
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,

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES,

Intervenor-Defendant – Appellant.

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.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA AT SAN FRANCISCO**

**BRIEF OF *AMICUS CURIAE* CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON IN SUPPORT OF APPELLEE URGING AFFIRMANCE**

Alan B. Morrison
GEORGE WASHINGTON UNIVERSITY
LAW SCHOOL
2000 H Street N.W.
Washington, D.C. 20052
(202) 994-7120

Counsel for Amicus Curiae

Anne L. Weismann
Melanie Sloan
CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON
1400 Eye Street, N.W., Suite 450
Washington, D.C. 20005
(202) 408-5565

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

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

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

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. DOMA’S DEFINITION OF “MARRIAGE” AND “SPOUSE” SERIOUSLY UNDERMINES A SIGNIFICANT NUMBER OF FEDERAL ETHICS LAWS	5
II. DOMA FRUSTRATES SIGNIFICANT ANTI-AVOIDANCE PROVISIONS OF THE INTERNAL REVENUE CODE.....	12
III. DOMA FRUSTRATES VARIOUS PROTECTIONS FOR CREDITORS IN THE BANKRUPTCY CODE	17
CONCLUSION.....	21
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF FILING AND SERVICE	

TABLE OF AUTHORITIES

Page(s)

CASES

Commonwealth of Massachusetts v. Department of Health & Human Services,
 ____ F.3d ____, 2012 WL 1948017 (May 31, 2012).....2, 3

Dean v. Veterans Admin.,
 151 F.R.D. 83 (N.D. Ohio 1993).....5

Windsor v. United States,
 833 F. Supp. 2d 394 (S.D.N.Y. 2012)13

STATUTES

1 U.S.C. § 7*passim*

2 U.S.C. § 31-2(a)9

2 U.S.C. § 352(2)(C)10

5 U.S.C. § 2302(b)(7).....7

5 U.S.C. § 3110(a)(3).....7, 8

5 U.S.C. § 3110(b)7

5 U.S.C. § 7342(a)(1)(G)9

5 U.S.C. Appx §§ 102(e)(1)(A)-(D)6

5 U.S.C. Appx § 109(16)6

5 U.S.C. Appx § 501(c)6

10 U.S.C. § 1787(a)11

11 U.S.C. § 101(14A)	19
11 U.S.C. § 302(a)	18
11 U.S.C. § 302(b)	18
11 U.S.C. § 522(b)(1).....	20, 21
11 U.S.C. § 522(d)	21
11 U.S.C. §§ 523(a)(5).....	19
11 U.S.C. §§ 523(a)(15).....	19
11 U.S.C. § 541(a)	20
11 U.S.C. § 541(b)(2).....	20
18 U.S.C. § 115(a)	10
18 U.S.C. § 115(c)(2).....	10
18 U.S.C. § 208(a)	10
26 U.S.C. § 23.....	16
26 U.S.C. § 23(b)(1).....	16
26 U.S.C. § 23(h)	16
26 U.S.C. § 63(c)(2)(C)	14
26 U.S.C. § 63(c)(6)(A)	14
26 U.S.C. § 267.....	14
26 U.S.C. § 267(c)(4).....	15
26 U.S.C. § 1041.....	15

26 U.S.C. § 1041(a)	15
26 U.S.C. § 4941	16
26 U.S.C. § 4946(a)	17
26 U.S.C. § 4946(d)	17
26 U.S.C. § 9035	9
28 U.S.C. § 455(b)(4).....	9
28 U.S.C. § 455(c)	9
28 U.S.C. § 631	8
28 U.S.C. § 631(b)(4).....	8
28 U.S.C. § 1930(a)(1).....	18
29 U.S.C. § 432(a)(1).....	7
29 U.S.C. § 1055(c)(2).....	20
29 U.S.C. § 1056(d)	20
29 U.S.C. § 1056(d)(3).....	20
31 U.S.C. § 1353	9
42 U.S.C. § 290b(j)(2)	10
42 U.S.C. § 300e-17(b)(4)	7

OTHER AUTHORITIES

Ethics in Government Act (“EIGA”), Pub. L. 95-521, 92 Stat. 1824 (1978).....	5
Jackie Gardina, <i>The Defense of Marriage Act, Same-Sex Relationships and the Bankruptcy Code</i> , available at http://ssrn.com/author=338824 , last revised April 19, 2012	17
Manual Guide - Human Resources Management Manual CDC Chapter 310-1 (Jan. 20, 1998)	8
Patricia A. Cain, <i>DOMA and the Internal Revenue Code</i> , 84 Chi.-Kent L. Rev. 481 (2009)	12
S. Rep. No. 170, 95 th Cong., 2d Sess. 31 (1978), <i>reprinted in</i> 1978 U.S.C.C.A.N. 4216	5

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 on the ethical and legal lapses of members of Congress. For example, in *Family Affair*, CREW detailed how certain members of Congress in leadership roles used their positions to financially benefit family members. Part of the information for this report was gleaned from personal financial disclosure reports 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 3 of the Defense of Marriage Act (“DOMA”), 1 U.S.C. § 7, has

¹ CREW confirms that no party’s counsel authored the brief in whole or in part; no party’s counsel contributed money that was intended to fund preparing or submitting the brief; and no person, other than CREW, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

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 made in CREW'S *amicus* brief filed in a recent case in the First Circuit in which the court found DOMA unconstitutional, *Commonwealth of Massachusetts v. Department of Health & Human Services*, ___ F.3d ___, 2012 WL 1948017 (Nos.10—2204, 2207 & 2214, decided May 31, 2012). They were the basis for the Court's discussion at

*8, including note 8, as an additional reason for finding DOMA to be unconstitutional.²

Since filing its amicus brief in *Massachusetts*, CREW has discovered that the perverse effects of DOMA extend beyond the federal ethics laws and include serious, unintended consequences in the Internal Revenue Code and the Bankruptcy Code. Accordingly, this brief also will discuss the adverse impacts of DOMA as they affect taxpayers, creditors, and others.

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

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 and her lawfully married spouse of federal health benefits that are afforded individuals in opposite-sex marriages.

² In the First Circuit, CREW also argued that not only did DOMA not conserve scarce resources as its proponents contend, but DOMA’s discriminatory treatment of same-sex married couples also will cost the federal government nearly \$1 billion per year, according to a 2004 report of the Congressional Budget Office. *See Massachusetts, supra*, at *9, note 9, where the Court also relied on this argument. Because others are expected to address that issue in their briefs, CREW will not include it in this brief.

As the opinion of the district court and the briefs of the plaintiff and the United States Office of Personnel Management make clear, section 3 of the Defense of Marriage Act is an utterly irrational law, unsupported by any legitimate purpose. They demonstrate conclusively that the purposes asserted by the Bipartisan Legal Advisory Group of the United States House of Representatives either are illusory, illegitimate, relevant only to state interests, and/or, in the case of conserving scarce resources, not factually supported. This brief has a different focus. Not only does DOMA not advance any valid purposes, but its differential treatment of the same-sex marriages of plaintiff Golinski and others undermines important protections in federal laws in three areas: conflicts of interest, federal income tax, 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 come from recognition of their marriages, but also to share the same burdens imposed under federal law on other married couples.

The reason that these three sets of perverse results occurs is that DOMA imposed – in a blunderbuss across-the-board manner – a rule that recognizes only opposite sex marriages across the more than 1,000 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 relevant, the utterly irrational impact of DOMA is hardly surprising. These effects reinforce a basic truth: DOMA was not driven by rational considerations, but instead by a desire to strike out at same-sex couples regardless of the consequences. DOMA would be unconstitutional under rational basis review even without these perverse consequences, but with them, its irrationality is even clearer.

ARGUMENT

I. DOMA’S DEFINITION OF “MARRIAGE” AND “SPOUSE” SERIOUSLY UNDERMINES A SIGNIFICANT NUMBER OF FEDERAL ETHICS LAWS.

In 1978, in the aftermath of Watergate, Congress passed the Ethics in Government Act (“EIGA”), P.L. 95-521, 92 Stat. 1824, to “preserve and promote the accountability and integrity of public officials and of the institutions of the Federal Government.” S. Rep. No. 170, 95th Cong., 2d Sess. 31 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4216. Its goal is “to prevent corruption and other official misconduct before it occurs . . .” *Dean v. Veterans Admin.*, 151 F.R.D. 83, 87 (N.D. Ohio 1993), *quoting* S. Rep. No. 170 at 31. One way that 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, defined to include, *inter alia*, a husband or wife. 5 U.S.C. Appx § 109(16). For example, among the items EIGA requires to be reported are income in excess of \$1,000, honoraria, and specified gifts of the reporting individual's "spouse." 5 U.S.C. Appx §§ 102(e)(1)(A)-(D). Under DOMA, these provisions must be construed as excluding from their coverage any "spouse" in a single-sex marriage. As a result, those in same-sex marriages need not report any of the financial information pertaining to their spouses that EIGA otherwise requires of opposite-sex married couples. But without this information, identifying potential financial conflicts of interest is difficult, if not impossible. Thus, for example, post-DOMA, a same-sex spouse (but not an opposite-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.

DOMA undermines other provisions of EIGA as well. EIGA dictates the treatment of honoraria paid to charitable organizations instead of directly to a member of Congress, officer, or employee. 5 U.S.C. Appx § 501(c). Such payments cannot exceed \$2,000, and also cannot be made to a charitable organization in which, *inter alia*, the member, officer, or employee or his or her spouse "derives any financial benefit." *Id.* Again, the purpose is to protect against

financial conflicts of interest, which is undermined by DOMA's exclusion of same-sex spouses from this ban.

DOMA's reach extends beyond the reporting requirements in EIGA to other statutes intended to protect against financial conflicts of interest. For example, officers and employees of labor organizations must report certain financial assets they or their spouses hold, a requirement that would not, by virtue of DOMA, extend to same-sex spouses. *See* 29 U.S.C. § 432(a)(1). Further, by statute, health maintenance organizations ("HMOs") must disclose certain financial information to the Secretary of Health and Human Services, including 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 would 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(a)(3) & (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. *Id.* at § 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.³

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, judges are free to appoint their same-sex spouses to be magistrate judges, even though such appointments raise the same potential conflicts as the prohibited appointment of opposite-sex spouses.

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

³ 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.

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

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

Beyond EIGA and anti-nepotism laws, DOMA undermines the transparency and accountability afforded by a wide range of statutes and regulations, from gift bans imposed on senators and their spouses,⁴ to limitations on the personal funds a presidential candidate can spend.⁵ 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, and excludes same-sex spouses from the foreign gift ban applicable to opposite-sex spouses in 5 U.S.C. § 7342(a)(1)(G).

⁴ 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).

⁵ 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 spouses).

DOMA also impacts 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 face no such bar.

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

Criminal laws also make it illegal to retaliate against a federal official by threatening or injuring an immediate family member of the official. 18 U.S.C. § 115(a). "Immediate family member" is defined to include the official's spouse 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. The reason for these bizarre consequences is that Congress never bothered to consider DOMA's impact on the ethical principles underlying these statutory schemes.

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

CREW recognizes that couples in same-sex marriages are no more and no less ethical than couples in opposite-sex marriages. Most married couples 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 ethical than their opposite-sex counterparts, yet DOMA, by exempting them from important ethics requirements, treats them as if they are. 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 an agency will refuse to participate in a matter in which his or her same-sex spouse has an otherwise disqualifying financial interest. Bizarrely,

DOMA tells those who are the least ethical and therefore the most in need of regulation that they need not follow federal ethics laws. On this basis alone, DOMA fails constitutional scrutiny.

II. DOMA FRUSTRATES SIGNIFICANT ANTI-AVOIDANCE PROVISIONS OF THE INTERNAL REVENUE CODE.⁶

One of the perennial problems in designing an income tax system is determining the appropriate unit of taxation in a nation in which many people are unmarried, others are married with relatively similar incomes, and others 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.

Until DOMA, the Internal Revenue Code had allowed all married couples to elect either to file their tax returns together, combining their income and deductions on one return, or file separately, with each person including his or her income and the deductions to which he or she is entitled. But filing separately 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. That system

⁶ 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).

worked well in most of its applications, but as explained more fully below, in some situations it created the potential for abuse, or perhaps more precisely, opportunities to manipulate the Code. To deal with these problems, Congress created special exceptions (or loophole closers).

DOMA, however, altered the basic tax scheme by deciding that marriages between members of the same sex, even if they are authorized by state law, will no longer be recognized under all federal laws, including the Internal Revenue Code.⁷ The effect was to reopen loophole closers, enabling some same-sex couples to obtain tax benefits that Congress plainly would have denied, had it given the matter a moment's thought. For example, because many taxpayers either do not keep adequate records or do not have significant recognized deductions, Congress determined that each person is entitled to a minimum level of deductions, called the standard deduction. It also allowed most taxpayers to choose between taking the standard deduction and itemizing their deductions. Some married taxpayers filing separate returns sought to take advantage of these two options by having one spouse claim all the actual deductions and the other claim the standard deduction. Congress concluded this was unfair, because the standard deduction is designed in

⁷ This brief does not focus on the decision to deny same-sex couples the right to file joint returns and to obtain other federal tax benefits available to opposite sex couples, as in *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012), or as here the denial of federal health benefits to a spouse of a same-sex married couple. Instead, this section focuses on the loophole closers that DOMA has reopened.

part to replicate the actual deductions that other taxpayers have. Therefore, it enacted 26 U.S.C. § 63(c)(6)(A) under which, as applied to married couples filing separately, the standard deduction is reduced from \$3300 (section 63(c)(2)(C)) to \$0, thereby removing the unfair advantage.

Under DOMA, even those who are legally married in their states cannot file joint returns because they are not “federally married.” As a result, because these couples are not considered married under the Tax Code, when they file separate returns, there is nothing preventing one spouse from taking all the itemized deductions and the other spouse from taking the standard deduction. This is the exact kind of tax avoidance section 63(c)(6)(A) was intended to prevent.

Second, one way that taxpayers minimize their tax bill is to incur losses to offset gains, or in some cases, other kinds of income. 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 would no longer own the asset, it still belonged to the family and might even be re-purchased after a period of time, and thus in a real economic sense, there was no “loss.” Congress enacted 26 U.S.C. § 267 to prevent a

taxpayer from claiming a loss based on sales to family members, defined as “brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.” 26 U.S.C. § 267(c)(4). Because, under DOMA, a same-sex spouse is not a spouse, this provision is inapplicable and same-sex couples may claim a loss that Congress denied to everyone else.

Similarly, under 26 U.S.C. § 1041(a), transfers of property between spouses or former spouses incident to a divorce are not recognized as gains or losses. As with section 267(c)(4), this provision seeks to avoid sham transfers that do not result in a real gain or loss for the parties involved. The exclusion of gains or losses from transfers to a former spouse incident to a divorce, which would include part ownership of the family home, makes this a non-event for tax purposes. Congress intended to deny some taxpayers (especially wealthy ones) the opportunity to engage in transactions incident to a divorce that can lower one spouse’s taxable income and, in effect, have the IRS pay for part of the cost of the divorce. This provision also was designed to prevent unsophisticated taxpayers from paying increased taxes when they transfer property to a spouse as part of a divorce. 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 a same-sex spouse is not a spouse under DOMA, section 1041 does not apply, and the tax avoidance (or tax trap) possibilities are again present.

A fourth example relates to the special treatment of adoption expenses under 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 more valuable than a deduction, subject to certain limitations based on the taxpayer's income. The self-evident purpose of this provision 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 (h). However, federal generosity has its limits, and so 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." Of course, under DOMA, same-sex married couples are not "spouses" under federal law, and so 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 same-sex spouses who can use the credit in adopting step children.

Finally, 26 U.S.C. § 4941 imposes significant taxes on those who control a private foundation, referred to as "disqualified persons," if they engage in self-dealing. A "disqualified person" is defined as an officer, director, or trustee of the foundation or who is (was) a substantial contributor to it, including a 20% owner of any entity that was a substantial contributor, as well as the family of any such

person. 26 U.S.C. § 4946(a). “Family” includes the “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 can engage in the very acts of self-dealing for which opposite-sex spouses would have to pay substantial taxes.

There are other examples in which DOMA perverts the intent of the Internal Revenue Code, but these five make the basic point. Quite apart from the basic unfairness to same-sex married couples, DOMA seriously undermines anti-avoidance provisions of the Code because of its wholly irrational exclusion of same-sex married couples under all federal laws.

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

The Federal Bankruptcy Code is a complex document that seeks to balance the interests of debtors in getting a fresh start, with 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, with fairness and accuracy.

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 Vermont Law School for the Federal Judicial Center in 2011. It is available at <http://ssrn.com/author=338824>, last revised April 19, 2012.

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, under chapter 7, 31.5% of individual cases, as contrasted with business cases, 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; that is up to the judge under 11 U.S.C. § 302(b). In some cases, ownership of property or the identity of the obligated debtor is not clear, and a consolidated proceeding eliminates the need to decide such questions. In addition, when both spouses file, there is less chance that they will engage in avoidance tactics that will harm the interests of creditors.

However, 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 a separate filing fee 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 estate available to creditors); both are precluded from

consolidating their cases, almost certainly adding to costs and delays on all sides; and, as discussed below, DOMA may enable debtors who are married to same-sex spouses to organize their affairs in a way that debtors who are opposite-sex couples cannot, to their advantage and to the disadvantage of their creditors.

For a debtor in bankruptcy, the goal is as broad a discharge from prior debts as possible. The Bankruptcy Code generally supports that goal, but section 523 places some limits on discharges of some kinds of debts for reasons of public policy. *See* 11 U.S.C. §§ 523(a)(5) & (15). Subparagraph 5 excludes a “domestic support obligation,” which is defined in 11 U.S.C. § 101(14A) to include alimony, maintenance, and other support obligations (past and future) owed “to a spouse or former spouse.” Subparagraph (15) in turn 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 policy rationale behind these exclusions is to prevent one spouse from escaping prior and future liability to a spouse by going through bankruptcy, thereby thwarting state laws designed to protect spouses. But since DOMA makes same-sex spouses into non-spouses, the

exclusions do not apply, and the congressional and related state policies are thereby undermined.⁹

DOMA will cause special problems in bankruptcy in community property states like California. Under 11 U.S.C. § 541(a), the bankrupt estate is broadly defined to include all property of the debtor, and under subsection (b)(2) it extends to all “interests of the debtor and the debtor’s spouse in community property as of the commencement of the case that is -- (A) under the sole, equal, or joint management and control of the debtor.” Since federal law after DOMA does not permit individuals to have a same-sex “spouse,” the attempt to bring in the community property of a same-sex partner will fail, with all the resulting confusion, additional costs and delays, and possible harm to creditors that this provision appears to be designed to prevent.

Finally, 11 U.S.C. § 522(b)(1) gives debtors a choice of electing federal or state law as a source of exemptions for property that would otherwise be available to creditors, when state law allows them to make that choice. Thus, on the federal

⁹ Similar spousal protection provisions in ERISA would be voided as to same-sex married couples because of DOMA. Under 29 U.S.C. § 1056(d), interests in pension plans covered by ERISA cannot generally be alienated or assigned. One exception in subsection 1056(d)(3) is for qualified domestic support orders, which includes orders for the support of children and spouses, but under DOMA it covers only opposite-sex spouses. Another spousal protection provision prevents one spouse from using the pension for his or her own purposes without the written consent of the other spouse. 29 U.S.C. § 1055(c)(2). Again, DOMA nullifies that protection as applied to same-sex spouses.

side, subsection 522(d) provides 12 categories of property that any debtor may elect for his or her exemptions, regardless of the law of the debtor's domicile. Some states provide more generous or different categories of exemptions, or their exemptions may be more generous than their federal counterpart in some areas, but not necessarily in others. Congress decided to let debtors choose between federal exemptions in subsection (d), or the exemptions available under the debtor's home state laws, although some states do not give debtors that option. There is one significant exception in subsection 522(b)(1): if both spouses are in bankruptcy, they must make the same choice, either both federal or both state. The obvious reason for this is 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, the requirement that both spouses make the same election applies only where the debtors "are husband and wife," which means that same-sex married couples can game the system to their advantage and to the disadvantage of their creditors.

CONCLUSION

In addition to the reasons set forth in the brief of the plaintiff-appellee, DOMA, because of its unthinking across-the-board exclusion of same-sex married couples from all federal laws relating to marriage, creates bizarre effects on federal laws relating to conflicts of interest, income taxes, and bankruptcy. If DOMA

were not indefensible on its own, the perverse consequences demonstrated above eliminate all possible defenses for the law. In short, the Defense of Marriage Act is simply indefensible, and the judgment below setting it aside should be affirmed.

Respectfully Submitted,

/s/ Alan B. Morrison

Alan B. Morrison
George Washington University
Law School
2000 H Street N.W.
Washington D.C. 20052
(202) 994-7120
alanbmorrison@gmail.com

/s/ Anne L. Weismann

Anne L. Weismann
Melanie Sloan
Citizens for Responsibility and
Ethics in Washington
1400 Eye Street, N.W., Suite 450
Washington, D.C. 20005
(202) 408-5565
aweismann@citizensforethics.org

DATED: July 2, 2012

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1 because:

[X] this brief contains [5,203] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

[] this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[X] this brief has been prepared in a proportionally spaced typeface using [*Microsoft Word 2000*] in [*14pt Times New Roman*]; *or*

[] this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

Dated: July 2, 2012

/s/ Alan B. Morrison
Counsel for Amicus Curiae

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 2nd day of July, 2012, I caused this Brief of *Amicus Curiae* Citizens for Responsibility and Ethics in Washington to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Tara L. Borelli
Jon Davidson
Shelbi D. Day
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
3325 Wilshire Boulevard, Suite 1300
Los Angeles, California 90010
(213) 382-7600

Counsel for Appellee

Gregory P. Dresser
Aaron D. Jones
Rita Lin
James R. McGuire
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105
(415) 268-6396

Counsel for Appellee

Susan L. Sommer
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
120 Wall Street, Suite 1900
New York, New York 10005
(212) 809-8585

Counsel for Appellee

Benjamin S. Kingsley
August E. Flentje
Michael J. Singer
Helen L. Gilbert
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 353-8253

Counsel for Defendants/Appellants

H. Christopher Bartolomucci
Paul D. Clement
Conor B. Dugan
Nicholas J. Nelson
BANCROFT PLLC
1919 M Street, N.W., Suite 470
Washington, D.C. 20036
(202) 234-0090

*Counsel for Intervenor-
Appellant/Intervenor*

Michael L. Stern
ATTORNEY AT LAW
8529 Century Oak Court
Fairfax Station, Virginia 22039
(703) 786-7581

*Counsel for Amicus Curiae
Orrin Hatch, et al.*

William C. Duncan
MARRIAGE LAW FOUNDATION
1868 North 800 E
Lehi, Utah 84043
(801) 367-4570

*Counsel for Amicus Curiae
National Organization for
Marriage*

Abram John Pafford
PAFFORD, LAWRENCE & ROSS, PLLC
1100 Commerce Street
Lynchburg, Virginia 24504
(434) 528-6508

*Counsel for Amicus Curiae
American College of Pediatricians*

Christine Davenport
Kerry W. Kircher
Kirsten W. Konar
William Pittard
Todd B. Tatelman
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700

*Counsel for Intervenor-
Appellant/Intervenor*

Jay Sekulow
AMERICAN CENTER FOR
LAW AND JUSTICE
201 Maryland Avenue, N.E.
Washington, D.C. 20002

*Counsel for Amicus Curiae
Former Attorneys General*

Thomas M. Fisher
OFFICE OF THE ATTORNEY GENERAL
302 West Washington Street, 5th Floor
Indianapolis, Indiana 46204
(317) 232-6255

*Counsel for Amicus Curiae
State of Indiana, et al.*

Lawrence J. Joseph
LAW OFFICE OF LAWRENCE J. JOSEPH
1250 Connecticut Avenue, Suite 200
Washington, D.C. 20036
(202) 669-5135

*Counsel for Amicus Curiae
Eagle Forum*

Steven W. Fitschen
THE NATIONAL LEGAL FOUNDATION
2224 Virginia Beach Boulevard
Suite 204
Virginia Beach, Virginia 23454
(757) 463-6133

Dale Schowengerdt
ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020

Counsel for Amicus Curiae
Concerned Women

Counsel for Amicus Curiae
The Frederick Douglass Foundation

I further certify that on this 2nd day of July, 2012, I caused this Brief of *Amicus Curiae* Citizens for Responsibility and Ethics in Washington to be served, via U.S. Mail, postage pre-paid, to the following non-registered CM/ECF user:

Tony West
U.S. DEPARTMENT OF JUSTICE
Post Office Box 868
Benjamin Franklin Station
Washington, D.C. 20044
(202) 532-4325

Counsel for Intervenor-Appellant/Intervenor

/s/ Alan B. Morrison
Counsel for Amicus Curiae