No. 12-307

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR,
in Her Capacity as Executor of the Estate
of Thea Clara Spyer, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* OF CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON ON THE MERITS IN SUPPORT OF RESPONDENT EDITH SCHLAIN WINDSOR

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INTEREST OF *AMICUS CURIAE*[1]

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

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

CREW is participating as an *amicus* in this case principally to highlight the impact that section

[1] Pursuant to Supreme Court Rule 37.2, no person other than counsel for the *amicus curiae* authored this brief in whole or in part. No person other than amicus and its counsel made a monetary contribution to fund the preparation or submission of this brief. All parties have consented to the filing on this brief.

3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, has on key federal ethics statutes, including those requiring public officials and candidates to disclose sources of income for themselves and their spouses, and anti-nepotism statutes designed to guard against the undue influence resulting from the employment of spouses of high-level officials and judges. If the constitutionality of section 3 is upheld, same-sex married couples who are public officials, employees, and candidates for public office will be subject to differing disclosure requirements than those to which officials, employees, and candidates in opposite-sex marriages are subject, with a resulting decrease in transparency and accountability. Similarly, the public will lose the protection against corruption and undue influence afforded by the anti-nepotism laws if they are not also applied to married same-sex couples. These ethics arguments were first made in CREW's amicus brief filed in the First Circuit case and were relied upon by the court in finding DOMA unconstitutional. *Commonwealth of Massachusetts v. Dep't of Health & Human Servs.*, 682 F.3d 1, 13 & n.8. (1st Cir. 2012), *petitions for certiorari pending*, Nos. 12-13, 12-15, & 12-97.

After filing its brief in the First Circuit, CREW realized that the perverse effects of DOMA extend beyond federal ethics laws and that DOMA produces serious unintended consequences under the Internal Revenue Code and the Bankruptcy Code. For that reason, its *amicus* brief in the Ninth Circuit case of *Golinski v. Office of Personnel Management*, Nos. 12-15388 & 12-15409, *petition for certiorari before judgment pending*, No. 12-16,

addressed those additional issues. Thereafter, CREW filed a brief in this case in the Second Circuit, similar to the brief it filed in *Golinski.* The arguments made in that brief were cited by the majority below in striking down DOMA. *Windsor v. United States*, 699 F.3d 169, 187 (2d Cir. 2012).

This brief is filed with the blanket consent of counsel for the United States and the Bipartisan Legal Advisory Group of the United States House of Representatives, and a letter of consent from counsel for respondent Edith Windsor, which is being filed with this brief.

SUMMARY OF ARGUMENT

DOMA mandates that the words "marriage" and "spouse," as used in any federal statute, regulation, ruling, or interpretation, "refer[] only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7. Plaintiff challenges this provision as unconstitutionally depriving her of equal protection by denying her the spousal marital property exclusion under the Internal Revenue Code that would be available had her spouse been of the opposite sex.

As the briefs of plaintiff and her *amici* make clear, section 3 of DOMA is an utterly irrational law, unsupported by any legitimate purpose. They demonstrate conclusively that the purposes asserted by the Bipartisan Legal Advisory Group either are illusory, illegitimate, relevant only to state interests, and/or, in the case of conserving scare resources, not factually supported.

This brief has a different focus. Not only does DOMA not advance any valid purposes, but DOMA's differential treatment of the same-sex marriage of plaintiff Windsor and her deceased spouse, and other similarly situated married couples, undermines important protections in federal laws in three areas: conflicts of interest, federal income taxation, and bankruptcy. By preferring marriages by same-sex couples over marriages by opposite-sex couples in a number of ways, DOMA produces perverse results that a rational Congress could not have intended. In challenging DOMA, plaintiff and other same-sex spouses like her seek not only the federal protections and benefits that stem from recognition of their marriages, but also demonstrate their willingness to share the same burdens and obligations imposed by federal law on other married couples.

Because DOMA was imposed in a blunderbuss, across-the-board manner, Congress failed to consider its impact on more than 1000 federal laws in which marriage is relevant. Given the complexity of our legal system and the great variety of contexts in which marriage may be pertinent, the completely irrational impact of DOMA is hardly surprising. Its unanticipated impact on other laws reinforces a basic truth: DOMA was not driven by rational considerations, but instead by a desire to strike out at same-sex married couples regardless of the repercussions. DOMA would be unconstitutional under rational basis review even absent such perverse consequences, but the senseless subversion of meritorious statutes crystalizes its irrationality.

ARGUMENT

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

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

Many of EIGA's provisions apply to both the reporting individual and "relative[s]" of that individual, broadly defined to include, *inter alia*, that individual's "husband" or "wife" as well as "the grandfather or grandmother of the spouse of the reporting individual" and even "the fiance or fiancee of the reporting individual." 5 U.S.C. App. 4 § 109(16). Among the items EIGA requires to be reported are income in excess of $1,000, honoraria, and specified gifts of the reporting individual's

"spouse." 5 U.S.C. App. 4 §§ 102(e)(1)(A)-(D). Under DOMA, these provisions exclude from their coverage any "husband," "wife," or "spouse" in a same-sex marriage. As a result, those in same-sex marriages need not report any of the financial information pertaining to their spouses (or relatives of their spouses) EIGA otherwise requires of opposite-sex married couples. Without this information, identifying potential financial conflicts of interest is difficult, if not impossible. Thus, for example, post-DOMA, a same-sex spouse of an agency head could receive significant income from an entity regulated directly by the agency with no duty to report such income, even though that situation could present a serious conflict of interest.

Similarly, the Stop Trading on Congressional Knowledge Act, known as the STOCK Act, was enacted in 2012 in response to public concern that members of Congress were trading stock on inside information. S. Rep. No. 112-244, at 1-2 (2012). The statute amended EIGA to require both members of Congress and executive branch officials to report certain stock sales or purchases within 45 days. 5 U.S.C. App. 4 § 103(l). Congress subsequently passed further legislation to clarify that stock transactions made by spouses (and children) of covered officials must be reported. 5 U.S.C. App. 4 § 103 note; Pub. L. No. 112-173, 126 Stat. 1310. Under DOMA, however, the same transactions made by same-sex spouses are exempt from disclosure.

DOMA undermines other provisions of EIGA as well. EIGA dictates the treatment of honoraria paid to charitable organizations in lieu of paying

them directly to a member of Congress, officer, or employee. 5 U.S.C. App. 4 § 501(c). Such payments cannot exceed $2,000, and also cannot be made to a charitable organization in which, *inter alia*, the "spouse" of a member, officer, or employee "derives any financial benefit." *Id.* Again, the purpose is to protect against financial conflicts of interest, which is undermined by DOMA's exclusion of same-sex spouses from this ban.

DOMA's reach extends beyond the reporting requirements in EIGA to other statutes intended to protect against financial conflicts of interest. For example, officers and employees of labor organizations must report certain financial assets they or their spouses hold, a requirement that does not, by virtue of DOMA, extend to same-sex spouses. *See* 29 U.S.C. § 432(a)(1). Further, by statute, health maintenance organizations ("HMOs") must disclose certain financial information to the Secretary of Health and Human Services, including certain transactions between the HMO and a "party in interest," defined to include the spouse of the party in interest. 42 U.S.C. § 300e-17(b)(4). Under DOMA, this requirement does not extend to same-sex spouses.

DOMA also thwarts the goals of "anti-nepotism" and judicial recusal laws. Under the federal anti-nepotism law, public officials are prohibited from appointing, employing, promoting, or advancing "any individual who is a relative of the public official." 5 U.S.C. § 3110(b); *see also* 5 U.S.C. § 2302(b)(7) (forbidding advocating the appointment or employment of a relative, including a spouse). By

outlawing favoritism based on kinship, anti-nepotism laws promote fairness in the workplace in hiring and promotions. The term "relative" is defined under these laws to include husbands and wives, and also a variety of "in-laws" and "step" relations. 5 U.S.C. § 3110(a)(3). Because DOMA excludes from the anti-nepotism law same-sex married couples, such couples are legally free to hire and supervise their own spouses and family members of their spouses. This situation presents the very danger of serious conflicts that anti-nepotism laws were enacted to prevent.[2]

DOMA creates loopholes in other similar statutes as well. In the federal judicial system, district judges are empowered to appoint magistrate judges. 28 U.S.C. § 631. That power is limited to appointing individuals who are "not related by blood or marriage to a judge of the appointing court or courts . . ." *Id.* at § 631(b)(4). Under DOMA, however, appointing judges are free to appoint their same-sex spouses to be magistrate judges, even though such appointments raise the same potential

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

conflicts as the prohibited appointment of opposite-sex spouses.

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

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

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

Beyond EIGA and anti-nepotism laws, DOMA undermines the transparency and accountability afforded by a wide range of statutes and regulations, from gift bans imposed on senators and their spouses,[3] to limitations on spending of personal funds, including funds of family members, by a

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[3] *See* 2 U.S.C. § 31-2(a) (barring members, officers, and employees of the Senate and their spouses from accepting gifts in excess of $250 from certain sources).

presidential candidate receiving matching funds.[4] DOMA impacts the ban on accepting certain travel and travel-related expenses from non-federal sources that applies to federal employees and their spouses, 31 U.S.C. § 1353(a), and excludes same-sex spouses from the foreign gift ban applicable to opposite-sex spouses in 5 U.S.C. §§ 7342(a)(1)(G) and (b)(2).

DOMA also undermines statutes intended to guard against potential conflicts in commission membership and participation. For example, spouses are barred from membership in the Citizens' Commission on Public Service and Compensation when their opposite-sex spouses sit on the commission, 2 U.S.C. § 352(2)(C), while same-sex spouses face no such prohibition. Similarly, members of the Foundation for the National Institutes of Health are barred from participating in any foundation matter in which their opposite-sex spouses have a financial interest, 42 U.S.C. § 290b(j)(2), yet the same-sex spouses of foundation members are not subject to the bar.

DOMA produces some of the most noxious results when applied to criminal statutes. "Bribery, graft, and conflicts of interest" are defined to include "[a]cts affecting a personal financial interest" of an employee of the federal or District of Columbia government, as well as those of a spouse and certain other listed persons. 18 U.S.C. § 208(a). DOMA removes from the automatic coverage of

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[4] *See* 26 U.S.C. § 9035 (barring presidential candidates who receive matching funds from spending more than $50,000 from the personal funds of their families, including their spouses and the spouses of any listed family members).

section 208(a) same-sex spouses. As a result, same-sex spouses might avoid culpability for engaging in conduct that would be criminal for opposite-sex married couples.

It is also a federal crime to retaliate against a federal official by threatening or injuring an immediate family member of the official. 18 U.S.C. § 115(a). "Immediate family member" is defined to include the official's spouse and any other person related by marriage. *Id.* at § 115(c)(2). By excluding same-sex spouses from the definition of "spouse," however, DOMA effectively decriminalizes retaliation when committed against a same-sex spouse of a federal official.

DOMA further affects analogous statutes that protect other important values. For example, the Secretary of Defense is required to request that each state report on suspected instances of child abuse and neglect of children of members of the armed forces or their spouses. 10 U.S.C. § 1787(a). Because of DOMA's restrictive definition of spouse, children of a same-sex spouse who are being abused are not protected by this reporting requirement.

* * *

Most federal officials are ethical, but the conflict of interest laws are written for those who are not, or who might not be if the law did not apply to them. Same-sex married couples are not inherently more or less ethical than their opposite-sex counterparts, yet by exempting them from important ethics requirements, DOMA treats them as if they

were. Of course, like opposite-sex married couples, many same-sex married couples will make disclosures about their spouses regardless of DOMA. Similarly, most spouses employed by federal agencies will refuse to participate in matters in which their same-sex spouses have an otherwise disqualifying financial interest. Bizarrely, however, DOMA serves to excuse those most in need of regulation – the least ethical – from federal ethics laws. On this basis alone, DOMA fails constitutional scrutiny.

II. DOMA FRUSTRATES SIGNIFICANT ANTI-AVOIDANCE PROVISIONS OF THE INTERNAL REVENUE CODE.[5]

One of the perennial problems in designing an income tax system is deciding on the appropriate unit of taxation in a nation in which many people are unmarried, many are married with relatively similar incomes, and many are married to spouses with very different incomes. Moreover, some families have children, and some have other relatives who live with them and are supported by the family. As a result, there is no system that produces perfect fairness, even among persons with similar incomes.

The Internal Revenue Code permits married couples to file their tax returns together, combining their income and deductions on one return, or

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[5] Many of the ideas for this section came from the article by Professor Patricia A. Cain of Santa Clara Law School, *DOMA and the Internal Revenue Code*, 84 Chi. - Kent L. Rev. 481 (2009).

separately, with each person including his or her income and the deductions to which he or she is entitled. But separate filing can create problems with joint expenses, such as mortgage interest and property tax payments that are the legal responsibility of both spouses. Congress resolved that problem by allowing either spouse to claim all such joint expenses. This system has proven generally workable, but nevertheless has created potential for abuse, or perhaps more precisely, opportunities to manipulate the tax code. To deal with these problems, Congress created special exceptions (or loophole closers), and it is these exceptions that DOMA renders inoperative.

Plaintiff Windsor is addressing the denial to same-sex spouses of the right to file joint returns and obtain other federal tax benefits available to opposite-sex married couples. The loophole closers, on the other hand, present the opposite problem: thanks to DOMA, some same-sex married couples can obtain tax benefits that Congress plainly never intended to grant them.

First, as noted above, Congress allows married couples to elect whether to file jointly or separately, and allows one spouse to claim all of the couple's allowable joint deductions. Because many taxpayers either do not keep adequate records or do not have significant recognized deductions, Congress determined each person should be permitted a minimum deduction, called the standard deduction. It also allowed most taxpayers to choose between taking the standard deduction and itemizing their deductions. Some married taxpayers, who were

filing separate returns, sought to take advantage of these two options by having one spouse claim all the joint deductions and the other claim the standard deduction. Congress concluded this was unfair, because the standard deduction is designed in part to replicate the actual deductions other taxpayers take. Therefore, it enacted 26 U.S.C. § 63(c)(6)(A), which for married couples filing separately, reduces the standard deduction from $3300 (section 63(c)(2)(C)) to zero, thereby removing the unfair advantage.

DOMA, however, removed the marital status under federal laws for same-sex lawfully married couples. Those married couples cannot file joint returns because they are not "federally married." Accordingly, when they file separate returns, nothing prevents one spouse from itemizing and taking all of the joint deductions and the other spouse from taking the standard deduction. This absurd result is the very kind of tax avoidance section 63(c)(6)(A) was enacted to prevent.

Second, one way taxpayers minimize their taxes is by incurring losses that offset gains. To incur a loss, a taxpayer must dispose of an asset, and if the amount realized from the sale is less than the basis of the asset (amount paid in most cases), the taxpayer can claim a loss. In that situation the loss is real, and the reduction in taxable income is proper. But in the past, some taxpayers (or perhaps their advisers) tried to gain the advantage of loss recognition by "selling" the asset to a family member. Although technically the taxpayer no longer would own the asset, it still belonged to the

family and might even be re-purchased after a period of time; thus in a real economic sense, there was no "loss". Or, more precisely, that is what Congress concluded when it enacted 26 U.S.C. § 267(a)(1), which prevents taxpayers from claiming a loss involving sales to family members, who, in subsection (c)(4), are defined to mean "brothers and sisters (whether by the whole or half-blood), spouse, ancestors, and lineal descendants." Once again, because DOMA decrees that a same-sex spouse is not a spouse under section 267, same-sex spouses can engage in a tax avoidance scheme Congress tried to prohibit.

Third, 26 U.S.C. § 1041(a)(1) has a similar rule for certain transfers, including gifts, and it extends to recognitions of gains as well as losses. As with section 267(a)(1), one of the provision's goals is to prevent sham transactions that would produce similar unjustified tax losses. Section 1041(a)(2), however, applies the non-recognition principal to a former spouse for transfers of property incident to a divorce, thereby making a divorce and any resulting transfer of property – which would include part ownership of the family home – a non-event for tax purposes. Through this statute, Congress denied some taxpayers (especially wealthy ones) the opportunity, as part of a divorce, to transfer property in which there was a loss, to the former spouse, and thereby lower the transferring spouse's taxable income. Essentially, Congress sought to ensure taxpayers could not have the IRS pay for part of the cost of a divorce. This provision also was intended to prevent unsophisticated taxpayers from having to pay considerable taxes if they transferred property

to a spouse as part of a divorce without realizing the transfer was a taxable event. Regardless of the wisdom of this law as a matter of social and economic policy, its non-recognition effect is clear. But, once again, because DOMA transforms a same-sex spouse into a non-spouse, section 1041 does not apply, and same sex couples may engage in tax avoidance or, conversely, find themselves in tax traps.

A fourth example relates to the special treatment for expenses of adoption provided by 26 U.S.C. § 23. If a taxpayer incurs certain expenses in connection with an adoption, the taxpayer is entitled to a credit – which is a direct reduction of taxes otherwise owed and hence is more valuable than a deduction – subject to certain limitations based on the taxpayer's income. The self-evident purpose of section 23 is to encourage adoptions by having the United States Treasury fund the costs in varying amounts, originally up to $10,000 (subsection 23(b)(1)), but now over $13,000 as a result of the inflation adjustment in subsection 23(h). Because federal generosity has its limits, Congress excluded from adoptions eligible for the credit "expenses in connection with the adoption by an individual of a child who is the child of such individual's spouse." 26 U.S.C. § 23(d)(1)(C). Of course, under DOMA, same-sex married couples are not "spouses" under federal law. Therefore, a limit plainly included in the law to prevent a married spouse from taking a tax credit for the adoption expenses of a step-child is inapplicable to a same-sex spouse who can use the credit even when adopting his or her step-children.

Fifth, 26 U.S.C. § 4941 imposes significant taxes on those who control a private foundation (referred to as "disqualified persons") when they engage in self-dealing with their foundation. A "disqualified person" includes anyone who is an officer, director, or trustee of the foundation or who is a substantial contributor to it, including a 20% owner of any entity that was a substantial contributor, as well as the family of such person. 26 U.S.C. § 4946(a)(1)(D). Family, in turn, is defined to include "only" the person's "spouse, ancestors, children, grandchildren, great grandchildren, and the spouses of children, grandchildren, and great grandchildren." 26 U.S.C. § 4946(d). Once again, because DOMA excludes same-sex spouses from the reach of all federal laws using the term spouse, unethical same-sex spouses could engage in the very acts of self-dealing for which opposite-sex spouses would have to pay substantial taxes.

Finally, and perhaps most perversely, DOMA makes the Earned Income Tax Credit ("EITC") in 26 U.S.C. § 32 much more expensive for the Government. The EITC is now the largest federal anti-poverty program, and the credit is refundable – meaning individuals whose income as determined by the EITC is so low that their credit is larger than any tax withheld or owed actually receive a check from the Treasury on top of their refunds.[6] DOMA affects the EITC in ways Congress never intended.

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[6] *See* Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 Wash. & Lee L. Rev. 1529, 1573 (2008), which brought the impact of DOMA on the EITC to the attention of CREW's counsel. In addition, section 32 includes other

The EITC is less a tax provision than a means of assisting low income families who are close to the poverty level by refunding some or all of the income tax their employers withheld. Quite sensibly, Congress insisted that for married couples, the income of both spouses be taken into account, which is why subsection 32(d) provides that married couples are eligible for the credit "only" if they file a joint return. But because DOMA means same-sex married couples are not considered married (and cannot file joint federal returns), this condition is eliminated. The result is that, if one same-sex spouse is income eligible under section 32, the fact that such individual's same-sex spouse is a significant income producer is legally irrelevant in determining eligibility of that married couple for the credit. Of all the provisions of the Tax Code perversely impacted by DOMA, surely its effects on the EITC are the most dubious.[7]

Indeed, the notion that the Congress that enacted DOMA intended to provide low income same-sex married couples and their families *more* taxpayer dollars than opposite-sex married couples

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marriage sensitive limits and exclusions significantly undermined by DOMA and which result in increased federal dollars accruing to same-sex married couples. *Id.* at 1574-77.

[7] Some federal anti-poverty programs avoid these problems by defining eligibility in terms of households. *See* 7 U.S.C. §§ 2014(c), 2012(n) (food stamps); 42 U.S.C. §§ 8624(b), 8622(5) (home energy assistance). Others use family, without any spousal element. *See* 42 U.S.C. §§ 601, 607 (Temporary Assistance to Needy Families, including "2-parent families"); 42 U.S.C. §§ 1396a(a)(10)(A)(v), 1396d(n) (Medicaid – "qualified family members").

in identical financial circumstances is antithetical to the stated position of DOMA's supporters that the federal government should not support same-sex married couples in any way. In fact, expanding federal benefits directly contradicts one of the central justifications proffered for DOMA when it was passed. *See* H.R. Rep. No. 104-664, at 18 (1996) ("To deny federal recognition to same-sex 'marriages' will thus preserve scarce government resources, surely a legitimate government purpose."); 142 Cong. Rec. H7488 (July 12, 1996) (statement of DOMA sponsor Rep. Barr) ("if you do not believe it is fiscally responsible to throw open the doors of the U.S. Treasury to be raided by the homosexual movement, then the choice is very clear"); 142 Cong. Rec. S10103 (Sept. 10, 1996) (statement of DOMA sponsor Sen. Nickles) ("Another reason this bill is needed now concerns Federal benefits. . . . [I]f Hawaii, or any other State, gives new meaning to the words 'marriage' and 'spouse,' reverberations may be felt throughout the Federal Code."); *Id.* at S10111 (statement of Sen. Byrd) ("the costs associated with such a change could amount to hundreds of millions of dollars, if not billions – if not billions – of Federal taxpayer dollars").

While there are other examples of DOMA's inadvertent impact on the Internal Revenue Code, even these few demonstrate that – aside from basic unfairness to same-sex married couples – DOMA seriously undermines anti-avoidance provisions of the Internal Revenue Code because of its wholly irrational exclusion of same-sex married couples under all federal laws. Justice Robert Jackson's wise reminder in *Arrowsmith v. Commissioner*, 344 U.S.

6, 12 (1952), that tax is "a field beset with invisible boomerangs," is truer post-DOMA than when he wrote it.

III. DOMA FRUSTRATES VARIOUS PROTECTIONS FOR CREDITORS IN THE BANKRUPTCY CODE.[8]

The federal Bankruptcy Code attempts to balance the interests of debtors in starting afresh, against the interest of creditors, often including the U.S. Government, in reducing their losses when debtors cannot pay in full. Coupled with these interests is the goal of conducting the proceedings promptly, at the lowest cost consistent with the level of fairness and accuracy required for the parties.

According to the Bankruptcy Judges Division of the Administrative Office of the U.S. Courts, for calendar year 2011, 33.7% of chapter 13 cases were joint filings under 11 U.S.C. § 302(a) (136,719 of 405,994). In addition, 31.5% of individual, as contrasted with business, bankruptcies under chapter 7 were joint filings (309,544 of 984,195). Allowing married couples to file jointly makes sense because often both spouses are signatories to the family debts and own everything from a car to a house jointly. The filing of a joint case does not automatically result in consolidation of the debtors'

[8] Many of the ideas for this section came from *The Defense of Marriage Act*, *Same-Sex Relationships and the Bankruptcy Code*, written by Professor Jackie Gardina of the Vermont Law School for the Federal Judicial Center in 2011. It is available at http://ssrn.com/abstract=1850926, last revised April 19, 2012.

estates; that is up to the judge under 11 U.S.C. § 302(b). In some cases, it is not clear who owns the property or who is the obligated debtor; a consolidated proceeding eliminates the need to decide such questions. In addition, when both spouses file, there is less chance they will engage in avoidance tactics that will harm the interests of creditors.

Section 302(a) allows the filing of a joint case only by a debtor and "such individual's spouse," which under DOMA excludes same-sex married couples. As a result, both persons in a same-sex marriage who choose to file for bankruptcy have to pay separate filing fees of $235 (chapter 13) or $245 (chapter 7) pursuant to 28 U.S.C. § 1930(a)(1) (which in the end reduces the amount available for creditors); both must prepare and file separate petitions and schedules, including sorting out who owns and owes what (which adds to the costs and reduces the funds available for creditors); and both are precluded from consolidating their cases, almost certainly adding to costs and delays on all sides. Moreover, DOMA enables debtors who are married to same-sex spouses to organize their affairs to their advantage and to the disadvantage of their creditors in ways opposite-sex married couples cannot.

For a debtor in bankruptcy, the goal is to obtain as broad a discharge from prior debts as possible. The Bankruptcy Code generally supports that goal, but includes some limitations. For example, 11 U.S.C. § 523(a)(5) excludes a "domestic support obligation," defined in 11 U.S.C. § 101(14A)(A)(i) to include alimony, maintenance,

and other support obligations (past and future) owed "to a spouse or former spouse." Similarly, section 523(a)(15) excludes a debt owed "to a spouse, former spouse, or child of the debtor . . . that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit." The public policy behind these exclusions is to prevent a spouse from escaping prior and future liability to a former spouse by going through bankruptcy, thereby thwarting state law. Because DOMA treats same-sex spouses as non-spouses, the exclusions do not apply, undermining congressional and state policies and potentially plunging children and non-working parents into precarious financial positions.[9]

DOMA also may create particular problems for bankruptcies in community property states like California, where property acquired during a marriage is owned jointly by both spouses. Under 11 U.S.C. § 541(a)(2), the bankrupt estate is broadly defined to include all property of the debtor, extending to all "interests of the debtor and the debtor's spouse in community property as of the

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[9] DOMA also vitiates similar spousal protection provisions in ERISA. Under 29 U.S.C. § 1056(d), interests in pension plans covered by ERISA cannot generally be alienated or assigned. Subsection 1056(d)(3) provides an exception for qualified domestic support orders, including orders for the protection of children and spouses. Similarly, 29 U.S.C. § 1055(c)(2) prevents one spouse from using the pension for his or her own purposes without the written consent of the other spouse. Again, DOMA nullifies these protections as applied to same-sex marriages.

commencement of the case that is-- (A) under the sole, equal, or joint management and control of the debtor." Because DOMA does not recognize same-sex spouses, the community property of a same-sex couple cannot be included in the estate, resulting in confusion, additional costs and delays, and harm to creditors.

DOMA frustrates congressional policy in another important respect. In 2005, Congress determined that individual debtors with regular incomes and mostly consumer debts were choosing liquidation bankruptcy under chapter 7, which excludes future income from the estate, instead of chapter 13, which requires debtors to devote some of their future income to a payment plan. Congress concluded that many of the debtors choosing chapter 7 could afford to repay more of their debts without undue hardship, and so it amended 11 U.S.C. § 707 to require the dismissal of any chapter 7 case filed by debtors with incomes above a certain threshold (the so-called "means test") and to require them to utilize chapter 13. Congress simultaneously amended chapter 13 to require debtors whose incomes exceed the median income for the state in which they reside to continue to repay their debts for a period of five years, whereas below-median income debtors need only make payments for three years. 11 U.S.C. § 1322(d).

In determining who is an above-median income debtor for purposes of section 1322(d), the income of the debtor's spouse, as well as that of the debtor, is taken into account. The theory behind this provision is that, if the non-debtor spouse has

income that can be used to pay for future living expenses, the debtor spouse has more money available to repay creditors. Because DOMA excludes same-sex spouses from all federal definitions of spouse, however, the income of the non-debtor spouse in a same-sex married couple cannot be counted. The result is that for two married couples with identical incomes, expenses, and debts, the same-sex couple may fall below the median income and the opposite-sex couple above it, allowing a same-sex spouse debtor to repay debts for only three years while a debtor in an opposite-sex marriage will have to make payments for five years.

Finally, 11 U.S.C. §§ 522(b)(1) and (2) offer debtors a choice of electing federal or state law to govern what property may be exempt from availability to creditors, unless state law precludes this choice. Under the federal option, subsection 522(d) lists 12 categories of property any debtor may elect for his or her exemptions, regardless of the law of the debtor's domicile. A state-authorized exemption may be more generous than its federal counterpart in some areas, but not necessarily in others. The caveat, however, is that if both spouses are in bankruptcy, they must make the same choice: both must choose federal exemptions or both must choose the state exemptions. 11 U.S.C. § 522(b)(1). This provision was clearly intended to prevent one spouse, for example, from taking advantage of a generous homestead exemption under state law, while the other takes advantage of other more favorable exemptions under federal law. Of course, pursuant to DOMA, only "husband and wife" debtors must make the same choice; same-sex married

couples are free to game the system to their advantage and to the disadvantage of their creditors.[10]

As unfair as this may be to opposite-sex spouses, the real losers are creditors, such as banks, credit card companies, local merchants, and the federal government. Because of DOMA, bankruptcy costs will increase for same-sex married debtors, leaving less for creditors, while at the same time, same-sex married debtors may be able to manipulate the law to protect more of their assets than Congress intended. All of this stems from DOMA's irrational alteration of the definition of marriage to exclude same-sex married couples.

CONCLUSION

DOMA's unthinking, across-the-board exclusion of same-sex married couples from all federal laws relating to marriage creates irrational effects on federal laws, especially those dealing with conflicts of interest, income taxation, and bankruptcy. If DOMA were not indefensible on its own, the illogical, indeed incomprehensible, impact of the statute on federal laws conclusively demonstrates its irrationality. In short, the Defense

[10] Outside of bankruptcy, the United States is entitled to set aside certain fraudulent conveyances by insolvent debtors, including those to "insiders." 28 U.S.C. §§ 3304, 3305. Insiders are defined to include relatives, such as a "spouse." 28 U.S.C. §§ 3301(5)(A)(i) and 3301(5)[sic, should be (7)]. Nevertheless, DOMA serves to limit this to opposite-sex spouses, potentially enabling certain same-sex married couple debtors to avoid paying their obligations to the government.

of Marriage Act is simply indefensible, and the judgment below setting it aside should be affirmed.

Respectfully Submitted,

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