

Nos. 12-15388, 12-15409

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KAREN GOLINSKI,
Plaintiff-Appellee,

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT,
JOHN BERRY, Director of the United States Office of
Personnel Management, in his official capacity,
Defendants-Appellants,

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE
U.S. HOUSE OF REPRESENTATIVES,
Intervenor-Defendant-Appellant.

On Appeal from the United States District Court for the
Northern District of California, Case No. 3:10-CV-0257-JSW
The Honorable Jeffrey S. White, Judge

**BRIEF OF *AMICI CURIAE* BAY AREA LAWYERS FOR INDIVIDUAL
FREEDOM AND ELEVEN BAR ASSOCIATIONS IN SUPPORT
OF AFFIRMANCE OF THE JUDGMENT BELOW**

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This brief is filed on behalf of the following bar associations:

Bay Area Lawyers for Individual Freedom

Alameda County Bar Association

Asian American Bar Association of the Greater Bay Area

Bar Association of San Francisco

Lesbian and Gay Lawyers Association of Los Angeles

Pride Law Fund

Sacramento Lawyers for the Equality of Gays and Lesbians

San Francisco Trial Lawyers Association

Santa Clara County Bar Association

South Asian Bar Association of Northern California

Tom Homann LGBT Law Association

Women Lawyers of Alameda County

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each of the undersigned *amici* states that it is not a corporation that issues stock and has no parent corporation.

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

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—other than *amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

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INTEREST OF *AMICI CURIAE*¹

Bay Area Lawyers for Individual Freedom (“BALIF”) is a bar association of more than 700 lesbian, gay, bisexual, and transgender (“LGBT”) members of the San Francisco Bay Area legal community. As the nation’s oldest and largest LGBT bar association, BALIF promotes the professional interests of its members and the legal interests of the LGBT community at large. To accomplish this mission, BALIF actively participates in public policy debates concerning the rights of LGBT individuals and families. BALIF frequently appears as *amicus curiae* in cases, like this one, where it believes it can provide valuable perspective and argument that will inform court decisions on matters of broad public importance.

BALIF is joined in this brief by eleven bar associations, each of which has a longstanding commitment to the rights of same-sex couples and their families:

Alameda County Bar Association is a professional association of lawyers in Alameda County, California, whose mission includes promoting civil rights and the fair and equitable administration of justice.

Asian American Bar Association of the Greater Bay Area is a professional organization which seeks to provide Asian American attorneys in the San Francisco Bay Area with a vehicle for the unified expression of opinions and positions on matters of concern to all Asian Pacific Americans.

¹ All parties have consented to the filing of this brief.

The **Bar Association of San Francisco** is a professional association of more than 9,000 lawyers which seeks to cultivate diversity and equality in the legal profession, provide a collective voice for public advocacy, and pioneer constructive change in society.

Lesbian and Gay Lawyers Association of Los Angeles is a multi-cultural, open and active bar association of gay, lesbian, bisexual and transgender lawyers, judges, law students and other legal professionals dedicated to furthering justice and equality and the advancement of gay, lesbian, bisexual and transgender issues throughout California and around the nation by making judicial endorsements and as appearing amicus curiae in cases such as this one.

Pride Law Fund promotes the legal rights of the lesbian, gay, bisexual, and transgendered community, and people living with HIV and AIDS, by funding legal services and projects and by sponsoring education and outreach. Pride Law Fund assists innovative academic programs, supports the development and distribution of legal and educational materials, and finances independent and documentary film projects to educate the public.

Sacramento Lawyers for the Equality of Gays and Lesbians is a professional association of attorneys, legal professionals, and legislative advocates which seeks to promote equality for members of the lesbian, gay, bisexual, transgender, queer, questioning, intersex, and ally community through strong

leadership, legislative advocacy, education, and participation in civic and social activities within the legal community and the community at large.

San Francisco Trial Lawyers Association promotes civil justice through education and trial advocacy, and is committed to providing quality continuing legal education, preserving access to justice for everyone, and creating social and networking opportunities.

Santa Clara County Bar Association is a professional association of lawyers in Santa Clara County, California which seeks to improve the administration of justice by promoting and advancing improvements in the courts and judicial system.

South Asian Bar Association of Northern California is a legal association devoted to advocating for the South Asian community and supporting those who value diversity in the legal profession.

Tom Homann LGBT Law Association (“THLA”) is a specialty bar organization based in San Diego dedicated to the advancement of lesbian, gay, bisexual and transgender issues throughout California and the nation. THLA serves as a leader on LGBT legal issues through its educational programs, community service events, public position statements, and candidate endorsements.

Women Lawyers of Alameda County is a California legal organization which works to advance the needs, desires, and interests of all women in the law.

SUMMARY OF ARGUMENT

Approximately 160,000 Americans are legally married to a person of the same sex.² Because they are lesbian, gay, bisexual, and transgender (“LGBT”), these individuals and their families often face discrimination from family members, neighbors, and employers. But the most pernicious discrimination these Americans face is that from their own federal government.

The Defense of Marriage Act (“DOMA”) is how the federal government discriminates. More than 1,100 federal statutory provisions use marital status as a factor in determining whether a person may receive federal rights or benefits. By defining “marriage” for the purpose of federal law as “only a legal union between one man and one woman as husband and wife,” DOMA harms married same-sex couples and their families by denying them these rights and benefits.

DOMA also harms the legal community. DOMA burdens the nation’s largest legal employer—the federal government—in its efforts to recruit and retain legal talent. DOMA burdens private-sector legal employers by forcing them to pay additional taxes and administrative costs. And DOMA is abhorrent to the legal profession’s cornerstone values of justice and non-discrimination.

² M.V. Lee Badgett & Jody L. Herman, *Patterns of Relationship Recognition by Same-Sex Couples in the United States* 5–6 (The Williams Institute, 2011) (approximately 160,000 LGBT Americans have legally recognized marriages: 50,000 couples have legally married in one of states that recognize marriage for same-sex couples, and an additional 30,000 couples have married abroad).

All American families are entitled to equal treatment under law. *Amici* will illustrate the significant and numerous ways that DOMA discriminates against legally married same-sex couples and their families. And *amici* agree that because this discrimination serves no important—or even legitimate—government interest, DOMA violates the Constitution’s Equal Protection Clause and should be struck down.³

³ *See generally* Pl.-Appellee’s Br.

ARGUMENT

A. DOMA Harms Legally Married Same-Sex Couples.

Nine states and the District of Columbia recognize marriages between individuals of the same sex.⁴ According to recent surveys, a majority of the American public believes that the federal government should follow suit.⁵ But DOMA—by defining “marriage” for the purpose of federal law as “only a legal union of one man and one woman as husband and wife”⁶—prohibits federal recognition of these marriages.

Rarely in the last century has a federal law caused so many Americans such great and daily harm. Marital status is a factor in determining eligibility for

⁴ Connecticut, Iowa, Massachusetts, New Hampshire, New York, Vermont, and the District of Columbia issue marriages licenses to same-sex couples. California issued marriage licenses to same-sex couples between June 16, 2008 and November 4, 2008, continues to recognize these marriages and also recognizes marriages validly obtained in other states prior to November 4, 2008. Maryland and Rhode Island recognize marriages of same-sex couples licensed by other jurisdictions. *See* Human Rights Campaign, *Same-Sex Relationship Recognition Laws: State by State*, <http://www.hrc.org/resources/entry/same-sex-relationship-recognition-laws-state-by-state> (last visited July 10, 2012).

⁵ *CNN Poll: Americans’ Attitudes Toward Gay Community Changing*, CNN, (June 6, 2012), <http://politicalticker.blogs.cnn.com/2012/06/06/cnn-poll-americans-attitudes-toward-gay-community-changing/> (54 percent of people surveyed believe marriages of same-sex couples should be recognized as valid by law); Damla Ergun, *Strong Support for Gay Marriage Now Exceeds Strong Opposition*, ABC News, May 23, 2012, <http://abcnews.go.com/blogs/politics/2012/05/strong-support-for-gay-marriage-now-exceeds-strong-opposition/> (53 percent of Americans support recognition of marriage for same-sex couples).

⁶ 1 U.S.C. § 7 (2006).

countless federal rights and benefits. But because federal law does not recognize marriages of same-sex couples, tens of thousands of American families cannot access these rights and benefits. DOMA thereby undermines marriage, depriving these families of the stability marriage should provide.

1. Marriage of same-sex couples is a reality.

Same-sex couples marry for the same reasons as other couples: marriage allows two individuals to forge a lasting bond as a couple and to demonstrate their life-long commitment to one another before family, friends, and community.⁷ By permitting them to pool their economic and social capital, marriage also enhances the couple's security in the event hardship or illness befalls one spouse. And marriage creates a stable environment for the couple to raise children.

Tens of thousands of same-sex couples have now had their marriages recognized by the states in which they live. Approximately 80,000 same-sex couples living in the United States have received marriage licenses.⁸ And a significant number of same-sex couples are raising children: The U.S. Census Bureau estimates that 28.8 percent of households with same-sex spouses are raising children together.⁹

⁷ See generally Brief of Amici Curiae Historians at 13–19.

⁸ Badgett & Herman, *supra* note 2, at 5–6.

⁹ U.S. Census Bureau, *American Community Survey Briefs: Same-Sex Couple Households*, 2–3 (Sept. 2011), available at <http://www.census.gov/prod/>

The states that have recognized marriages of same-sex couples have done so to ensure that all married couples are afforded the same rights, benefits, and protections. In overturning California’s ban on marriage between individuals of the same sex in June 2008, the California Supreme Court stated that same-sex couples should have “the opportunity . . . to establish—with the person with whom the individual has chosen to share his or her life—an *officially recognized and protected family* possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage.” *In re Marriage Cases*, 183 P.3d 384, 399 (Cal. 2008). Likewise, in passing the Marriage Equality Act, the New York Legislature affirmed the necessity of marriage for same-sex couples:

Section 2. Legislative Intent. Marriage is a fundamental human right. Same sex couples should have the same access as others to the protections, responsibilities, rights, obligations, and benefits of civil marriage. Stable family relationships help build a stronger society. For the welfare of the community and in fairness to all New Yorkers, this act formally recognizes otherwise-valid marriages without regard to whether the parties are of the same or different sex.

2011 N.Y. Sess. Laws Ch. 95 (A. 8354) (McKinney) (signed into law June 24, 2011).

2011pubs/acsbr10-03.pdf (showing that of 593,324 same-sex households, an estimated 152,484 reported having a spouse; approximately 43,933—or 28.8 percent—of those had children).

There are in this country approximately 80,000 legally married same-sex couples who, because of DOMA, lack the full range of protections available to other Americans. The number of legally married same-sex couples is growing every day. Whatever obstacles law or society imposes, same-sex couples will continue to marry because marriage is a fundamental part of what it means to be human. The federal government's refusal to recognize these marriages causes only hardship, and for no justifiable reason.

2. DOMA denies legally married same-sex couples numerous federal rights and benefits associated with marriage.

Congress quickly passed DOMA into law in 1996, in anticipation that Hawai'i would soon recognize marriages of same-sex couples.¹⁰ Congress held only one day of hearings, despite calls for an inquiry into the potential effects of DOMA.¹¹ Congress simply did not consider DOMA's far-reaching ramifications.¹² It was not until the next year that Congress requested that the General Accounting

¹⁰ Pl.-Appellee's Br. 6.

¹¹ *Id.* at 7.

¹² *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 682 F.3d 1, 13 (1st Cir. 2012) (citing *Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. (1996)).

Office (“GAO”) analyze the statutory provisions affected by DOMA. GAO initially found that DOMA impacted 1,049 federal statutory provisions.¹³

In 2004, the GAO updated this study and “identified a total of 1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges.”¹⁴ The 1997 and 2004 studies discussed thirteen areas impacted by DOMA, including the federal tax code, Social Security, veterans’ benefits, military service, immigration, and employment rights.¹⁵ DOMA’s broad denial of so many rights and benefits comes at a very high cost: between \$41,196 and \$467,562 over the course of a hypothetical same-sex couple’s fifty-year marriage, according to one study.¹⁶

¹³ U.S. Gen. Accounting Office, GAO/OGC-97-16, *Defense of Marriage Act 1–2* (1997) (hereinafter “GAO 1997 Report”).

¹⁴ U.S. Gen. Accounting Office, GAO-04-353R, *Defense of Marriage Act 1* (2004) (identifying additional laws passed after the 1997 study that rely on marital status).

¹⁵ The study’s thirteen categories are (1) Social Security and related programs, housing, and food stamps; (2) veterans’ benefits; (3) taxation; (4) federal civilian and military service benefits; (5) employment benefits and related laws; (6) immigration, naturalization, and aliens; (7) Indians; (8) trade, commerce, and intellectual property; (9) financial disclosure and conflict of interest; (10) crimes and family violence; (11) loans, guarantees, and payments in agriculture; (12) federal natural resources and related laws; and (13) other miscellaneous provisions, including education and foreign relations. *See generally id.* at 3–13; GAO 1997 Report, *supra* note 13 (Enclosure II).

¹⁶ Tara Siegel Bernard & Ron Lieber, *The High Price of Being a Gay Couple*, N.Y. Times (Oct. 2, 2009), <http://www.nytimes.com/2009/10/03/your->

Taxation. Because of DOMA, same-sex couples face a number of inequities under the federal tax code. *First*, DOMA denies same-sex couples the ability to file joint federal-income tax returns. This has several implications. To start, because same-sex couples must file separate tax returns, most same-sex couples pay more in federal taxes than if they were able to file jointly.¹⁷ Additionally, certain deductions and tax credits are not available to same-sex couples. For example, a married woman who fully supports her wife cannot claim the \$3,700 spousal exemption.¹⁸ Nor can she elect the \$11,600 standard deduction for married couples filing jointly; instead, she can claim only the \$5,800 standard deduction for single individuals.¹⁹ Similarly, a married man cannot deduct medical or

money/03money.html (comparing hypothetical same-sex and different-sex couples, both making \$140,000 per year).

¹⁷ M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 Drake L. Rev. 1081, 1089–90 (2010). Badgett examined tax filings by same-sex couples in Massachusetts between 2005 and 2007 and found that 66 percent of couples would pay on average \$2,325 less in federal taxes if they filed jointly, 23 percent would pay on average \$502 more, and 11 percent would have the same tax liability. Badgett recognized other studies that found the “marriage penalty” due to joint filing may benefit some same-sex couples, but argues these studies failed to adequately account for the actual income gap between most spouses in same-sex couples. *Id.* at 1090–91.

¹⁸ 26 U.S.C. § 151(b); *see also* I.R.S. Form 1040 (2011), *available at* <http://www.irs.gov/pub/irs-pdf/f1040.pdf> (lines 6b and 42).

¹⁹ 26 U.S.C. § 63(c)(2); *see also* I.R.S. Form 1040 (line 40).

educational expenses incurred on behalf of his husband.²⁰ Same-sex couples must also account for the taxable income created by certain employment benefits, such as the employer's contribution to the cost of spousal health insurance.²¹

This already complex process is made more burdensome if the couple has children. If so, only a spouse who is legally recognized as a parent can claim child-related deductions and credits, such as dependent exemptions, child tax credits, child care expense credits, and dependent educational expenses.²² If the spouse who pays child-related expenses is not legally recognized as a parent, these deductions are simply not available to the couple. Where both parents may claim child-related deductions and credits, the parents must determine who should claim the deductions or credits to ensure the most favorable tax treatment.²³ This

²⁰ 26 U.S.C. § 213(a); Dep't of the Treasury, I.R.S. Pub. 970, *Tax Benefits for Education* 9–10, 20–21 (2011), available at <http://www.irs.gov/pub/irs-pdf/p970.pdf> (describing the American opportunity credit and lifelong learning credit).

²¹ See discussion *infra*, Section B.2.

²² See, e.g., 26 U.S.C. §§ 21, 24; see also I.R.S. Pub. 970, *supra* note 20; Medical Advancement Project, Family Equality Council & Center for Am. Progress, *Unequal Taxation and Undue Burdens for LGBT Families* 11–13 (2012), available at <http://www.lgbtmap.org/file/unequal-taxation-undue-burdens-for-lgbt-families.pdf>.

²³ Medical Advancement Project, et al., *supra* note 22, at 9–11, 17 (showing that one same-sex couple's tax liability could differ by \$1,503 depending on who claims child-related deductions).

requires the couple to prepare multiple tax returns, costing significant time, or seek professional advice, costing significant money.²⁴

Second, DOMA creates hardships for same-sex couples who wish to share property. While different-sex spouses may transfer an unlimited amount of property to one another without incurring gift-tax liability, same-sex spouses must recognize gift taxes after sharing more than \$13,000 in a year.²⁵ This is a significant burden. For example, if one spouse owns a house before the marriage and wants to add the other to the deed, half of the value of the house in excess of \$13,000 would be subject to the gift tax. Any property being divided during dissolution of a marriage would also be subject to the gift tax, as would any alimony paid after the marriage.²⁶

Third, DOMA creates hardships for same-sex couples even when one spouse is grieving for his or her partner's death. When a person dies, the estate tax applies

²⁴ *Id.* at 5, 18 (noting LGBT families spend four to five times longer on federal tax filings, or pay up to \$4,000 in professional tax advice).

²⁵ Dep't of the Treasury, I.R.S. Pub. 950, *Introduction to Estate and Gift Taxes* 1–3 (2011), <http://www.irs.gov/pub/irs-pdf/p950.pdf> (noting the gift tax applies to gifts to someone other than a spouse or charity in excess of \$13,000); *see also* Robert W. Wood, *Biggest Injustice of Denying Same-Sex Marriage? Tax-Free Divorce*, *Forbes.com*, (May 10, 2012), <http://www.forbes.com/sites/robertwood/2012/05/10/biggest-injustice-of-denying-same-sex-marriage-tax-free-divorce>.

²⁶ 26 U.S.C. § 215(a); Wood, *supra* note 25.

to property in the estate in excess of \$5.12 million in value.²⁷ Different-sex spouses can avoid this tax by transferring property to their spouse because such property is not considered part of the taxable estate.²⁸ But same-sex couples are denied this exemption from the estate tax, which can cost these couples huge sums of money. In 2009, for example, same-sex couples subject to the estate tax paid, on average, an estimated \$3.3 million more than similarly situated different-sex couples.²⁹

Finally, because of the numerous hardships created by DOMA under the federal tax code, many same-sex couples feel compelled to seek professional tax or legal advice, costing same-sex couples still more money.³⁰

Social Security. Social Security is designed to assist individuals and their spouses when they need it most: in retirement, disability, and death. The spouse of a person eligible for Social Security can elect partial retirement benefits beginning at age 62, or full benefits between age 65 and 67 (depending on the beneficiary's

²⁷ I.R.S. Pub. 950, *supra* note 25, at 4.

²⁸ *Id.*

²⁹ Michael D. Steinberger, *Federal Estate Tax Disadvantages for Same-Sex Couples* 15 (The Williams Institute, Nov. 2009), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Steinberger-Federal-Estate-Tax-Nov-2009.pdf>.

³⁰ Badgett, *supra* note 17, at 1097 (noting that the current tax rules create increased transaction costs for same-sex couples); see also Medical Advancement Project, *supra* note 22 at 16–17.

birth year). And this is true regardless of whether he or she worked. If the spouse did not work, he or she receives a benefit that is one-half of what the working spouse receives.³¹ If the spouse worked, he or she receives the greater of (1) his or her own benefit, or (2) a benefit that is half of what the other spouse receives.³² When a person eligible for Social Security benefits passes away, the surviving spouse can receive a benefit in the amount of what the deceased spouse received, if the benefit amount is greater than the surviving spouse's own benefit.³³ And spouses of disabled workers are eligible to receive up to half of the disabled person's benefit.³⁴

For same-sex spouses, DOMA forecloses any spousal benefits under Social Security.³⁵ DOMA also disallows Social Security's one-time death benefit, benefits under the Supplement Security Income program, and qualification for

³¹ 42 U.S.C. § 402(b)-(c); Social Security Admin., *Retirement Planner: Benefits for Your Spouse*, <http://www.ssa.gov/retire2/yourspouse.htm> (last visited July 9, 2012).

³² *Id.*

³³ 42 U.S.C. § 402(e)-(f); Social Security Admin., *Survivors Benefits* (2011), <http://www.socialsecurity.gov/pubs/10084.pdf> (last visited July 9, 2012).

³⁴ Social Security Admin., *Disability Planner: Family Benefits*, <http://www.socialsecurity.gov/dibplan/dfamily.htm> (last visited July 9, 2012).

³⁵ 42 U.S.C. § 402(b), (c); *see also* Gay and Lesbian Advocates and Defenders (“GLAD”) & Equality Maine, *Discrimination Against Gay and Lesbian Working Families 5* (2008), available at http://www.glad.org/uploads/docs/advocacy/Working_Families_GLAD_20_EQME.pdf (last visited July 10, 2012).

Medicare through a same-sex spouse.³⁶ Thus, while Social Security is intended to help families during their most challenging times, same-sex couples must find alternative means of caring for one another.

Military Service and Veterans' Benefits. The recent repeal of the military's "Don't Ask, Don't Tell" policy has exposed a new set of obstacles for service members and veterans with a same-sex spouse. Many benefits accrue to a service member's spouse. Married service members are eligible for military family housing, or if the couple does not live in government-provided housing, a Basic Allowance for Housing.³⁷ When service members are permanently transferred stations, they are eligible for increased relocation costs if they are married.³⁸ Additionally, upon transfer, a service member's spouse can receive employment and educational benefits.³⁹

³⁶ GLAD & Equality Maine, *supra* note 35, at 3; *see also* Laura Haltzel & Patrick Purcell, Cong. Research Serv., RS21897, *The Effect of State-Legalized Same-Sex Marriage on Social Security Benefits and Pensions* 2 (2008), available at <http://www.glad.org/uploads/docs/cases/gill-v-office-of-personnel-management/1-2008-social-security.pdf>; Social Security Admin., *supra* note 31.

³⁷ 37 U.S.C. §§ 401, 403; *see also* Servicemembers Legal Defense Network, *Freedom to Serve: The Definitive Guide to LGBT Military Service* 21 & n.112 (July 2011), available at http://sldn.3cdn.net/5d4dd958a62981cff8_v5m6bw1gx.pdf.

³⁸ 37 U.S.C. §§ 475(a), 476, 477, 484; *see also* Servicemembers Legal Defense Network, *supra* note 37, at 21.

³⁹ 10 U.S.C. § 1784; *see also* Servicemembers Legal Defense Network, *supra* note 37, at 21.

Because of DOMA, a same-sex spouse cannot automatically enter military housing and must bear the relocation and employment costs related to a station transfer. Moreover, if a same-sex spouse would like to move with a service member transferred overseas, the spouse may “not be eligible for the special host-nation legal protections that a ‘command sponsored’ individual may receive.”⁴⁰ This makes keeping a family together during military service even more difficult.

Even after service members have fulfilled their duty to the military, DOMA continues to affect veterans’ families. Some veterans’ spouses are eligible for healthcare benefits.⁴¹ Any surviving spouse of a veteran can receive dependency compensation if the veterans’ death was service-connected, or pension benefits otherwise.⁴² Additionally, a surviving spouse is eligible for educational assistance to aid any job search.⁴³ DOMA denies these benefits to veterans’ same-sex spouses despite their commitment to the military. A veteran with a same-sex spouse must spend extra time and money planning to care for his or her family,

⁴⁰ U.S. Dep’t of Defense, *Report of the Comprehensive Review of the Issues Associated with a Repeal of “Don’t Ask, Don’t Tell”* 147 (2010), available at [http://www.defense.gov/home/features/2010/0610_dadt/DADTRReport_FINAL_20101130\(secure-hires\).pdf](http://www.defense.gov/home/features/2010/0610_dadt/DADTRReport_FINAL_20101130(secure-hires).pdf) (noting that most Status of Forces Agreements would not cover same-sex partners accompanying a service member abroad).

⁴¹ 38 U.S.C. § 1781.

⁴² 38 U.S.C. §§ 1310, 1521.

⁴³ 38 U.S.C. §§ 3500, 3501.

while fellow service members can access all the benefits offered to them by virtue of their military service.

Immigration Rights. One analysis of 2000 Census data concluded that there are about 36,000 bi-national same-sex couples in the United States.⁴⁴ A later study estimated that over 79,000 same-sex couples in the United States include a non-U.S. citizen or a citizen who has been naturalized.⁴⁵ Each of these bi-national couples faces unique hardships if they have married because of DOMA's effect on the immigration laws.

First, DOMA creates uncertainty for same-sex bi-national couples who want to live in the United States because it prevents a U.S. citizen from sponsoring his or her same-sex spouse who is a foreign national for conditional permanent residence status.⁴⁶ For different-sex couples, a foreign national can receive permanent residence status after marriage, and become a U.S. citizen after just

⁴⁴ Gary J. Gates, The Williams Project on Sexual Orientation Law & Pub. Policy, *Binational Same-Sex Unmarried Partners in Census 2000: A Demographic Portrait* 4 (2005), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Binational-Report-Oct-2005.pdf>.

⁴⁵ Craig J. Konnoth & Gary J. Gates, *Same-Sex Couples and Immigration in the United States* 3 (The Williams Institute, Nov. 2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Konnoth-Binational-Report-Nov-2011.pdf>.

⁴⁶ See Badgett, *supra* note 17, at 1097–98 (citing 8 U.S.C. § 1186(a)).

three years.⁴⁷ This process gives the couple comfort that they can remain together without interference from immigration officials. A same-sex foreign national spouse must instead go through the arduous process of first obtaining permanent resident status, and then waiting an additional five years before being eligible for citizenship.⁴⁸ This longer process leaves same-sex couples less secure in their ability to remain together. Moreover, same-sex spouses are subject to the limitations on the number of immigrants admitted to the United States for permanent residence.⁴⁹

Second, because of DOMA, same-sex bi-national couples face increased costs compared to different-sex bi-national couples. The foreign national spouse may be required to travel back to his or her home country for extended periods of time.⁵⁰ This travel may prevent the foreign national spouse from establishing roots in the U.S. and may hinder his or her ability to find employment.⁵¹ DOMA also

⁴⁷ See 8 U.S.C. § 1186(a); 8 C.F.R. § 319.1 (2010); see also U.S. Citizenship and Immigration Servs., *Green Card for an Immediate Relative of a U.S. Citizen*, <http://www.uscis.gov/greencard> (click “Green Card Through Family,” then click “an immediate relative of a U.S. citizen”).

⁴⁸ See 8 C.F.R. § 316.2 (2010).

⁴⁹ See 8 U.S.C. § 1151; Badgett, *supra* note 17, at 1098.

⁵⁰ See Badgett, *supra* note 17, at 1098.

⁵¹ See *id.*

requires bi-national couples to bear additional costs as they seek out legal advice to comply with immigration rules.⁵²

Third, same-sex bi-national couples face the risk of being forced to move abroad, live separately, or fear potential immigration proceedings. When foreign nationals enter the country on a temporary visa, they must prove to immigration officials they have no intent to remain permanently in the United States, a presumption for many temporary visas.⁵³ This includes, for example, individuals in the country with student or visitor visas.⁵⁴ A foreign national with a same-sex U.S. citizen spouse will likely fail to rebut this presumption, making it very difficult to obtain or extend a temporary visa.⁵⁵ If the foreign national cannot rebut the presumption or receive permanent residence status through another visa, the

⁵² *See id.*

⁵³ *See* 8 U.S.C. § 1184(b) (creating a presumption of immigrant status); Immigration Equality, *Should We Marry?*, <http://www.immigrationequality.org/issues/couples-and-families/should-we-marry>.

⁵⁴ Joseph J. Shepherd, *In Defense Of (Same-Sex) Marriage – How Doma Separates Binational Families and Why It Must Be Abolished*, Bender's Immigration Bulletin, January 6, 2012, *available at* <http://www.ilw.com/articles/2012,0109-shepherd.shtm>. Even where the federal government does not pursue actions against foreign national same-sex spouses, this failure to take administrative action does not provide a new immigrant status to the foreign national or remove the specter of future immigration proceedings. *Id.*

⁵⁵ *See* Immigration Equality, *supra* note 53; GLAD, *Warning for Same-Sex Binational Couples: Marriage May Not Fix Immigration Problems, May Cause New Ones* (2011), http://www.glad.org/uploads/docs/publications/Binational_Couples_Immigration_Warning.pdf.

same-sex couple would be forced to live outside the United States, live separately, or have one spouse remain in the country illegally. Different-sex couples never face this Hobbesian choice. And this situation continues to exist despite the U.S. Citizenship and Immigration Services' stated goal "[t]o promote family unity."⁵⁶

Employment Benefits. DOMA prevents federal employees from obtaining employment benefits for their same-sex spouses, including survivor annuities and compensation for work-related injuries.⁵⁷ DOMA also prevents the federal government from providing employer-sponsored health insurance to same-sex spouses of its employees, forcing these employees to instead seek out health insurance for their spouses in the private market. Private health insurance plans can be expensive: Ms. Golinski testified before the trial court that one plan she considered for her wife cost \$970 per month.⁵⁸ Private health insurance plans are also typically inferior to the plans available through the Federal Employees Health Benefits ("FEHB") Program. Co-payments and deductibles are typically much

⁵⁶ See U.S. Citizenship and Immigration Servs., *supra* note 47.

⁵⁷ See Congressional Budget Office, *H.R. 2517, Domestic Partnership Benefits and Obligations Act of 2009* (Nov. 18, 2009); see also NALP & PSLawNet, *2011–2012 Federal Legal Employment Opportunities Guide 7*, available at http://www.pslawnet.org/uploads/2011_12_FLEOG.pdf (listing the many benefits available to federal legal employees); John Okray, *Inside the World's Largest Legal Employer: Careers and Compensation with U.S. Federal Agencies* 3 (Lawyerup Press LLC, Dec. 3, 2010).

⁵⁸ See Decl. of K. Golinski in Supp. of Mot. for Prelim. Inj. ¶ 13, *Golinski v. Office of Pers. Mgmt.*, 781 F. Supp. 2d 967 (N.D. Cal. 2011) (No. 3:10-CV-0257-JSW).

higher than those for FEHB plans, and the scope of coverage is often much less.⁵⁹ DOMA thereby imposes a financial burden on federal employees and their same-sex spouses while also limiting their access to quality health insurance and other employment benefits.

B. DOMA Harms the Legal Profession.

1. DOMA burdens the federal government's efforts to recruit and retain highly qualified lawyers.

The United States is home to more than 700,000 lawyers, including more than 34,000 who work for the federal government as prosecutors, civil litigators, advisors, law clerks, and judges.⁶⁰ Approximately two percent of all U.S. lawyers—including many who work for the federal government—identify as lesbian, gay, bisexual, or transgender.⁶¹

⁵⁹ Compare Blue Cross/Blue Shield, *2012 Standard & Basic Option Service Benefit Plan Summary* 18–20, <http://www.fepblue.org/benefitplans/2012-sbp/2012-benefits-summary-2894-cd-rev-100110.pdf> with Blue Shield of California, *Compare Plans*, <https://www.blueshieldcaplans.com/compareplans.aspx?marketcode=00031765MC&dial=8003819990&sessionid=w25sp545v0emikrj33ngmkbc&cpao=&cpca=&cpag=&kw=>.

⁶⁰ Dep't. of Labor, Bureau of Labor Statistics, *Lawyers: Occupational Outlook Handbook* (April 2012), <http://www.bls.gov/ooh/Legal/Lawyers.htm>; U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Employment and Wages – May 2011* (Mar. 27, 2012), <http://www.bls.gov/news.release/pdf/ocwage.pdf>.

⁶¹ See NALP, *Most Firms Collect LGBT Lawyer Information, LGBT Representation Steady* (Dec. 2011), http://www.nalp.org/lgbt_lawyers_dec2011.

The federal government faces challenges in recruiting and retaining talented lawyers. To start, federal government lawyers are paid considerably less than their peers in the private sector.⁶² By preventing the federal government from providing its LGBT employees with certain employment benefits—such as spousal health insurance and a family leave policy equivalent to that provided to heterosexual employees—DOMA further enlarges this wage-gap, placing the federal government at a considerable disadvantage in recruiting and retaining legal talent.⁶³

Law firms and other private-sector legal employers have seen this effect and capitalize on it as a point of competitive advantage in recruiting and retention. Most of the nation's large law firms provide their LGBT employees with the full array of employment benefits, including spousal health insurance and family

⁶² See Harry Bradford, *Federal Employees Paid A Quarter Less Than The Private Sector*: BLS, Huffington Post (Nov. 7, 2011), http://www.huffingtonpost.com/2011/11/07/government-employees-23-percent-less-private-sector_n_1080108.html; NALP, *How Much Do Law Firms Pay New Associates? A 16-Year Retrospective* (Oct. 2011) http://www.nalp.org/new_associate_sal_oct2011.

⁶³ See Joe Palazzo, *Law Grads Face Brutal Job Market*, Wall Street Journal Online (June 25, 2012), <http://online.wsj.com/article/SB10001424052702304458604577486623469958142.html>; see also S. Rep. No. 111-376, at 10–13 (2010) (concluding that the federal government could more readily recruit and retain employees if it were to offer domestic partner benefits).

leave.⁶⁴ At least 23 of these firms, including Skadden, Arps, Slate, Meagher & Flom LLP; Simpson Thacher & Bartlett LLP; and Weil, Gotshal & Manges LLP, and other private-sector employers even go so far as to provide LGBT employees with a “gross-up” of \$2,000 to \$2,500 to cover the payroll and other taxes assessed on the employer’s contribution to the cost of spousal health insurance which, because of DOMA, is considered taxable income to the employee.⁶⁵ In other words, while DOMA requires the federal government to *withhold* certain benefits from LGBT employees, many law firms and other legal employers have opted to

⁶⁴ For a list of commercial law firms offering same-sex spousal benefits in 2012, see Human Rights Campaign, *Corporate Equality Index 2012: Rating American Workplaces on Lesbian, Gay, Bisexual and Transgender Equality* 79–82 (2012), available at http://sites.hrc.org/documents/CorporateEqualityIndex_2012.pdf; see also James Campbell, Albert Snell & Mike Terry, *Health Care Reform: The Impact to the LGBT Community* 3 (Oct. 26, 2011), available at [http://www.outandequal.org/documents/2011summit/Health Care Reform - The Impact to the LGBT Community - James Campbell.pdf](http://www.outandequal.org/documents/2011summit/Health%20Care%20Reform%20-%20The%20Impact%20to%20the%20LGBT%20Community%20-%20James%20Campbell.pdf) (“39% of large employers (500+ employees) and 31% of all employers provide benefits to same-gender domestic partners”).

⁶⁵ See Tara Siegel Bernard, *A Progress Report on Gay Employee Health Benefits*, N.Y. Times (June 27, 2012), <http://bucks.blogs.nytimes.com/2010/12/14/a-progress-report-on-gay-employee-health-benefits/> (listing many private employers—including leading financial, legal, and technology firms—that offer increased income to offset imputed taxable income incurred from same-sex spousal benefits); GLAD, *How DOMA Hurts Americans: A Summary of the GAO Reports on Section 3 of the Federal Defense of Marriage Act* 6, <http://www.glad.org/uploads/docs/publications/how-doma-hurts-americans.pdf>. For an explanation of LGBT federal employees’ additional tax burden under DOMA, see M.V. Lee Badgett, Center for American Progress & The Williams Institute, *Unequal Taxes on Equal Benefits: The Taxation of Domestic Partner Benefits* 5–7 (Dec. 2007), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-UnequalTaxesOnEqualBenefits-Dec-2007.pdf>.

both provide such benefits to their LGBT employees *and* compensate them for the additional taxes they must pay on the value of these benefits because of DOMA. Add to this the substantial gap between federal government and private-sector salaries for lawyers and the federal government's disadvantage in attracting and retaining talented lawyers is clear.

2. DOMA burdens private-sector legal employers by requiring them to pay additional taxes and administrative costs.

a. Many private-sector employers offer their LGBT employees the full range of benefits, including spousal health insurance.

The number of private-sector employers who provide health benefits for their employees' same-sex spouses and partners is growing rapidly: of Fortune 100 companies, 64 percent offered same-sex partner benefits in 2003; by 2009, that number had grown to 83 percent.⁶⁶ The reasons are clear: such benefits provide a competitive advantage in recruiting and retaining both LGBT and heterosexual employees and also enhance workforce productivity.

In December 2010, following a hearing on legislation to extend benefits to the domestic partners of federal employees, the Senate Committee on Homeland Security and Governmental Affairs concluded that “[t]he primary reason why

⁶⁶ Human Rights Campaign, *How Fortune-Ranked Companies Stack Up On LGBT Workplace Policies* (Sept. 21, 2009), <http://www.hrc.org/blog/entry/how-fortune-ranked-companies-stack-up-on-lgbt-workplace-policies> (last visited July 10, 2012).

employers offer domestic partnership benefits is to attract and retain employees,” particularly younger employees.⁶⁷ In its report, the Committee cited statements from a number of employers. General Electric reported that university students who were about to enter the job market “expressed that while a record of innovation and a strong culture were key drivers of an employment decision, the lack of domestic partner benefits would be *an automatic disqualifier*.”⁶⁸ Several employers informed the Committee that such benefits enhanced their companies’ ability to recruit and retain heterosexual employees. Dow Chemical reported that many heterosexual recruits and employees “felt [domestic partner] benefits were a good indicator of how the company would treat ALL employees within the workforce.”⁶⁹ IBM similarly reported that its same-sex partner benefits helped attract and retain heterosexual employees.⁷⁰ Employers also reported that offering

⁶⁷ S. Rep. No. 111-376, at 10; *see also* *KPMG to Offer Tax Offsets to LGBT Employees*, <http://www.accountingweb.com/topic/education-careers/kpmg-has-announced-it-now-offers-tax-offsets-lgbt-employees> (“Recruitment and retention of talent, especially among the most recent college and high-school graduates, is critical to business success as the students of today become the workforce of tomorrow.”).

⁶⁸ S. Rep. No. 111-376, at 10 (quoting Letter from Deborah A. Elam, Vice President and Chief Diversity Officer, Corporate Human Resources, General Electric Company (Sept. 17, 2008)) (emphasis added).

⁶⁹ *Domestic Partner Benefits: Fair Policy and Good Business for the Federal Government: Hearing on S. 1102 Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 111th Cong. 106 (2009) (“2009 Hearing”) (statement of William H. Hendrix, Dow Chemical Company) (emphasis in original).

⁷⁰ S. Rep. No. 111-376, at 38–39 (statement of Yvette C. Burton, IBM).

same-sex partner benefits helps improve workforce productivity, allowing employees—particularly LGBT employees—to more fully engage in their work and form more meaningful commitments to their employer.⁷¹ Dow Chemical reported that LGBT employees felt they could “perform their jobs more openly . . . without fear of repercussion and therefore have more reason to be committed to the company in return.”⁷²

Many legal employers have similarly concluded that it makes good business sense to provide same-sex partner benefits to their employees.⁷³ In 2010, the Human Rights Campaign (“HRC”) found that 75 percent of the highest revenue law firms extend benefits to their employees’ same-sex partners.⁷⁴ Two years later,

⁷¹ *Id.* at 13–14; 2009 Hearing, *supra* note 69, at 86 (statement of William H. Hendrix, Dow Chemical Company); *see also* MetLife, Inc., *8th Annual Study of Employee Benefit Trends: Findings from the National Survey of Employers and Employees* 10, 32 (2010), available at http://www.healthplansonline.com/docs/articles/metlife/MetLife_8th_Annual_Trend_Study.pdf.

⁷² 2009 Hearing, *supra* note 69, at 86 (statement of William H. Hendrix, Dow Chemical Co.).

⁷³ The National Association of Legal Placement (“NALP”) advises that, to recruit and retain the most talented LGBT lawyers, employers should offer “the best work environment, the best compensation, and the best benefits” and “*at a minimum . . . extend to LGBT lawyers the same benefits they extend to heterosexual lawyers.*” NALP, *Recruiting, Hiring, and Retaining LGBT Lawyers*, <http://www.nalp.org/recruitinghiringretaininglgbtLawyers> (emphasis added).

⁷⁴ Human Rights Campaign, *The State of the Workplace for Lesbian, Gay, Bisexual, and –2008*, at 9 (2009), http://www.hrc.org/files/assets/resources/HRC_Foundation_State_of_the_Workplace_2007-2008.pdf.

in 2012, HRC conducted a more detailed survey of 134 top law firms and found that 126, or 94 percent, now provide same-sex partner benefits.⁷⁵ As law firms and legal organizations compete to attract the most talented lawyers, an ever-larger percentage of whom identify as LGBT, there is simply no longer any question of whether such benefits should be provided.

b. DOMA imposes discriminatory costs when employers provide benefits to employees with a same-sex spouse.

While the decision to provide LGBT employees with the full range of benefits makes good business sense, DOMA requires employers and employees to bear substantial costs in offering these benefits. Approximately 60 percent of U.S. employers offer health insurance to their employees, and typically their spouses and children as well.⁷⁶ Many employers pay a portion of the insurance cost.⁷⁷ Because of DOMA, any employer contribution to the cost of health benefits for a same-sex spouse or partner is considered taxable income to the employee.⁷⁸ This means that both the employer and the employee must pay higher taxes: the

⁷⁵ Human Rights Campaign, *Corporate Equality Index 2012: Rating the American Workplaces on Lesbian, Gay, Bisexual and Transgender Equality* at 18, 79–82 (2012).

⁷⁶ The Kaiser Family Foundation & Health Research and Education Trust, *Employer Health Benefits: 2007 Annual Survey 3* (2007), available at <http://www.kff.org/insurance/7672/upload/76723.pdf>.

⁷⁷ *Id.*

⁷⁸ Badgett, *supra* note 65, at 4.

employer through increased payroll taxes and the employee through increased payroll and income taxes.⁷⁹

The additional tax liabilities are significant. Employers pay an average of \$248 per year for each employee receiving same-sex partner benefits.⁸⁰ The employee does much worse, owing, on average, \$1,069 per year in additional taxes.⁸¹ In all, the federal government collects approximately \$235 million in taxes on domestic partner benefits: \$57 million from employers and \$178 million from employees.⁸²

There are other costs that employers must bear as a direct result of DOMA, including the additional costs of administrating more complex benefit systems and the inherent litigation risk resulting from unclear federal law in a number of areas.⁸³

CONCLUSION

From the abolitionist movement of the nineteenth century to the LGBT rights movement of today, lawyers and legal organizations have played a central

⁷⁹ *Id* at 4–6.

⁸⁰ *Id.*

⁸¹ *Id.* at 7.

⁸² *Id.*

⁸³ *See generally* Brief of *Amici Curiae* Business, Professional and Municipal Employers, and Professional, Trade, and Civic Organizations Representing Employers in Support of Appellee and in Support of Affirmance of the Judgment Below.

role in ensuring that all Americans are treated equally under law, regardless of their race, religion, sex, or sexual orientation. The legal profession's cornerstone principles of justice and non-discrimination are reflected in the oaths each lawyer takes upon becoming a member of the bar, in the ethical rules of various states, in statements by the American Bar Association and other representative groups, and in the actions of individual lawyers every day.

Federal government lawyers were at the vanguard of the civil rights movement, fighting to uphold this nation's commitment to equal treatment under law. Today, these lawyers, if they are lesbian, gay, bisexual, or transgender, cannot even obtain employer-sponsored health insurance for their spouses. This is absurd, and it serves no legitimate government interest. DOMA—by singling out same-sex couples and purposefully denying their marriages federal recognition—is abhorrent to the long-held values of both the legal profession and this nation.

The Court should affirm the district court's order of February 22, 2012.

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,614 words, excluding the portions of the brief exempted by Rule 32(a)(7)(B)(iii).

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I hereby certify that I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 10, 2012.

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Dated: July 10, 2012

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