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,

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

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BRIEF OF *AMICI CURIAE* AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, CHANGE TO WIN, AND NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF APPELLEE AND IN SUPPORT OF AFFIRMANCE OF THE JUDGMENT BELOW

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CASES

Dragovich v. U.S. Dep't. of the Treasury,
764 F.Supp. 2d 1178 (N.D. Cal. 2011) 9

Matter of Paul Wilson Dorman,
25 I.& N.Dec. 485 (A.G. 2011) 29

Metropolitan Life Ins. Co. v. Massachusetts,
471 U.S. 724 (1985) 13

Perry v. Brown,
671 F.3d 1052 (9th Cir. 2012) 3

Strauss v. Horton,
46 Cal.4th 364 (2009) 3

CONSTITUTIONAL AND STATUTORY PROVISIONS

1 U.S.C.
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§ 8133(a) 19
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§§ 8951 – 8962 7
§§ 8981 – 8992 7

8 U.S.C.
§ 1101(a)(15)(H) 29
§ 1151(b) 28
§ 1154(a)-(b) 28
§ 1430 28
§ 1153(d) 27, 30

26 U.S.C.
§ 63(a) 10
§ 106 (a) 10
§ 125 ..... 8, 10

§ 219 25
§ 401 (a)(1) 26
§ 401(h) 10
§ 402(c)(ii) 26
§ 408 25
§ 417(a)(2)(A)(i) 26

29 U.S.C.
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§ 1144(a) 13, 24
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§§ 1181 – 1183 16
§ 2601(b)(1) 18
§ 2612(a) 18
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42 U.S.C.
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§ 402(i) 17
§ 402(e) & (f) 17
§ 415 17
§ 3796(a) 20
§ 3796 d-l 20
§ 7384 20

Defense of Marriage Act, Pub.L.No. 104-199, 110 Stat. 2419 (1996)
Codified at 1 U.S.C.§ 7 and 28 U.S.C. § 1738(c) 1

Cal. Ins. Code § 381.5 (2011) 24

Mass. Gen. Laws Ann. Chapter 151B, § 4 (2010) 24

REGULATIONS AND ADMINISTRATIVE RULINGS

20 C.F.R. § 10.410 (2010) 19

26 C.F.R.
§ 1.401(a)(9)-3, A-3(a) 26
§ 1.401(a)-20, A-24(a) 26

I.R.S. P.L.R.
159315–04 (Mar. 17, 2005) 11
200731023 (Aug. 3, 2007) 11
200339001 (Sept. 26, 2003) 11
9850011 (Dec. 11, 1998) 11
9109060 (Dec. 6, 1990) 11

OTHER AUTHORITIES

M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples,* 58 Drake L. Rev. 1081 (2010) 25, 31

M.V. Lee Badgett, *Unequal Taxes on Equal Benefits: The Taxation of Domestic Partner Benefits*,Williams Institute (2007), http://www.americanprogress.onj/issues/2007/12/pdl7domestic partners.pdf 11

Tara Siegel Bernard & Ron Lieber, *The High Price of Being a Gay Couple,* N.Y. Times, October 2, 2009 at Al, http://www.nytimes.com/2009/10/03/your-money/03money.html?_r=1.....11, 12

Carmen DeNavas-Walt, Bernadette D. Proctor & Jessica C. Smith. *Income, Poverty, and Health Insurance Coverage in the United States: 2010*, U.S. Census Bureau, Current Population Reports, P60-239 (2011), http://www.census.gov/prod/2011pubs/p60-239.pdf 4

Jessica Feinberg, *The Plus One Policy: An Autonomous Model of Family Reunification,* 11 Nev. L. J. 629 (2011) 27, 32

Cori K. Garland, *Say "I Do": The Judicial Duty to Heighten Constitutional Scrutiny of Immigration Policies Affecting Same-Sex Binational Couples,* 84 Ind. L.J. 689 (2009) 26, 27

Naomi G. Goldberg,*The Impact of Inequality for Same-Sex Partners in Employer-Sponsored Retirement Plans,* Williams Institute, (2009), http://www.escholarship.org/uc/item/0pn9c1h4.....23, 25

Naomi G. Goldberg, Christopher Ramos, & M.V. Lee Badgett, , *The Fiscal Impact of Extending Federal Benefits to Same-Sex Domestic Partners,* Williams Institute (2008), http://wiwp.law.ucla.edu/wp-content/uploads/Badgett-Goldberg-Ramos-S2521 FiscalAnalysis-Sept-2008.pdf 6, 8

Human Rights Campaign, *Uniting American Families Act* (2011), http://www.hrc.org/resources/entry/uniting-american-families-act 27

Immigration Policy Center, *The Migrant Integration Policy Index* (2011), http://www.inimigrationpolicy.org/iust-facts/migrant-integration-policv-index-mipex-iii.....31

Kaiser Family Foundation, *Employer Health Benefits 2011 Annual Survey* (2011), http://ehbs.kff.org/pdf/2011/8225.pdf 5, 13

Craig J. Konnoth and Gary J. Gates, *Same-Sex Couples and Immigration in the United States*, Williams Institute (Nov. 2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Konnoth-Binational-Report-Nov-2011.pdf.....27

Janice Kay McClendon, *A Small Step Forward in the Last Civil Rights Battle: Extending Benefits Under Federal Regulated Employee Benefit Plans to Same-Sex Couples,* 36 N.M. L. Rev. 99 (2006) 13, 24

Maine Dep't of Sec. of State, *Proposed Initiative Ballot Question/Public Comment*, http://www.maine.gov/sos/cec/elec/2012/proposed2012question.html 3

National Conference of State Legislatures, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws* (June 2012), http://www.ncsl.org/default.aspx?tabid=16430.....3

Office of Justice Programs, *Public Safety Officers' Benefits (PSOB) Programs* (2011), https://www.bja.gov/ProgramDetails.aspx?Program_ID=78 20

Ninez A. Ponce, *et al. The Effects of Unequal Access to Health Insurance for Same-Sex Couples in California*, Health Affairs (Aug. 2010), http://content.healthaffairs.org/content/29/8/1539.full.html. 6

Jill Louise Ripke, *Employee ERISA Benefits After Goodridge v. Public Health: Do Same-Sex Marriages Qualify as Legal Marriages Under Employer-Created ERISA Plans?,* 31 J. Corp. L. 267 (2005) 24

Adam P. Romero, *et al,* The Williams Institute, *Census Snapshot: United States* (2007), http://escholarship.org/uc/item/6nx232r4%23 .....16, 17

Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders, *et. al.*, *Improving the Lives of LGBT Older Adults* (2010) http://www.lgbtagingcenter.org/resources/resource.cfm?r=16 23

Social Security Admin., *Retirement Benefits*, SSA Pub. No. 05-10035, ICN 457500 (Sept. 2011), http://www.ssa.gov/pubs/10035.html#a0=2 22

U.S. Citizenship and Naturalization Services, *Citizenship through Naturalization* (2011), http://www.uscis.gov/portal/site/uscis (follow "Citizenship through Naturalization" hyperlink) 29

U.S. Citizenship and Naturalization Services, *How do I Help My Relative Become a U.S. Permanent Resident, M-561* (2008), http://www.uscis.gOv/USCIS/Resources/B1en.pdf 29

U.S. Department of Labor, "Introduction," *An Employee's Guide to Health Benefits under COBRA* (2012), http://www.dol.gov/ebsa/publications/cobraemployee.html 15

U.S. Department of Labor, *Frequently Asked Questions for Participants and Beneficiaries*, http://www.dol.gov/ebsa/faqs/faq_911_1.html. 15

U.S. Department of State, Visa Bulletin for June 2012, IX:45, http://www.travel.state.gov/visa/bulletin/bulletin_5712.html 28

U.S. Dept. of State, *Visa Types for Immigrants*, http://travel.state.gov/visa/immigrants/types/types_1326.html 26

U.S. Office of Personnel Management, *2012 Guide to Federal Employees Dental and Vision Insurance Program* (2011), http://www.opm.gov/insure/health/planinfo/2012/guides/70-1.pdf 7

U.S. Office of Personnel Management, *Death of Employee Covered Under the Civil Service Retirement System* (2011), http://www.opm.gov/retire/pre/death/index.asp 21

U.S. Office of Personnel Management, *Death of Employee Covered Under the Federal Employees Retirement System (FERS)* (2011), http://www.opm.gov/retire/pre/death/index.asp 19

U.S. Office of Personnel Management, "Family Members", *Federal Employees Health Benefits Program Handbook,* http://www.opm.gov/insure/health/reference/handbook/fehb28.asp 7

U.S. Office of Personnel Management, *Federal Flexible Spending Account Program* (2011), http://www.opm.gov/insiire/11exible/index.asp 8

U.S. Office of Personnel Management, *Quick Guide to FEHB, FEDVIP, FLTCIP, FSAFEDS, and FEGLI* (2011), http://www.opm.gov/insure/fastfacts/quickguide.pdf 7

Rebecca Walters, *The Uniting American Families Act: A Critical Analysis of Legislation Affecting Bi-National Same-Sex Couples,* 17 Am. U. J. Gender Soc. Pol'y & L. 521 (2009).....29

CORPORATE DISCLOSURE STATEMENTS AND CERTIFICATIONS

Pursuant to Circuit Rule 26.1(a), *amici* provide the following disclosures of corporate identity:

Amicus the American Federation of Labor and Congress of Industrial Organizations, (AFL-CIO) is a federation of 56 unions representing more than 12 million working men and women, including workers employed in manufacturing, retail, construction, hospitality, the public sector, health care, entertainment, and other industries. AFL-CIO certifies that it is a non-profit corporation. It does not offer stock and has no parent corporation.

Amicus Change to Win (CTW) is a federation of four labor unions representing 5.5 million working men and women, including farm workers, food service workers, janitors, security guards, healthcare workers, truck drivers, and other employed in both the public and private sectors. CTW certifies that it is a non-profit corporation. It does not offer stock and has no parent corporation.

Amicus the National Education Association (NEA) is a nationwide employee organization with over 3 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA certifies that it is a non-profit corporation. It does not offer stock and has no parent corporation.

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

Pursuant to Federal Rule of Appellate Procedure 29(a), *amici* certify that all parties to this case have consented to the filing of this brief.

Pursuant to Circuit Rule 25-5(e), *amici* certify that all *amici* concur in the content of this brief.

INTEREST OF *AMICI CURIAE*

Amici curiae AFL-CIO, CTW, and NEA together represent over 20 million American workers. *Amici* and our member labor unions are pledged to fight for the equal and fair treatment of all workers. We consider protecting the economic rights of lesbian and gay Americans an important part of that overall mission. Labor unions have long fought for domestic partner benefits in union contracts, for prohibitions forbidding employers from firing lesbian and gay workers because of their sexual orientation, and for programs to help end discrimination in the workplace. The Defense of Marriage Act (DOMA),[1] by intention and design, ensures that workers with same-sex spouses earn less money, are taxed more on their wages and benefits, and have available to them fewer valuable benefits and less economic security than their counterparts with different-sex spouses. As such, DOMA severely impedes our ability to represent union members and to advocate and seek justice for all workers.

Defending all workers' free opportunity to obtain economic security for themselves and their families has long been a priority for the labor movement. Work is the central means by which the vast majority of Americans obtain such

[1] Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

security. DOMA has the effect of relegating an entire class of working families to lower economic security.

SUMMARY OF ARGUMENT

Most Americans, including families and children, secure benefits such as healthcare, retirement, and disability insurance through a family member's employment. Indeed, spousal and dependent benefits comprise a significant portion of the overall compensation package for most employees. These employee benefits, together with state and federal programs for working people, form the safety net upon which working families rely for retirement and in the event of illness, injury, disability or death. In many American families, only one adult works outside of the home or for an employer that provides benefits. These families generally rely exclusively on workplace benefits – including healthcare, retirement, and Social Security – provided through the employment of one member of the family.

Section 3 of DOMA defines the terms "marriage" and "spouse" for purposes of federal law and limits the application of these terms solely to unions between a man and a woman.[2] Because marital status plays a role in determining eligibility for, and taxation of, a myriad of workplace benefits, rights and privileges, DOMA deprives same-sex married workers and their

[2] 1 U.S.C. § 7.

families of significant economic benefits associated with employment that are enjoyed by their coworkers in different-sex marriages. Federal employees – including Karen Golinski – who are married to a same-sex spouse under the laws of their home state[3] are denied spousal workplace benefits altogether. DOMA also allows private sector employers to reduce or withhold workplace benefits from the spouses and families of employees married to persons of the same sex.

In this brief, *amici* labor organizations address four areas in which DOMA significantly limits the rights of workers married to persons of the same sex. First, DOMA prevents or significantly restricts access to spousal

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[3] Six states, Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont, as well as the District of Columbia, currently grant marriage licenses to same-sex couples. *See* National Conference of State Legislatures, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx (last updated June 2012). In February 2012, both Washington and Maryland enacted laws allowing marriage for same-sex couples that will only go into effect if approved by voter referenda in November 2012. Similarly, Maine will consider legalizing marriage for same-sex couples on the November 2012 ballot. *See* Maine Dep't of Sec. of State, *Proposed Initiative Ballot Question/Public Comment*, http://www.maine.gov/sos/cec/elec/2012/proposed2012question.html. In California, 18,000 marriages of same-sex couples took place in 2008 and remain valid today. *Strauss v. Horton*, 46 Cal.4th 364, 470–474 (2009). Although a voter referendum enacted a subsequent ban on marriage of same-sex couples, this Court invalidated the ban as unconstitutional. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (stayed). Maryland, New Mexico, and Rhode Island recognize out-of-state marriages between two people of the same sex. *See* National Conference of State Legislatures, *supra.*

healthcare benefits. Second, DOMA denies to same-sex couples benefits provided to other married couples when a worker suffers a workplace injury, or otherwise becomes ill or infirm. Third, DOMA impinges on the ability of workers to plan for retirement by mandating a complete denial of Social Security benefits to same-sex spouses of covered workers, and precludes same-sex spouses from receiving the benefits of tax provisions intended to incentivize savings in private retirement accounts. Fourth, DOMA unfairly circumscribes immigration and naturalization laws for married same-sex couples seeking to work and remain lawfully in the United States.

ARGUMENT

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

Employer-provided healthcare benefits are the most common source of medical insurance for working Americans and their families.[4] Karen Golinski and her lawful spouse Amy Cunninghus, like thousands of other married same-sex couples, are denied access to such benefits. The lack of access to employer-provided spousal health coverage forces some same-sex couples to go without

[4] Carmen DeNavas-Walt, Bernadette D. Proctor & Jessica C. Smith, *Income, Poverty, and Health Insurance Coverage in the United States: 2010*, U.S. Census Bureau, Current Population Reports, 60-239 (2011), http://www.census.gov/prod/2011pubs/p60-239.pdf (55.3% of people, or 169.3 million, were covered by employer-based health insurance in 2010.)

insurance for the non-covered spouse or to rely on public coverage. For workers whose employers extend coverage to same-sex spouses or who can afford to purchase insurance for the non-covered spouse on the open market, DOMA raises healthcare expenditures for married same-sex couples significantly, up to thousands of dollars annually.[5]

The lack of spousal coverage often forces individuals to remain in the workforce when they might otherwise choose to stay home to care for children, or to work part-time in a job that does not provide coverage. Even where the non-covered spouse qualifies for coverage through her own employer, the family often faces higher insurance costs or lower levels of coverage because coverage by a single plan for a couple or family is generally less expensive than coverage under two separate individual plans. The second spouse's employer-provided coverage may charge higher premiums or out-of-pocket costs than those charged by the first spouse's employer-provided coverage, denying same-sex married workers the ability to choose which spouse's benefit plan is the most advantageous for their economic and health needs.

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[5] *See* Kaiser Family Foundation, *Employer Health Benefits 2011 Annual Survey* 20 (2011), http://ehbs.kff.org/pdf/2011/8225.pdf.

Due in part to the effects of DOMA, married same-sex couples are more likely to be uninsured than married different-sex couples.[6] In California, employers are required under law to provide group health plan coverage to all state-registered domestic partners, if the health plan also covers different-sex spouses.[7] Even there, the disparity between same-sex spousal coverage and different-sex spousal coverage is vast.[8]

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

Active and retired government employees receive several valuable health benefits for themselves and their family members. The Federal Employee Health Benefits Act (FEHBA) provides healthcare coverage to federal employees, retirees, their different-sex spouses, and their dependent children.[9] The federal government significantly subsidizes family FEHBA coverage.[10] Because of DOMA, however,

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[6] Ninez A. Ponce, *et al.*, *The Effects of Unequal Access to Health Insurance for Same-Sex Couples in California*, Health Affairs, 5–7 (Aug. 2010), http://content.healthaffairs.org/content/29/8/1539.full.html.

[7] *Id.* at 2.

[8] *Id.*

[9] 5 U.S.C. §§ 8901-8914.

[10] In 2008, the federal government contributed an average of $8,100 for non-postal employees toward healthcare coverage for employees with families. Naomi G. Goldberg, Christopher Ramos, & M.V. Lee Badgett, *The Fiscal Impact of Extending Federal Benefits to Same-Sex Domestic Partners,* Williams Institute 5

married federal workers with same-sex spouses are denied spousal and dependent care coverage provided to their colleagues married to different-sex spouses.[11]

DOMA similarly precludes same-sex spouses of federal employees and their dependent children from enrolling in the Federal Employees Dental and Vision Insurance Program (FEDVIP).[12] This program provides a particularly valuable benefit to employees' family members because the benefits and premiums have been jointly negotiated by a large consumer – the federal government – and can be paid with pre-tax dollars, thereby reducing significantly the cost of the insurance to the employees.[13]

Another healthcare benefit provided to federal employees, their spouses and dependent children is the Federal Flexible Spending Account Program (FSA),

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(2008), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Goldberg-Ramos-S2521FiscalAnalysis-Sept-2008.pdf.

[11] DOMA dictates that FEHBA only cover different-sex spouses of federal employees and their dependent children. U.S. Office of Personnel Management, "Family Members," *Federal Employees Health Benefits Program Handbook*, http://www.opm.gov/insure/health/reference/handbook/fehb28.asp. Legally recognized children of covered workers are covered automatically (5 U.S.C. § 8901(5)), but because of DOMA the legal children of a worker's same-sex spouse would not be covered, whereas the legal children of a different-sex spouse automatically receive coverage.

[12] 5 U.S.C. §§ 8951-8962, 8981-8992.

[13] *See* U.S. Office of Personnel Management, *2012 Guide to Federal Employees Dental and Vision Insurance Program* 3 (2011), http://www.opm.gov/insure/health/planinfo/2012/guides/70-1.pdf; U.S. Office of Personnel Management, *Quick Guide to FEHB, FEDVIP, FLTCIP, FSAFEDS, and FEGLI* 2 (2011), http://www.opm.gov/insure/fastfacts/quickguide.pdf.

which permits federal employees to set aside a designated amount of earnings to pay for certain out-of-pocket health expenses. The money set aside in the FSA is not subject to federal income taxes, thereby reducing the overall cost of healthcare.[14] DOMA precludes setting aside money in an FSA to cover the health expenses of same-sex spouses or the dependent children of those spouses.[15]

According to the 2005-2006 American Community Survey (ACS), approximately 34,117 federal employees are members of same-sex couples, including many individuals who are, like Karen Golinski, lawfully married under the laws of the states in which they reside and work.[16] Nearly 90% of these federal workers are coupled with persons who are not federal employees and would, absent DOMA, be eligible for federal healthcare benefits through their spouses' employment.[17] It is estimated that almost half of these federal employees would likely enroll their same-sex spouses and dependent children of their spouses in the federal health benefit program if provided the opportunity.[18] Instead, DOMA forces the same-sex spouses of federal employees – and sometimes their dependent

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[14] 26 U.S.C. § 125.

[15] *See* U.S. Office of Personnel Management, *Federal Flexible Spending Account Program* (2011), https://www.fsafeds.com/fsafeds/summaryofbenefits.asp#WhatIsFSA.

[16] Goldberg, *Fiscal Impact*, *supra* note 9, at 6.

[17] *Id.* at 3.

[18] *Id.* at 4.

children as well[19] – to rely on coverage from another employer (if available), purchase costly or substandard private healthcare insurance, or go without healthcare insurance altogether.

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

A majority of private and non-federal public employers extend healthcare benefits to their employees, their employees' spouses and their employees' dependent children as part of the employees' overall compensation package. In states that allow same-sex couples to join in marriage, state and local governments generally extend employee benefits to same-sex spouses of public employees. However, the application of DOMA to the federal tax code limits the ability of public and private employers to extend equal benefits by imposing disparate payroll and income tax requirements on both employers and on employees married to a person of the same sex. Because of this, some states that recognize marriage of same-sex couples have attempted argued DOMA precludes extending such benefits to same-sex spouses without incurring tax penalties.[20]

The federal tax code provides a number of incentives to encourage employers to provide health benefits to employees and their family members.

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[19] *See supra* note 10.

[20] *See, e.g., Dragovich v. U.S. Department of the Treasury*, 764 F.Supp. 2d 1178, 1179-81 (N.D. Cal. 2011) (California sought to deny long-term care insurance to same-sex partners of state employees because of federal tax implications).

Moreover, federal law generally allows taxpayers to exclude from gross income the value of employer-provided health insurance coverage, thus allowing employees to take advantage of valuable healthcare coverage for themselves, their spouses, and their dependent children, with no increase in taxes. This exclusion represents a significant tax advantage because the fair market value of employer-provided healthcare insurance would otherwise be taxable as part of an employee's compensation.[21] The federal tax code also generally permits employees to pay for health insurance premiums and many out-of-pocket healthcare costs incurred on behalf of themselves and certain family members with pre-tax dollars, thereby both lowering the actual cost of coverage and reducing the individual's taxable income.[22] Because of DOMA, however, employees married to same-sex spouses do not qualify for the tax exclusions and benefits awarded to other married employees.[23] Consequently, employees who receive health benefits for a same-sex spouse are forced to report the fair market value of the employer-provided benefits as taxable, unless the spouse otherwise qualifies as a dependent. Such employees are also prohibited from using pre-tax dollars to pay for healthcare expenses for a

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[21] 26 U.S.C. § 106(a); 26 U.S.C. § 63(a).

[22] 26 U.S.C. § 125; 26 U.S.C. § 401(h) (permitting payments from retirement plans for medical expenses of spouses).

[23] *See* I.R.S. P.L.R. 159315-04 (Mar. 17, 2005) (denying exclusion to same-sex domestic partners and concluding that fair market value of health benefit must be imputed to recipient's gross taxable income).

spouse or dependent children of a same-sex spouse.[24] Thus, DOMA directly increases the cost of benefits to workers with same-sex spouses and – in some cases – even forces workers into a higher overall tax bracket.

One study calculated that the average employee who receives domestic partner benefits pays $1,069 more in taxes per year than a married employee with the same coverage.[25] Another study, by the Tax Policy Center, quantified the discriminatory effect of DOMA on a hypothetical married same-sex couple living in New York State.[26] The couple in the study is presumed to be married for 46 years, starting when both spouses are 35 years old and continuing until one spouse dies at age 81. Assuming the lower earning spouse's employer did not provide health insurance, and her spouse's employer did not cover married same-sex couples, the married same-sex couple would pay up to an additional $211,993 over their lifetimes for healthcare coverage, compared to another similarly situated married person. Assuming both spouses were individually eligible for employer-provided coverage, and that the higher-earner's employer provided healthcare

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[24] *See* I.R.S. P.L.R.s 200731023 (Aug. 3, 2007), 200339001 (Sept. 26, 2003), 9850011 (Dec. 11, 1998), 9109060 (Dec. 6, 1990).

[25] M.V. Lee Badgett, *Unequal Taxes on Equal Benefits: The Taxation of Domestic Partner Benefits*, Williams Institute 7–8 (2007), http://www.americanprogress.org/issues/2007/12/pdf/domestic_partners.pdf.

[26] Tara Siegel Bernard & Ron Lieber, *The High Price of Being a Gay Couple*, N.Y. Times, October 2, 2009, at A1, http://www.nytimes.com/2009/10/03/yourmoney/03money.html.

benefits that covered the same-sex spouse for the five years the spouse stayed at home to care for their two children, healthcare coverage would cost the married same-sex couple at least $28,595 more in insurance premiums over their lifetimes than it would cost a similarly situated different-sex couple.[27] Yet, this extra cost in premiums would still be cheaper than using domestic partnership coverage throughout the couple's lifetime because of the onerous tax implications.

Although married same-sex couples are sometimes able to purchase substitutes for employer-provided benefits, such substitutes – when available – are often both inadequate and more expensive.

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

Because DOMA prevents federal lawmakers from recognizing same-sex spouses, or protecting them from disparate treatment, the federal Employee Retirement Income Security Act (ERISA) leaves same-sex married couples particularly vulnerable. ERISA was enacted with the purpose of increasing economic security for all workers and their families.[28] Although some states have enacted laws to ensure that same-sex spouses are entitled to the same benefits as different-sex spouses, DOMA and its effects on ERISA create a large loophole that allows continued discrimination by certain employers. Self-insured employers'

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[27] *Id.*

[28] 29 U.S.C. §1001, *et seq*.

health plans – which cover nearly 60 percent of Americans who have employer-sponsored health care coverage[29] – are regulated solely by ERISA.[30] And ERISA § 514(b)(2)(B) preempts state law protections relating to the equal treatment of same-sex and different-sex spouses as applied to self-funded plans.[31] Congress enacted ERISA to stabilize employee benefit plans because they directly affect the well-being and security of millions of employees and their dependents.[32] Yet even in states that recognize marriage of same-sex couples and prohibit discrimination against them, DOMA – in combination with ERISA – shields employers that self-

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[29] Kaiser Family Foundation, *Employer Health Benefits 2011 Annual Survey* 150 (2011), http://ehbs.kff.org/pdf/2011/8225.pdf. The percentage of covered workers in self-funded plans increases as the number of employees in a firm increases. Specifically, 79 percent of covered workers in firms with 1,000 to 4,999 workers and 96% of covered workers in firms with 5,000 or more workers were covered by self-funded plans in 2011. *Id.*

[30] *Metropolitan Life Ins. Co. v. Massachusetts.*, 471 U.S. 724, 733 (1985).

[31] Section 514(a) of ERISA preempts state laws relating to ERISA-covered employee benefit plans but under ERISA's saving clause. 29 U.S.C. § 1144. Therefore, employers that use group insurance policies from an outside provider are regulated by state laws preventing discrimination on the basis of sexual orientation. However, if the employer is self-insured or self-funded, ERISA's savings clause is not applicable. *See* Janice Kay McClendon, *A Small Step Forward in the Last Civil Rights Battle: Extending Benefits Under Federal Regulated Employee Benefit Plans to Same-Sex Couples,* 36 N.M. L. Rev. 99, 107–08 (2006).

[32] 29 U.S.C. § 1001.

insure from the requirement that they extend the equal benefits to employees with same-sex spouses.[33]

DOMA's effect on ERISA also thwarts the balance usually contained in state law by leaving intact the worker's duty to support her spouse and to be responsible for certain debts incurred by the spouse during the marriage. When married, an individual takes on significant responsibilities under state law to her spouse and to third parties with respect to the spouse. State law generally provides corresponding rules that forbid discrimination and allow the worker to enforce related rights and protections. Because of ERISA preemption, however, an employee cannot take advantage of state-law rights to challenge an employer that chooses to discriminate based on sexual orientation in its family health insurance plan.

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

The Consolidated Omnibus Budget Reconciliation Act (COBRA) requires public and private employers with twenty or more employees to offer continued coverage, at group rates, for a defined period of time to employees and their dependents under certain circumstances, such as termination, reduction in employment hours or death of an employee.[34] The aim of COBRA is to maintain

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[33] *See, e.g.*, 29 U.S.C. § 1056.

[34] 29 U.S.C.§§ 1161-1169.

the portability of health coverage and ensure that employees who change jobs or become unemployed are not at risk of a coverage break without an opportunity to maintain coverage.[35] The effects of DOMA on same-sex married couples undermine this goal.[36] Because of DOMA, covered employers are not required to continue coverage for same-sex spouses.[37] Although an employer may voluntarily extend such benefits to the same-sex spouse of an employee, the employer would remain free to terminate coverage at any time, thereby exposing the couple to precisely the healthcare insecurity COBRA was enacted to prevent.

The Health Insurance Portability and Accountability Act (HIPAA) was also designed to protect employees who lose eligibility in a group health coverage plan. HIPPAA allows employees to enroll in other group health plans, including a plan provided by a spouse's employer, during a special enrollment period.[38] This provision of HIPAA furthers the goal "portability" of healthcare coverage and eases transfer of coverage in the event of a change in family circumstances. Once again, DOMA obstructs this goal by preventing same-sex spouses from taking full

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[35] *See* U.S. Department of Labor, "Introduction," *An Employee's Guide to Health Benefits under COBRA* (2012), http://www.dol.gov/ebsa/publications/cobraemployee.html.

[36] 29 U.S.C. § 1167(3) ("qualified beneficiary" defined as "spouse" of covered employee).

[37] *See* U.S. Department of Labor, *Frequently Asked Questions for Participants and Beneficiaries*, http://www.dol.gov/ebsa/faqs/faq_911_1.html.

[38] 29 U.S.C. §§ 1181-1183.

advantage of this program, thereby placing married same-sex couples at an increased risk of loss of continuity in health coverage.

II. DOMA Denies Employees with Same-Sex Spouses Certain Benefits in the Event of Illness, Workplace Injury or Death

Several federal programs provide monetary and other assistance to workers if the worker or her spouse becomes ill, injured, or dies. The best-known of these programs is Social Security, which provides benefits to surviving spouses of workers who paid into the Social Security system. Many workers are also guaranteed the right to unpaid leaves of absence to care for a sick spouse. Federal and public sector workers also benefit from a number of programs that provide care for a spouse in the event the worker becomes injured or dies on the job. These benefits are generally denied to married same-sex couples. A number of these programs are described below.

A. Employees with Same-Sex Spouses are Denied Social Security Survivor Benefits

The Social Security system provides a variety of disability and survivor benefits to spouses and surviving spouses of covered workers.[39] Social Security

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

provides benefits to some surviving spouses whose deceased spouses have paid into the system but have yet to retire.[40] This provision is particularly beneficial to a surviving spouse who earned less income than her deceased spouse, since Social Security Benefits are computed based on an individual's lifetime earnings.[41] Surviving spouses may also be eligible for a "Lump-Sum Death Benefit"[42] and/or the "Widower's Insurance Benefit," which grants the surviving spouse the insurance benefits of the deceased spouse.[43] Because of DOMA, however, surviving same-sex spouses are automatically excluded from Social Security death benefits, thereby denying same-sex married couples the security and protection otherwise provided married couples in this most vulnerable time.

B. Employees with Same-Sex Spouses are Denied Equal Access to Family Medical Leave

The Family and Medical Leave Act (FMLA) entitles employees of qualified employers up to twelve weeks of unpaid leave to care for a spouse who has a serious health condition.[44] DOMA undermines the FMLA's goal of protecting workers from loss of employment when a spouse falls ill. The FMLA was intended "to balance the demands of the workplace with the needs of families, to

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[40] 42 U.S.C. § 402.

[41] 42 U.S.C. § 415.

[42] 42 U.S.C. § 402(i).

[43] 42 U.S.C. § 402(e)&(f).

[44] 5 U.S.C. § 6382(a); 29 U.S.C. § 2612(a).

promote the stability and economic security of families, and to promote national interests in preserving family integrity."[45] As a result of DOMA, however, employers are not required to provide FMLA leave to employees who need time off from work to care for a seriously ill same-sex spouse.

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

A number of benefit programs protect federal employees and their families in the event of death or injury of the federal employee. The Federal Employee Retirement System (FERS), for example, provides death and survivor benefits to the current or former spouse of a federal employee if the employee dies before retirement and has worked for the federal government for a minimum of 18 months.[46] Under FERS, when a federal employee dies before retirement and has worked for the federal government for a minimum of 18 months but less than 10 years, her different-sex spouse is entitled to a lump-sum payment of at least $28,093.53.[47] If the deceased employee accrued 10 years of service, her different-sex spouse will also receive a monthly survivor benefit, in the form of 50% of the

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[45] 29 U.S.C. § 2601(b)(1).

[46] *See* U.S. Office of Personnel Management, *Death of Employee Covered Under the Federal Employees Retirement System (FERS)* (2011), http://www.opm.gov/retire/pre/death/index.asp#FERS.

[47] *Id.*

civil service annuity owed to the deceased employee.[48] Because of the application of DOMA to FERS, same-sex spouses of deceased federal employees are barred from receiving these benefits.

Another program designed to protect federal employees is the Federal Employees' Compensation Act, which provides workers' compensation benefits to federal employees injured in the performance of duty. If an employee dies as a result of such injury, her surviving spouse is entitled to receive up to 75% of the deceased employee's monthly pay.[49] DOMA denies this significant workers' compensation benefit to surviving same-sex spouses. Federal employees with same-sex spouses who desire such protection must purchase life insurance from a private vendor, a burden not shared by similarly situated federal employees with different-sex spouses.

DOMA also precludes same-sex spouses of federal employees who work in particularly dangerous fields from qualifying for specialized workers' compensation benefits provided by the federal Public Safety Officers' Benefits Program. If a married public safety officer dies or becomes permanently disabled as result of an injury sustained on duty, her different-sex spouse receives a lump-sum death benefit, currently $323,035, and may be eligible for financial assistance

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[48] *Id.*

[49] 5 U.S.C. § 8133(a); 20 C.F.R. § 10.410 (2010).

for education.[50] Because of DOMA, however, a same-sex spouse would not be entitled to receive either the lump-sum death benefit or the education benefit in the event such tragedy occurred.[51]

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

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

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

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

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

[51] *See* 42 U.S.C. § 3796d-1; Office of Justice Programs, *Public Safety Officers' Benefits (PSOB) Programs* (2011), https://www.bja.gov/ProgramDetails.aspx?Program_ID=78.

spouse in the event the federal employee predeceases her spouse.[52] Retired federal employees who choose this option receive a smaller retirement benefit payment while alive to ensure that a surviving spouse would continue to receive benefits in the event the retiree dies first. DOMA, however, precludes federal employees from designating a same-sex spouse as a survivor beneficiary under this important FERS program.

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

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

Upon retirement, a married worker covered by Social Security may opt to receive the larger of either her own retirement benefit or one-half of her covered spouse's benefit.[53] Because of the application of DOMA to the Social Security laws, however, workers with a same-sex spouse are denied the right to such spousal benefits. Social Security also permits a married person at full retirement age to elect to receive only her spouse or former spouse's benefits, while at the same time continuing to accrue delayed retirement credits on her own record, a benefit that DOMA denies to same-sex spouses.[54]

When one spouse dies, Social Security generally permits the surviving spouse to receive the deceased spouse's benefit if it would be greater than that of the surviving spouse. This provision allows a lower-earning spouse to maintain her standard of living in the event the higher-earning spouse predeceases her. Once again, DOMA precludes same-sex widows and widowers from taking advantage of this benefit in old age. Thus, for married same-sex couples, when the higher-earning spouse dies first, the surviving spouse loses the higher-earner's

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[53] 42 U.S.C. § 402.

[54] Social Security Admin., *Retirement Benefits*, SSA Pub. No. 05-10035, ICN 457500 (Sept. 2011), http://www.ssa.gov/pubs/10035.html#a0=2.

Social Security payment and continues to receive only her own (lower) payment, if she is eligible to receive any payment at all.

The effect of DOMA on Social Security for married same-sex couples can result in the loss of thousands of dollars of retirement benefits annually. According to a 2009 study, the average difference in annual Social Security income between the partners in a same-sex relationship and opposite-sex spouses is approximately $5,700.[55] In the worst situations, the lower earning surviving same-sex spouse could lose up to $28,152 per year in Social Security Payments.[56] This loss of income makes it more likely that a same-sex surviving spouse will live her elder years at or below the poverty line.

C. DOMA Denies Employees with Same-Sex Spouses Equal Benefits under Private Pension Plans

In enacting ERISA, Congress sought to increase the reliability and solvency of private sector employer-sponsored pension and retirement plans.[57] Contrary to ERISA's stated goal of reliability, however, DOMA *creates* confusion and a lack

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

[56] This assumes that the deceased partner earned the maximum Social Security payout and the lower earning spouse does not qualify for Social Security on his/her own. Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders, *et al., Improving the Lives of LGBT Older Adults* 13 (2010), http://www.lgbtagingcenter.org/resources/resource.cfm?r=16.

[57] 29 U.S.C. Ch. 18.

of predictability for same-sex spouse beneficiaries. Although many states have anti-discrimination laws that would otherwise prohibit employers from denying spousal benefits on the basis of their sexual orientation,[58] ERISA preemption strips states, counties, and municipalities of the autonomy to extend rights and benefits under ERISA-covered employee pension benefit plans to same-sex spouses.[59] Because of DOMA's effect on ERISA, however, employers may choose to include or exclude same-sex spouses of employees as beneficiaries in their pension plans.[60]

Difficulties also arise when an employer-sponsored pension plan document fails to define the term "spouse" or defines it with reference to state law. DOMA creates confusion when attempting to construe and apply such plan provisions because the state and federal definitions may conflict,[61] particularly because ERISA has been found to preempt all state laws relating to ERISA-covered employee benefit plans.[62] Accordingly, because of ERISA, even in states with

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[58] *See, e.g.*, Mass. Gen. Laws Ann. Ch. 151B, § 4 (2010); Cal. Ins. Code § 381.5 (2011).

[59] McClendon, *A Small Step Forward*, 36 N.M. L. Rev. at 107.

[60] 29 U.S.C. § 1002(8).

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

[62] 29 U.S.C. § 1144(a).

laws that protect same-sex couples, employers can discriminate against employees with same-sex spouses under their employee benefit plans.[63]

D. Same-Sex Spouses Cannot Contribute to Their Spouse's Retirement Accounts

Federal law provides certain tax benefits to working individuals who make contributions to qualified retirement accounts.[64] For example, working people who file joint tax returns are permitted to deduct contributions made to a retirement account on behalf of a spouse who may be out of work.[65] Because of DOMA, these tax benefits are not available to married same-sex couples, thereby denying them equal footing in planning for a secure retirement.

The divide furthers when one spouse dies. Surviving spouses of different-sex couples may roll over a deceased spouse's IRA or 401(k) plan into their own account and defer withdrawing funds from the account until they reach 70.5 years of age.[66] In contrast, a surviving same-sex spouse designated as the beneficiary of her spouse's retirement account is required to commence withdrawing distributions

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[63] Goldberg, *Impact of Inequality*, *supra* note 54, at 11.

[64] 26 U.S.C. § 219.

[65] *See*, 26 U.S.C. 408 & 408A (also generally limiting by half or more the amount a same-sex individual may contribute to a traditional or Roth IRA when compared to a different sex married individual).

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

by the end of the year following the year of death.[67] In addition, because of DOMA, the participant with a same-sex spouse is permitted to change her beneficiary, obtain a loan from the retirement account, or change the form of benefit (*e.g.*, to a lump sum from an annuity) without her spouse's written approval or knowledge.[68] Indeed, because of DOMA, IRA and 401(k) plans are not required to offer the option of joint annuity benefit distribution to a same-sex spouse. In addition, the types of roll-overs available to the same-sex spouse upon the death of her participant wife are also limited.[69] Here again, DOMA denies married same-sex couples retirement planning tools and benefits, thus undermining their financial security in retirement.

IV. DOMA Diminishes Financial and Familial Stability for Married Bi-National and Non-Citizen Same-Sex Couples

Foreign nationals seeking to work and live in the United States do so either through family sponsorship or employment-based preferences.[70] While lawful

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[67] *See*, 26 C.F.R. § 1.401(a)(9)-3, A-3(a).

[68] *See*, 26 U.S.C. § 401(a)(1) & 417(a)(2)(A)(i) (governing Qualified Pre-retirement Survivors Annuities and Qualified Joint and Survivor Annuities); 26 C.F.R. § 1.401(a)-20, A 24(a).

[69] *See*, 26 U.S.C. § 402(c)(ii) (limiting non-spousal beneficiaries to direct rollovers).

[70] An individual not married to a U.S. citizen may also seek to immigrate to this country through diversity visas and refugee visa, both of which include the right to bring a different-sex, but not a same-sex, spouse. *See* U.S. Department of State, *Visa Types for Immigrants*, http://travel.state.gov/visa/immigrants/types/types_1326.html. *See also* Cori K.

immigrants are normally permitted to immigrate with a spouse,[71] DOMA denies this entitlement to same-sex couples, even those whose marriages are fully recognized under the laws of their home country.[72] According to a 2010 study based on Census Bureau data, an estimated 28,574 bi-national couples and approximately 11,422 dual non-citizen couples currently reside in the U.S.[73] In California alone, over 10,000 same-sex couples have one or more non-citizen partner.[74] Although U.S. immigration policy generally places spousal relationships above all others – protecting U.S. citizens' right to marry non-citizens while providing greater freedom and safeguards to facilitate the bi-national, married couple's ability to remain in the same marital home, work and seek employment,

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Garland, *Say "I Do": The Judicial Duty to Heighten Constitutional Scrutiny of Immigration Policies Affecting Same-Sex Binational Couples*, 84 Ind. L.J. 689, 700 (2009).

[71] 8 U.S.C. §1153(d)(spouse of lawful immigrant entitled to immediate visa and to the same status as spouse, even if not otherwise qualified to immigrate).

[72] Ten countries permit same-sex couples to marry, including Canada, Spain, the Netherlands, Belgium, South Africa, Sweden, Argentina, Iceland, Portugal, and Norway. *See* Jessica Feinberg, *The Plus One Policy: An Autonomous Model of Family Reunification,* 11 Nev. L.J. 629, 646 (2011). At least nineteen countries recognize same-sex couples for immigration purposes. *See* Human Rights Campaign, *Uniting American Families Act* (2011), http://www.hrc.org/resources/entry/uniting-american-families-act.

[73] Craig J. Konnoth and Gary J. Gates, *Same-Sex Couples and Immigration in the United States*, Williams Institute, 1 (Nov. 2011) http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Konnoth-Binational-Report-Nov-2011.pdf ("bi-national" refers to couples where only one member is a U.S. citizen).

[74] *Id.* at 4.

and pursue higher education – DOMA categorically denies these protections to married same-sex couples.

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

U.S. immigration policy puts the highest priority on reuniting non-citizen spouses with their spouses who are either U.S. citizens or lawful permanent residents. U.S. citizens who marry non-citizens are generally automatically granted the rights and benefits of "Family Sponsorship," enabling the U.S. citizen to sponsor her spouse for naturalization and conditional permanent residence pending naturalization.[75] In order to effect the timely reunification of married couples, non-citizen spouses of U.S. citizens are not subject to the numerical limitations on immigration generally applicable to other types of immigrant visa holders. This allows a non-citizen to join her U.S. citizen spouse expeditiously, without having to adhere to the quota system, waiting lists, and priority dates applicable to other types of family-sponsored immigration.[76] If a lawful permanent resident becomes a U.S. citizen while her spouse is waiting for a visa, her spouse

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[75] 8 U.S.C. §§ 1430, 1151(b), 1154(a)-(b).

[76] The quota system can often stall family reunification for years and even decades. For example, the wait time for an F-1 family visa for unmarried sons and daughters of U.S. citizens from Mexico is nearly 20 years. U.S. Department of State, *Visa Bulletin for June 2012*, IX:45, http://www.travel.state.gov/visa/bulletin/bulletin_5712.html (stating priority dates at or before May 15, 1993 for citizens of Mexico and an overall priority date of June 22, 2005 for most other chargeable areas); 8 U.S.C. § 1151(b)(2).

immediately receives a visa as well.[77] In addition, a non-citizen spouse of an American citizen becomes eligible for U.S. citizenship after only three years, in contrast to the five-year wait required of other lawful permanent residents.[78]

Because of DOMA, married same-sex bi-national couples are denied spousal sponsorship rights. Thus, U.S. citizens married to a non-citizen same-sex spouse cannot sponsor a spouse to immigrate to this country.[79]

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

Workers may also immigrate to the United States through sponsorship by an employer.[80] Employment-based visas normally provide immigrants the right to bring their spouses, who in turn are provided the right to live and work in the

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

[78] *See* U.S. Citizenship and Naturalization Services, *Citizenship through Naturalization* (2011), http://www.uscis.gov/portal/site/uscis (follow "Citizenship through Naturalization" hyperlink).

[79] *See* Rebecca Walters, *The Uniting American Families Act: A Critical Analysis of Legislation Affecting Bi-National Same-Sex Couples*, 17 Am. U. J. Gender Soc. Pol'y & L. 521, 525 (2009) (INA does not explicitly exclude bi-national same-sex couples from immigration benefits but is constrained by DOMA's definition of spouse); *but see Matter of Paul Wilson Dorman,* 25 I. & N. Dec. 485 (A.G. 2011) (vacating decision of Board of Immigration Appeals and remanding case for Board to make specific findings about whether non-citizen's same-sex civil union qualifies him as a spouse under INA absent requirements of DOMA).

[80] 8 U.S.C. § 1101(a)(15)(H).

United States.[81] DOMA denies immigrating workers the right to be accompanied by a spouse if the spouse is of the same-sex – even if the worker's marriage is otherwise lawfully recognized in her country of origin and the state in the U.S. where the immigrant intends to work.

The denial of this right profoundly affects the ability of legal immigrants with same-sex spouses to maintain family relationships and financial stability. Without lawful permanent resident status, same-sex spouses of employment-based visa holders must be able to obtain their own visitor visas to remain with a spouse in the U.S. Visitor visas generally require the applicant to prove that she does not intend to stay permanently in the United States and that she maintains strong ties to her home country. These requirements may be fulfilled by furnishing proof of home ownership in the home country. In addition, visitor visa holders may not work or attend school in degree seeking programs during their stay in the United States. Thus, for a non-citizen to remain with her U.S. permanent resident spouse in the United States, she may be forced to bear the cost of maintaining a home in her home country, forgo employment and educational opportunities, and attest that she has no plans to remain permanently in the U.S.

Additionally, many same-sex spouses of employment-based visa holders cannot qualify for a visitor visa or may not be permitted to renew the visitor visa.

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[81] 8 U.S.C. §1153(d).

Under these circumstances, the same-sex spouse may need to return to her home country for extended periods of time, resulting in costly travel expenses and in time separated from her spouse and children, who are permitted to remain lawfully in the U.S.[82] Such extended visits can hinder the occupational advancement of either or both members of the couple, reducing earnings over the course of a lifetime.[83] Not only must same-sex couples deliberate about whether they can afford the harsh constraints of DOMA on their immigration possibilities when considering U.S. employment opportunities, employers may be reluctant to hire immigrant workers who may be compelled to return home regularly for family reasons.[84]

DOMA's impact on U.S. immigration policy cruelly forces many married, bi-national, same-sex couples into painful and untenable dilemmas. As a consequence of DOMA, families are either broken apart, or qualified workers who happen to be married to a person of the same sex choose not to immigrate to the United States for employment. DOMA leaves same-sex couples who are legally married under state law or the laws of a foreign nation with a choice between three equally poor options: the citizen must leave the United States, the non-citizen must

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[82] *Economic Value*, *supra* note 66, at 1097-98.

[83] *Id.*

[84] Immigration Policy Center, *The Migrant Integration Policy Index* (2011), http://www.immigrationpolicy.org/just-facts/migrant-integration-policy-indexmipex-iii.

reside in the United States illegally, or the couple must separate.[85] Each of these options directly contravenes longstanding U.S. immigration policy favoring family unification.

CONCLUSION

As *amici* have shown, DOMA has far-reaching detrimental effects on American workers, and those seeking to work in the U.S. DOMA creates two castes of married workers: those married to a person of a different sex, and those married to a person of the same sex. By denying to certain employees workplace benefits otherwise provided to married Americans, DOMA undermines the economic security of this entire class of American workers, as well as the very goals of economic and family stability that federal laws and workplace benefits were intended to promote. The judgment of the district court should be affirmed.

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[85] Feinberg, *supra* note 55, at 630.

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Dated: July 10, 2012

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) because this brief contains 6,995 words, which is less than half the length allowed for a party's principal brief under Federal Rule of Appellate Procedure 32(a)(7)(B), excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it was prepared in a proportionally-spaced typeface, using Word 2010 in 14 point Times New Roman font.

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Dated: July 10, 2012

CERTIFICATE OF SERVICE

9th Circuit Case Number(s) 12-12-15388 & 12-15409

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

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participant:

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Signed: s/ Nicole G. Berner, Cal. SBN 187415