one-half of his/her covered spouse's benefit. 42 U.S.C. § 402. Because of the application of DOMA to the Social Security laws, however, workers in same-sex marriages are denied the right to such spousal benefits. Social Security also generally permits a married person to delay retirement and receive a higher Social Security retirement benefit based on their own record – a benefit that DOMA denies to same-sex spouses.

When one spouse of a married couple dies, Social Security generally provides for the surviving spouse to receive the deceased spouse's benefit if it would be greater than that of the surviving spouse's own benefit. This provision

³⁰ U.S. Office of Personnel Management, *Death of Employee Covered under the Civil Service Retirement System* (2011), available at <http://www.opm.gov/retire/pre/death/index.asp>.

allows a lower-earning spouse to maintain his or her standard of living in the event the higher-earning spouse dies first. DOMA precludes married same-sex widows and widowers from the benefits of this provision. Thus, for married same-sex couples, if the higher earning spouse were to predecease his/her spouse, the surviving spouse would lose the higher earner's Social Security payment and continue to receive only his/her own lower payment, if he/she is eligible. According to a 2009 study, the average difference in annual social security income between partners in same-sex couples aged 65 or over is approximately \$5,700.³¹ Therefore, the effect of DOMA for married same-sex couples often results in the loss of thousands of dollars of Social Security retirement benefits annually.

C. DOMA Denies Married Workers with Same-Sex Spouses Equal Benefits under Pension Plans

Virtually all employer-sponsored pension and retirement plans in the private sector are governed by ERISA.³² ERISA permits employers to choose to include or exclude same-sex spouses of employees as beneficiaries in their pension plans.³³ Difficulties may arise when an employer's pension plan document fails to define

³¹ Naomi G. Goldberg, The Williams Institute, *The Impact of Inequality for Same-Sex Partners in Employer-Sponsored Retirement Plans* 9 (2009) (“*Impact of Inequality*”), <http://www.escholarship.org/uc/item/0pn9c1h4>.

³² 29 U.S.C. Ch. 18.

³³ 29 U.S.C. § 1002(8).

the term “spouse” or defines it with reference to state law. DOMA creates confusion when attempting to construe and apply such plan provisions because the state and federal definitions may conflict.³⁴

Additionally, ERISA preempts all state laws relating to ERISA-covered employee benefit plans. 29 U.S.C. § 1144(a). As one legal scholar puts it:

Thus, ERISA preemption effectively strips states, counties, and municipalities of the ability to enact laws that extend rights and benefits under ERISA-covered employee pension benefit plans, such as state laws extending retirement plan death benefits to same-sex spouses and domestic partners.³⁵

This is despite the fact that many states have anti-discrimination laws that would otherwise prohibit employers from denying spousal benefits on the basis of their sexual orientation.³⁶ Accordingly, because of ERISA, many employers opt not to cover same-sex spouses under their employee benefit plans, even in states where marriage of same-sex couples is lawfully recognized.³⁷

³⁴ Jill Louise Ripke, *Employee ERISA Benefits After Goodridge v. Public Health: Do Same-Sex Marriages Qualify as Legal Marriages Under Employer-Created ERISA Plans?*, 31 J. Corp. L. 267, 270 (2005).

³⁵ Janice Kay McClendon, *A Small Step Forward in the Last Civil Rights Battle: Extending Benefits Under Federal Regulated Employee Benefit Plans to Same-Sex Couples*, 36 N.M. L. Rev. 99, 107 (2006).

³⁶ See, e.g., Mass. Gen. Laws Ann. ch. 151B, § 4 (2010); Cal. Ins. Code § 381.5 (2011).

³⁷ Goldberg, *Impact of Inequality*, *supra*, at 11.

D. Married Same-Sex Couples Cannot Contribute to Their Spouses' Retirement Accounts

Federal law provides certain tax benefits to working individuals who make contributions to qualified retirement accounts.³⁸ Working individuals who file joint tax returns are permitted to deduct contributions they make to a retirement account on behalf of a spouse who may be out of work.³⁹ Because of DOMA, these tax benefits are not available to married same-sex couples. Thus, these married couples are less able to plan for a secure retirement for both spouses.

The divide furthers when one spouse dies. Surviving spouses of different sex couples may roll over a deceased spouse's IRA or 401(k) plan into his/her own account and defer taking withdrawals until he/she reaches 70.5 years of age.⁴⁰ In contrast, a surviving same-sex spouse must start taking distributions immediately. *Id.* Here again, DOMA denies married couples of the same sex the retirement planning tools and benefits available to married couples of different sexes.

³⁸ 26 U.S.C. § 219.

³⁹ *Id.*

⁴⁰ M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 Drake L. Rev. 1081, 1096-97 (2010).

IV. DOMA Diminishes Financial and Familial Stability for Married Bi-National and Non-Citizen Same-Sex Couples of the Same Sex and Deters Qualified Workers from Immigrating to the United States

There are two possible routes for a foreign national to become a lawful permanent resident or a U.S. citizen that are particularly relevant to employment issues in the United States: (1) family sponsorship, and (2) employment-based preferences.⁴¹ While immigrants under these categories are normally entitled to immigrate with their spouse, *See* 8 U.S.C. §1153(d), DOMA’s definition of “spouse” denies this entitlement to same-sex couples.

Thus, DOMA’s definition of “spouse” broadly impacts United States immigration policy, and cruelly forces many married bi-national couples of the same sex into painful and untenable dilemmas. As a consequence of DOMA, families are literally broken apart and American businesses are denied qualified workers whose marriages are to persons of the same sex. Thus, DOMA creates a direct bar to permitting these much-needed workers to immigrate to this country with their families.

⁴¹ Two other paths for immigration for individuals not married to a U.S. Citizen are diversity visas and refugee visas. Notably, however, recipients of these types of visas may also be afforded the right to bring their different-sex, but not same-sex, spouses with them. *See* U.S. Department of State, *Visa Types for Immigrants*, http://travel.state.gov/visa/immigrants/types/types_1326.html. *See also* Cori K. Garland, *Say “I Do”: The Judicial Duty to Heighten Constitutional Scrutiny of Immigration Policies Affecting Same-Sex Binational Couples*, 84 Ind. L.J. 689, 700 (2009).

A. DOMA Forecloses Married Bi-National Couples of the Same Sex the Option of Immigration through Family Sponsorship

United States immigration policy grants U.S. citizens who are married to non-citizens the rights and benefits of “Family Sponsorship,” enabling the U.S. citizen to sponsor his/her spouse for naturalization and conditional permanent residence pending naturalization.⁴² Furthermore, the non-citizen spouse becomes eligible for citizenship after just three years as a lawful permanent resident compared to five years for other immigrants.⁴³ And non-citizen spouses are not subject to the numerical limitations on immigration generally applicable under federal immigration law.⁴⁴ Similarly, a lawful permanent resident (“LPR”) of the U.S., who is married to a non-citizen, can use his/her LPR status to sponsor his/her spouse to immigrate to the U.S. as a permanent resident.⁴⁵ If a permanent resident becomes a U.S. citizen while his or her spouse is waiting for a visa, his/her spouse’s visa will become immediately available.⁴⁶

⁴² 8 U.S.C. §§ 1430, 1151(b), 1154(a)-(b).

⁴³ See U.S. Citizenship and Naturalization Services, *Citizenship through Naturalization* (2011), <http://www.uscis.gov/portal/site/uscis> (follow “Citizenship through Naturalization” hyperlink).

⁴⁴ 8 U.S.C. § 1151(b)(2).

⁴⁵ See U.S. Citizenship and Naturalization Services, *How do I Help My Relative Become a U.S. Permanent Resident, M-561*, 2 (2008), <http://www.uscis.gov/USCIS/Resources/B1en.pdf>.

⁴⁶ *Id.*

DOMA's definition of "spouse" denies same-sex spouses the sponsorship rights otherwise afforded to U.S. citizens and LPRs.⁴⁷ U.S. citizens married under state law or the marriage laws of other countries⁴⁸ are not permitted to be sponsors of their same-sex spouses, and are therefore denied the various benefits the federal immigration law provides to bi-national married couples.

The 2000 Census reflected approximately 35,820 bi-national same-sex couples, all of whom are potentially affected by the policy of DOMA as it relates to immigration law.⁴⁹ As one commentator aptly noted, DOMA leaves same-sex couples who are married under valid state law or the laws of other nations with a

⁴⁷ 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. Policy & L. 521, 525 (2009) (INA does not explicitly exclude bi-national same-sex couples from immigration benefits but is constrained by DOMA's definition of spouse); *but see Matter of Paul Wilson Dorman*, 25 I. & N. Dec. 485 (A.G. 2011) (Attorney General Holder vacating decision of Board of Immigration Appeals and remanding case for Board to make specific findings about whether non-citizen's same-sex civil union qualifies him as a spouse under INA absent requirements of DOMA).

⁴⁸ Same-sex marriage is currently legal in ten countries, including Canada, Spain, the Netherlands, Belgium, South Africa, Sweden, Argentina, Iceland, Portugal, and Norway. See Jessica Feinberg, *The Plan One Policy: An Autonomous Model of Family Reunification*, 11 Nev. L.J. at 649, 646 (2011). At least nineteen countries recognize same-sex couples for immigration purposes. See Human Rights Campaign, *Uniting American Families Act* (2011), <http://www.hrc.org/resources/entry/uniting-american-families-act>.

⁴⁹ See Gary J. Gates, The Williams Institute, *Bi-National Same-Sex Unmarried Partners in Census 2000: A Demographic Portrait* 1 (2000), <http://escholarship.org/uc/item/6kk5x4pn>.

choice between three equally poor options: 1) the citizen must leave the United States, (2) the non-citizen must reside in the United States illegally, or (3) the couples must separate.⁵⁰ This is true despite immigration policy that is intended to provide U.S. citizens the right to marry non-citizens while remaining in the U.S. to live and work.

B. DOMA Denies the Right of Immigrating Workers to Bring their Same-Sex Spouses to the United States

Individuals may be sponsored by employers to immigrate to the United States on the basis of employment-based visas.⁵¹ While individuals immigrating to the United States on the basis of an employment-based visa would normally be afforded the opportunity to bring his/her spouse to the U.S., 8 U.S.C. §1153(d), DOMA denies same-sex spouses such rights -- even when their marriages are recognized in their country of origin.

The denial of this right profoundly affects the ability of legal, employment-based immigrants with same-sex spouses to maintain their family relationships and financial stability. Without lawful permanent residence status, non-citizen spouses of employment-based workers may need to return to their home countries for

⁵⁰ Feinberg, 11 Nev. L.J. at 630.

⁵¹ 8 U.S.C. § 1101(a)(15)(H).

extended periods of time, resulting in costly travel expenses.⁵² These extended visits generally hinder the occupational advancement of either or both individuals, reducing earnings over the course of a lifetime.⁵³ And employers need to decide if they can afford to hire immigrant workers who will be required to return home regularly for family reasons.

A study by the Immigration Policy Center found that the U.S.'s failure to recognize marriages of same-sex couples for immigration purposes makes the U.S.'s family reunification policies less competitive than those of its European and Canadian counterparts.⁵⁴ Indeed, problems with family reunification have been cited as a top reason discouraging foreign talent from immigrating to the United States.⁵⁵ As of 2000, the U.S.'s lack of same-sex family reunification was already affecting the 6% of same-sex couples who are bi-national (approximately 35,820 couples).⁵⁶ The additional number of same-sex couples, in which one spouse chose

⁵² Badgett, 58 Drake L. Rev. at 1097-98.

⁵³ *Id.*

⁵⁴ Immigration Policy Center, *The Migrant Integration Policy Index* (2011), <http://www.immigrationpolicy.org/just-facts/migrant-integration-policy-index-mipex-iii>.

⁵⁵ *Id.*

⁵⁶ Human Rights Watch & Immigration Equality, *Family, Unvalued: Discrimination, Denial, and the Fate of Binational Same-Sex Couples under U.S. Law* 7 (Human Rights Watch) (2006).

to forgo a U.S. employment opportunity in favor of an employment opportunity in a country that recognizes same-sex family reunification and marriage of persons of the same sex, is immeasurable.

CONCLUSION

As *amici* labor organizations show, DOMA has far reaching detrimental effects on American workers. DOMA creates two castes of workers, those in marriages of persons of different sexes and those in marriages of same sex couples. By denying to a select class over 1,300 benefits federal law provides to married Americans, DOMA undermines the economic security of an entire class of American workers and undermines the goals of economic stability these federal laws were intended to promote.

Respectfully submitted,

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