

No. 12-307

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF
THE ESTATE OF THEA CLARA SPYER, *ET AL.*,

Respondents.

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

**BRIEF OF THE EMPIRE STATE PRIDE AGENDA,
EQUALITY CALIFORNIA, EQUAL RIGHTS WASHINGTON,
ONE IOWA, EQUALITY MARYLAND, VERMONT FREEDOM
TO MARRY, MASSEQUALITY, NEW HAMPSHIRE FREEDOM
TO MARRY COALITION AND EQUALITYMAINE AS *AMICI
CURIAE* ON THE JURISDICTIONAL QUESTIONS
IN SUPPORT OF RESPONDENT EDITH SCHLAIN WINDSOR**

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INTEREST OF *AMICI CURIAE*¹

Empire State Pride Agenda (“ESPA”) is New York’s statewide lesbian, gay, bisexual and transgender (“LGBT”) civil rights and advocacy group. ESPA is committed to winning equality and justice for LGBT New Yorkers and their families. ESPA has been involved with advancing legislation securing equitable rights for all New Yorkers, and was a driving force behind New York State’s enactment of marriage equality in 2011. ESPA also has participated as *amicus curiae* in litigation involving marriage equality.

Equality California is a state-wide advocacy group protecting the needs and interests of same-sex couples and their children in California, and is the largest LGBT advocacy organization in California. Equality California frequently participates in litigation in support of the rights of LGBT persons, including as an *amicus curiae* in *Perry v. Brown*, 10-16696 (9th Cir. 2011).

Equal Rights Washington (“ERW”) is Washington’s largest state-wide LGBT advocacy and community outreach organization. Its mission is to ensure and promote dignity, safety and equality for all LGBT Washingtonians. ERW played a significant role in securing passage of Washington’s LGBT anti-discrimination bill in 2006 and Washington’s

¹ The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No persons other than *Amici* or their counsel made a monetary contribution to this brief’s preparation or submission.

domestic partner law in 2007, as well as expansions thereto in 2008 and 2009.

One Iowa is the largest LGBT rights group in Iowa. Its mission is to support full equality for LGBT individuals living throughout Iowa through grassroots efforts and education.

Equality Maryland is the largest LGBT rights group in Maryland. Equality Maryland helped introduce and was instrumental in obtaining passage of the Maryland Civil Marriage Protection Act in 2012. Equality Maryland also has participated as *amicus curiae* in litigation in support of marriage equality.

Vermont Freedom to Marry (“VFM”) serves as a resource for same-sex marriage in Vermont and related financial and tax issues, family and child custody concerns, and more. Through its task force, VFM has advocated for and participated in litigation involving marriage equality.

MassEquality was founded in 2001 to promote and protect marriage equality in Massachusetts, the first state to end marriage discrimination. MassEquality today is the leading statewide grassroots organization in Massachusetts working to ensure that everyone across Massachusetts can thrive without discrimination and oppression based on sexual orientation, gender identity, or gender expression. MassEquality works to achieve full equality for the LGBT community in all spheres of society through advocacy in the legislative and executive branches and through public education.

New Hampshire Freedom to Marry Coalition is a non-profit organization dedicated to protecting marriage for gay and lesbian families in New Hampshire.

EqualityMaine is the oldest and largest organization in Maine that advocates for LGBT rights and equality. EqualityMaine has participated as *amicus curiae* in litigation in support of marriage equality and was one of the primary supporters of the push to recognize same-sex marriage in Maine.

As a result of their involvement in successful marriage equality advocacy in their States, *Amici* are well aware that marriages of same-sex couples are disregarded by the federal government for all purposes where marital status is a factor. As organizers and advocates in the LGBT communities in states with legal regimes under which gay couples may marry, *Amici* also have a unique perspective on the substantial emotional and financial burdens that the Defense of Marriage Act (“DOMA”) imposes in the daily lives of legally married same-sex couples and their families. The constitutional questions presented in this appeal will directly affect *Amici*’s members, supporters and the communities that *Amici* serve.

SUMMARY OF ARGUMENT

Amici agree with Respondent Edith Windsor, for the reasons set forth in her brief on the jurisdictional questions, that the United States’ appeal presents a “case or controversy” for the purpose of Article III jurisdiction. *Amici* respectfully urge the Court to exercise that jurisdiction in order to remedy the

significant and daily injury that DOMA causes tens of thousands of married same-sex couples by disqualifying them from a wide range of rights and benefits that federal law affords opposite-sex marriages.

Court-appointed *Amica Curiae* suggests that, as a prudential matter, the Court should defer resolution of the question of DOMA's constitutionality to allow for more "time and reflection in the lower courts". *Amica* Br. 38. This brief responds to that suggestion. As demonstrated by the real life experiences of married same-sex couples described below, *Amica's* proposed approach would perpetuate the substantial inequalities and harms DOMA causes in the daily lives of tens of thousands of couples. It would subject a fundamental aspect of people's lives—their marriage—to continued uncertainty. And it would inevitably result in repeated litigation and other disputes in the lower courts and administrative agencies regarding precisely the same issues. While this would impose substantial burdens on the affected couples, who would need to present and pursue these disputes again and again, it would not likely result in any additional information of material utility to this Court in deciding the important constitutional question presented by Windsor's case. (*Infra* Part I.)

Moreover, as the brief of Respondent Windsor explains, DOMA is not the type of law that can be neutralized by unilateral Executive Branch action or inaction. Thus, even if the Executive Branch were to cease enforcing DOMA, the law would continue to cause great harm to thousands of individuals, and

compel costly litigation. The experiences recounted below help illustrate this point. (*Infra* Part II.)

ARGUMENT

I. The Experiences Of Married Same-Sex Couples Under DOMA Highlight Important Prudential Considerations That Strongly Favor The Court Resolving DOMA's Constitutionality On This Appeal.

Prudential considerations weigh strongly in favor of the Court resolving the question of DOMA's constitutionality now, rather than leaving that question to be decided on a case-by-case basis by the lower courts, as *Amica* suggests. *Amica's* arguments to the contrary overlook the practical realities of the situation.

As the real-life experiences of married same-sex couples described below illustrate, the harms that DOMA causes married same-sex couples by automatically disqualifying them from more than 1,000 federal marital rights and benefits are extensive and target many of the most fundamental concerns of the American family.² DOMA subjects

² U.S. Gen. Accounting Office, GAO-04-353R, *Defense of Marriage Act, Update to Prior Report 1* (Jan. 23, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf>. The rights that DOMA unfairly withholds from same-sex couples include many military benefits, tax credits and exemptions, family-based immigration rights, rights that federal law secures surviving spouses, medical benefits and many other core components of the social safety net. See OutServe-SLDN, *Freedom to Serve, The Definitive Guide to LGBT Military*

tens of thousands of married same-sex couples and their families to such injury on a daily basis.³ *Amica's* proposed approach of letting the issue percolate further in the lower courts would have two adverse consequences that strongly militate in favor of this Court's exercising its jurisdiction to decide this matter now.

First, only a very small fraction of the Nation's same-sex couples have to date challenged the denial of benefits through administrative proceedings and the lower courts. If the Court adopts *Amica's* suggestion, many more will need to do so. Litigation and administrative proceedings would be the only avenue for these couples to attain the benefits DOMA currently denies them—resulting in further proceedings before the lower courts and administrative agencies, which will draw in not just federal agencies but also the many state and private

Service 25-26 (July 27, 2011), available at http://sldn.3cdn.net/5d4dd958a62981cff8_v5m6bw1gx.pdf; Blake Ellis, *Same-sex couples could see tax windfalls*, CNNMoney (Nov. 14, 2012), available at <http://money.cnn.com/2012/11/14/pf/taxes/doma-same-sex-couples/index.html>; Immigration Policy Center, *Immigration and the Defense of Marriage Act (DOMA): A Q&A Fact Check* (Aug. 18, 2011), available at <http://www.immigrationpolicy.org/just-facts/immigration-and-defense-marriage-act-doma-qa-fact-check>.

³ M.V. Lee Badgett & Jody L. Herman, *Patterns of Relationship Recognition by Same-Sex Couples in the United States* 5-6 (The Williams Institute, 2011) (indicating that there are at least 100,000 legally married same-sex couples living in the United States), available at <http://williamsinstitute.law.ucla.edu/headlines/latest-data-married-registered-same-sex-couples>.

entities responsible for administering federally regulated benefits. As BLAG has suggested in prior briefing, such continued litigation would impose significant costs on the federal taxpayer.⁴ And to what end does *Amica* propose imposing such burdens? The Court already has available multiple lower court decisions, many years of experience since the enactment of DOMA and extensive scholarship and *amicus* briefing. The incremental benefit from allowing this issue to continue being addressed in the lower courts would be minimal.

The real life experiences described below also illustrate the fundamental unfairness of requiring married same-sex couples to be forced to litigate in order to obtain benefits available to married opposite-sex couples. Litigation is a costly and time-consuming process, particularly when it involves the denial of federally regulated benefits that must first be challenged through administrative proceedings, as is the case with many of the benefits that DOMA withholds. Moreover, many married same-sex couples lack the resources or sophistication to pursue such judicial or administrative proceedings. Unless this Court resolves the constitutional questions presented in this case, those couples will suffer from DOMA's denial of benefits by default.

⁴ See Intervenor-Defendant's Reply to Plaintiffs' Opposition to Motion to Stay Proceedings at 6, *Pedersen v. Office of Personnel Mgmt.*, No. 10-01750 (D. Conn. June 29, 2012).

A. Jo Ann Whitehead: A Massachusetts Educator Excluded From Social Security's Spousal Protections Because Of DOMA.

The Social Security Act provides important protections designed to assist workers and their spouses in retirement or in the event of the worker's disability or death. In retirement, Social Security allows a lower-earning or non-earning spouse to increase his or her benefit by up to one half of the higher-earning spouse's retirement benefit.⁵ In the event of the death of a higher-earning spouse, Social Security provides a lower-earning spouse his or her spouse's higher benefit.⁶ And in the event a worker becomes disabled, Social Security entitles his or her spouse to receive up to half the disabled worker's benefit.⁷

DOMA automatically disqualifies legally married same-sex couples from these important protections, depriving them of a critical source of financial assistance at a time when it is most needed, and despite their having paid into the system just like married opposite-sex couples. The experience of Bette Jo Green and Jo Ann Whitehead illustrates the significant toll that this automatic disqualification takes on married same-sex couples and the lengths

⁵ See 42 U.S.C. § 402(b), (c).

⁶ See 42 U.S.C. § 402(e), (f). Surviving spouses also are eligible for a lump sum death benefit. *Id.* § 402(i).

⁷ See 42 U.S.C. § 402(b), (c).

to which they must go to challenge the denial of these benefits.

Bette Jo, 70, retired in 2008 from a 35-year career as a labor and delivery nurse at a large Boston-area hospital.⁸ Bette Jo's wife, Jo Ann, also 70, is a Community Garden Educator with a non-profit group in the Boston area.⁹ Bette Jo and Jo Ann met in college in 1960, have been in a committed relationship for over 30 years, and were legally married under the laws of Massachusetts in 2004.¹⁰ Both women have survived recent, serious battles with cancer.¹¹ In February 2008, both Jo Ann and Bette Jo applied for and began receiving Social Security benefits based on their respective earnings records.¹² Because Bette Jo had higher lifetime earnings than Jo Ann, Jo Ann applied for the Social Security spousal benefit based on Bette Jo's earnings record.¹³ Not only would this benefit have allowed Jo Ann to receive a higher monthly benefit, it also would have allowed Jo Ann to delay her retirement age for purposes of Social Security based on her own

⁸ Second Am. Compl. ¶ 331, *Gill v. Office of Personnel Mgmt.*, No. 09-10309 (D. Mass. May 25, 2010) ("Gill Compl.").

⁹ *Id.* ¶ 332.

¹⁰ *Id.* ¶¶ 333-35, 339.

¹¹ *Id.* ¶ 337.

¹² *Id.* ¶ 340.

¹³ *Id.* ¶ 343.

earnings record, which could potentially increase her benefit amount later on.¹⁴

However, Jo Ann's application was denied by the Social Security Administration ("SSA"), which provided a letter, dated April 2008, stating that "[s]ince the Defense of Marriage Act prohibits SSA from finding you[] and the insured were married for benefit purposes, you are not eligible for Spouse's Benefits".¹⁵ Jo Ann thereafter filed a timely Request for Reconsideration in May 2008, in which she noted that she had been legally married under Massachusetts law since 2004.¹⁶ The SSA did not respond to Jo Ann's Request for Reconsideration until January 2009, when it issued a written denial which again cited DOMA as the reason it could not recognize Jo Ann's marriage to Bette Jo for benefit purposes.¹⁷ In February 2009, Jo Ann went to her local SSA office, in Roxbury, MA, to make a written request for an Expedited Appeals Process ("EAP"), a more direct path to district court adjudication of a Social Security claim that is available following an initial and reconsidered determination where the only factor preventing a favorable determination is a provision in the law the applicant believes is unconstitutional.¹⁸ In May 2009, Jo Ann received several unsigned copies of an EAP agreement to sign

¹⁴ *Id.* ¶¶ 343-44.

¹⁵ *Id.* ¶¶ 345-49.

¹⁶ *Id.* ¶ 346.

¹⁷ *Id.* ¶¶ 347-49.

¹⁸ *Id.* ¶ 350; *see also* 20 C.F.R. § 416.1424.

which stated that the reconsidered determination rendered by the SSA was final for purposes of judicial review.¹⁹ After the Initial Complaint was filed in district court in 2009, judgment was entered in Jo Ann's favor in July 2010.

Thus, altogether Jo Ann waited over two years before potentially becoming eligible to receive the benefits she sought, even with avoidance of the Social Security hearing that would have been necessary absent the EAP agreement.²⁰ During that period of time, Bette Jo and Jo Ann have been denied an important income boost that is afforded to similarly situated opposite-sex couples and that could have made a meaningful difference for two retirees on a fixed income.²¹ Moreover, because Jo Ann was unable to qualify for the spousal benefit, she lost the ability to delay her own retirement age, which could have increased her benefit.²² And Jo Ann was unfairly forced to spend time and money filing paperwork with the SSA and filing a complaint to seek benefits for which opposite-sex spouses qualify automatically.

¹⁹ Gill Compl. ¶ 352.

²⁰ See 42 U.S.C. § 405. The Plaintiffs in *Gill* won on appeal in the First Circuit, but that judgment has been stayed and they have not yet received any of the benefits for which they have been fighting.

²¹ Gill Compl. ¶¶ 355-56.

²² *Id.* ¶ 344.

B. Nancy Gill: A United States Postal Employee Unable To Add Her Lawful Spouse To Her “Family” Health Plan Under The Federal Employees Health Benefits Program.

One of the key financial benefits of marriage is the ability to obtain affordable health coverage through a spouse’s employer-sponsored health plan. DOMA denies this important benefit to married same-sex spouses, requiring them to spend significantly more to acquire health coverage for their loved ones than identically qualified opposite-sex spouses.

For current and retired employees of the federal government who are married to a spouse of the same sex, DOMA makes it significantly more expensive to obtain quality health insurance by precluding them from enrolling their spouses in the Federal Employees Health Benefits (“FEHB”) Program, which the federal government makes available to all federal employees, retirees and their survivors and family members, including “the spouse of an employee or annuitant”.²³ DOMA also prevents federal employees with same-sex spouses from obtaining a number of other employer-sponsored benefits that are available to employees with opposite-sex spouses, such as vision care and coverage under a flexible spending account.²⁴

²³ See 5 U.S.C. § 8901(5).

²⁴ In the private sector, DOMA discourages employers from contributing to the cost of spousal health benefits for

Nancy Gill is one of the many federal employees who, because of DOMA, has been compelled to buy expensive private health insurance for a same-sex spouse, and forego several other employment related benefits, despite the availability of “family” benefit plans through FEHB.

employees with spouses of the same sex by requiring employers that do to pay additional payroll taxes on such contributions, which, because of DOMA, are considered taxable income to the employee. See M.V. Lee Badgett, *Unequal Taxes on Equal Benefits: The Taxation of Domestic Partner Benefits* 5-7, Center for American Progress & The Williams Institute (2007), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-UnequalTaxesOnEqualBenefits-Dec-2007.pdf>. As a consequence, although a growing number of employers have been willing to take on the cost of extending benefits to their employees’ same-sex spouses, many employers do not. In addition, employees with same-sex spouses fortunate enough to work for an employer that offers them spousal benefits typically must pay significantly more in taxes than similarly situated employees with opposite-sex spouses—according to one study, on average over \$1,000 annually in federal taxes. See David Badash, *Top 10 Ways DOMA Affects Same-Sex Couples* (The Williams Institute, July 2011), available at <http://williamsinstitute.law.ucla.edu/press/top-10-ways-doma-affects-same-sex-couples>. Some employers recently have implemented “gross up” policies that account for the income tax burden of employer contributions to domestic partner coverage by reimbursing the employee for that extra cost. See Tara Siegel Bernard, *A Progress Report on Gay Employee Health Benefits*, N.Y. Times (Feb. 14, 2013), available at <http://bucks.blogs.nytimes.com/2010/12/14/a-progress-report-on-gay-employee-health-benefits>. However, the employee may still end up with additional liability because the “gross up” can put the employee in a higher tax bracket. Moreover, these burdens on employers provide an economic disincentive to hire married gay people in the first place.

Nancy, an employee of the United States Postal Service, and her wife Marcelle Letourneau, a transcriptionist at a nursing services provider, have been in a committed relationship since 1980 and were married under Massachusetts law in May 2004.²⁵ As a federal employee, Nancy is eligible for FEHB and has been enrolled in FEHB’s “Self and Family” Plan since the birth of her and Marcelle’s first child in 1993.²⁶ Today, the FEHB plan provides affordable, quality health insurance, as well as vision care and other important benefits, to three out of the four members of Nancy’s nuclear family—herself and her and Marcelle’s two children.²⁷ However, because of DOMA, Nancy is unable to obtain coverage under FEHB for Marcelle.

That harsh reality was news to Nancy when, in May 2004, she first attempted to enroll Marcelle in the plan by submitting a standard form to her employer listing Marcelle and their children as her family members.²⁸ Up to that point, Nancy naturally assumed that, because Massachusetts recognized Marcelle as her lawful spouse, she would be able to obtain coverage for Marcelle under her family plan just as her other legally married co-workers are able to do for their spouses. Yet shortly thereafter, and much to her and Marcelle’s surprise, Nancy received a letter from the United States Postal Service advising her she was ineligible for spousal benefit

²⁵ Gill Compl. ¶¶ 67-72.

²⁶ *Id.* ¶¶ 74-75.

²⁷ *Id.* ¶ 75.

²⁸ *Id.* ¶¶ 78-83.

coverage because of DOMA.²⁹ Seeking only the same rights as her co-workers married to spouses of the opposite sex, Nancy filed a complaint with the Equal Employment Opportunity Commission (“EEOC”) challenging Marcelle’s exclusion from FEHB.³⁰ One month later, in July 2004, Nancy’s complaint was dismissed on the ground that discrimination based on sexual orientation “is not actionable under EEOC Regulations”.³¹ Nancy later attempted to enroll Marcelle in the FEHB family vision and flexible spending programs as well but again was denied coverage because of DOMA.³²

Like many other married couples raising children together, money is an ever-present concern for Nancy and Marcelle. But DOMA has forced the couple to spend several thousand dollars, and counting, on private insurance for Marcelle since the day they were legally married, and that is on top of the \$800 that they spend annually for the FEHB family plan that would automatically cover Marcelle if she or Nancy were of the opposite sex.³³ It is a significant financial burden, and one that countless

²⁹ *Id.* ¶ 81.

³⁰ *Id.* ¶¶ 84-88.

³¹ *Id.* ¶ 89.

³² *Id.* ¶¶ 91-102.

³³ See Maria Papadopoulos, *Bridgewater women begin legal challenge against federal marriage law* (May 11, 2010), available at http://www.enterpriseneews.com/news/cops_and_courts/x1773730805/Bridgewater-women-begin-legal-challenge-against-federal-marriage-law?zc_p=0.

legally married same-sex couples are forced to endure under DOMA.

C. Charlie Morgan: A Recently Deceased Service Member Forced To Spend The Last Years Of Her Life Fighting For Military Benefits Needed To Provide Financial Stability For Her Family.

Military service members who have same-sex spouses courageously defend this nation against threats worldwide on a daily basis. DOMA unfairly discriminates against them by denying them and their spouses the same benefits afforded to service members who are married to spouses of the opposite sex, which are designed to help military families deal with the substantial sacrifices they are asked to make in service to their country.³⁴

The experiences of Charlie and Karen Morgan epitomize DOMA's unfairness, its destructive impact on married same-sex military couples, and the need for immediate resolution of the statute's

³⁴ For example, opposite-sex spouses of active service members are eligible for healthcare coverage through the TRICARE program. In the event of a service member's death, surviving opposite-sex spouses may receive a one-time non-taxable \$100,000 death gratuity. Surviving opposite-sex spouses of retired service members may also receive 55% of the deceased service member's retirement pay. Opposite-sex spouses of veterans are also eligible for death benefits, disability benefits, educational assistance and job counseling. See GLAD, *How DOMA Hurts Americans: A Summary of the GAO Reports on Section 3 of the Federal Defense of Marriage Act*, available at <http://www.glad.org/doma/how-doma-hurts-americans>.

constitutionality. Charlie, who recently passed away, was a decorated service member. She served in the Army and, more recently, as a Chief Warrant Officer in the New Hampshire National Guard.³⁵ Charlie and Karen were in a committed relationship for over 15 years, have a five-year-old daughter, and were married in 2011 pursuant to the laws of New Hampshire.³⁶

Before her death, Charlie was the sole income-earner in the family, while Karen has been a full-time mother.³⁷ Like many military families, life for the Morgans has had its difficult moments, such as when, in 2005, Charlie was given less than 24 hours notice to deploy for three weeks to the Gulf Coast in response to Hurricane Katrina.³⁸ Unlike opposite-sex military spouses, Karen had the extra burden of wondering whether anyone would know to contact her if anything happened to Charlie, given that she was essentially invisible to the military because of Don't Ask, Don't Tell ("DADT").³⁹ Even though DADT has since been repealed, Karen and Charlie still were never treated equally by the military because of DOMA. As a result, Karen has no medical

³⁵ Decl. Re Statement of Material Facts L.R. 56.1 Of CW2 Charlie Morgan ¶¶ 2-4, *McLaughlin v. Panetta*, No. 11-11905 (D. Mass. Nov. 21, 2011) ("Morgan Decl.").

³⁶ *Id.* ¶ 5; see also David Small, *Opposing DOMA: One Couple in the Fight for Life*, *OutServe Magazine* (May 2012), available at <http://outservemag.com/2012/05/opposing-doma>.

³⁷ Morgan Decl. ¶ 9.

³⁸ Small, *Opposing DOMA*, *supra* note 36.

³⁹ *Id.*

benefits of her own.⁴⁰ To complicate matters further, in 2008, Charlie was diagnosed with breast cancer and underwent chemotherapy, radiation and a double mastectomy.⁴¹ The treatment subdued the cancer for a time. However, upon returning from a deployment in Kuwait, Qatar and Iraq in August 2011, Charlie's cancer returned, this time in a form that her doctors determined was metastatic and effectively incurable.⁴² Given that diagnosis, Charlie opted to stop treatment so that she and Karen could take their daughter to Disney World, visit family and get the most out of their final months together.⁴³ Then, in February 2013, Charlie tragically lost her battle with cancer.⁴⁴

Now, Karen finds herself in a difficult position that opposite-sex military couples simply do not have to face. Despite Charlie's heroic service to our country, her wife Karen, now a widow, will not receive the important military benefits, including a \$100,000 non-taxable death gratuity, that she needs to support herself and her daughter and that she

⁴⁰ Morgan Decl. ¶ 9.

⁴¹ *Id.*

⁴² Small, *Opposing DOMA*, *supra* note 36.

⁴³ Andrea Stone, *Soldier dies of breast cancer, but her widow won't get benefits*, Wash. Post (Feb. 10, 2013), available at <http://www.washingtonpost.com/blogs/she-the-people/wp/2013/02/10/soldier-dies-of-breast-cancer-but-her-widow-wont-get-benefits>.

⁴⁴ *Id.*

would be entitled to if she or Charlie were of the opposite sex.⁴⁵

D. Mary Ritchie: A State Police Officer Forced To Pay Significantly Higher Federal Taxes Because Of DOMA.

The federal tax code is designed, in part, to recognize the reality that individuals who are legally married operate as a single economic unit and should therefore be accorded certain benefits unavailable to

⁴⁵ See *supra* note 34 (noting military benefits that DOMA denies same-sex spouses). Despite the Defense Department's recent decision to extend some benefits to married same-sex couples, DOMA still bars same-sex military spouses from the majority of spousal military benefits. For example, spouses of gay and lesbian service members cannot be designated as primary next of kin, and thus are not notified directly in the event that a service member spouse is injured or killed. Such was the indignity faced by Tracy Johnson, a staff sergeant in the North Carolina National Guard whose spouse, Donna, was killed in Afghanistan recently. Tracy learned about Donna's death not through a casualty officer, which would have happened if she or Donna were male, but rather through her in-laws after reading a news item about an attack near where Donna was stationed and after not having received her regular morning phone call from Donna. Adding to the indignity Tracy and others like her have suffered is the fact that same-sex military spouses are ineligible for the travel allowance surviving military spouses are provided to attend burial ceremonies. See Tracy Johnson, *A law that adds to gay military widows grief*, Wash. Post (Feb. 10, 2013), available at http://articles.washingtonpost.com/2013-02-10/opinions/37026203_1_widows-donna-military-rule; see also 37 U.S.C. § 411(f).

unmarried individuals.⁴⁶ Married couples may file their federal tax returns jointly, which often results in a lower tax liability than if each individual were required to file their taxes separately.⁴⁷ Married couples may also pool deductions on their returns, which can allow them, for example, to meet the required threshold for a federal tax deduction for uncompensated medical expenses.⁴⁸ Spouses also have an unlimited ability to make gifts and transfer property to one another without incurring taxes, and may deduct the amount of the fair market value of any property passing from a deceased spouse from that spouse's gross estate tax.⁴⁹ None of these protections, however, are available to same-sex spouses. Because DOMA precludes the federal government from recognizing the lawful marriages of these committed couples, they cannot file their taxes jointly (and thus cannot combine their deductions), are taxed on property transfers that opposite-sex couples are able to make tax-free, and cannot access various other deductions and credits that the federal tax code makes available to married couples.⁵⁰

⁴⁶ See Patricia Cain, *DOMA and the Internal Revenue Code*, 84 Chi.-Kent L. Rev. 481, 503 (2009-2010).

⁴⁷ M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 Drake L. Rev. 1081, 1089-90 (2010).

⁴⁸ 26 U.S.C. §§ 213, 6013.

⁴⁹ 26 U.S.C. §§ 1041, 2056(a).

⁵⁰ DOMA also causes additional complexities and costs in tax preparation for same-sex spouses with children. Only a spouse who is legally recognized as a parent may claim child related deductions and credits, but if the spouse who pays child

The life of Mary Ritchie and Kathleen (“Kathy”) Bush highlights the significant burdens suffered by married same-sex couples because DOMA prevents the federal tax code from treating them as single economic units. Mary and Kathy have been in a committed relationship for over 20 years, have two sons, and were legally married under Massachusetts law in May 2004, immediately after marriage became available in the state.⁵¹ Mary is a Detective Lieutenant with the Massachusetts State Police, where she has been employed since 1988.⁵² Kathy worked for the New England Journal of Medicine for 15 years until the couple’s first child was born, when she stopped working to care for their children. The financial strains associated with keeping a family of four healthy and fed can be significant, and Mary and Kathy’s family must deal with the added burden of Mary’s job, which can place her in unpredictably dangerous situations. DOMA only further complicates matters by increasing the amount of

related expenses is not legally recognized as the parent, these deductions are not available to the couple. Further, if both parents can claim these deductions, they must determine who should claim them to obtain the most favorable tax treatment, which often requires expensive professional advice. See Medical Advancement Project, Family Equality Council & Center for Am. Progress, *Unequal Taxation & Undue Burdens for LGBT Families* 5, 8-14, 18 (2012), available at <http://www.lgbtmap.org/file/unequal-taxation-undue-burdens-for-lgbt-families.pdf>.

⁵¹ Joint Aff. of Mary Ritchie and Kathleen Bush ¶¶ 1-2, 6, *Gill v. Office of Personnel Mgmt.*, No. 09-10309 (D. Mass. Nov. 17, 2009) (“Ritchie-Bush Aff.”).

⁵² *Id.* ¶ 4.

federal tax the couple is required to pay. Because DOMA prohibits the Government from recognizing their marriage, Mary, the only income-earner in the family, claims Kathy (along with their two children) as a dependent on her tax return, which is fundamentally degrading in itself.⁵³ As a result, since 2004 the couple have paid over \$19,000 more in federal income taxes than they would have paid if they had been permitted to file jointly.⁵⁴ Mary and Kathy's attempts to recoup these additional taxes through the filing of amended returns changing the filing status to "Married Filing Jointly", based on the fact that they are legally married, have been unsuccessful because of DOMA.⁵⁵ For example, the IRS's denial of their amended return was accompanied by a letter stating that "[c]urrent federal law does not recognize same sex marriage even if legally constituted by a sovereign state".⁵⁶

In addition to Mary and Kathy's increased tax liability, DOMA has thwarted their efforts to save for

⁵³ *Id.* ¶ 11.

⁵⁴ *Id.* ¶ 19

⁵⁵ *Id.* ¶¶ 12-19.

⁵⁶ *Id.* ¶ 17. Numerous other married same-sex couples have likewise been required to pay more taxes each year than similarly situated married heterosexual couples. For example, Brad Kleinerman and Flint Gehre, who reside in Connecticut with their three sons, have been together for over 20 years and were married under Connecticut law in 2009, paid an extra \$8,000 in federal taxes in 2010 because DOMA prevents them from filing jointly. See GLAD, *Bradley Kleinerman & James "Flint" Gehre*, available at <http://www.glad.org/doma/plaintiffs-pedersen/bradley-kleinerman-james-flint-gehre>.

retirement. Because Kathy does not earn any income, and given the demands of Mary's job, the couple explored the possibility of having Mary contribute a portion of her income to an Individual Retirement Account ("IRA") on Kathy's behalf.⁵⁷ However, a prerequisite for opening such an account is the ability of the employee and his or her spouse to file their federal income taxes jointly. Because Mary and Kathy cannot file their federal taxes jointly, Mary cannot take the allowable tax deduction for any contribution to Kathy's IRA, thus frustrating the very purpose of having a spousal IRA and preventing the couple from taking steps to ensure their family's financial stability in the future.

E. Adi Lavy: A U.S. Citizen Facing Separation From Her Non-Citizen Spouse While She Receives Critical Medical Care Only Available In The United States.

According to a recent analysis of Census data, over 79,000 same-sex couples in the United States include either a non-U.S. citizen or a citizen who has been naturalized.⁵⁸ Although the federal immigration statutory scheme is designed, in part, to

⁵⁷ Ritchie-Bush Aff. ¶¶ 20-21.

⁵⁸ Craig J. Konnoth & Gary J. Gates, *Same-Sex Couples & Immigration in the United States* 3 (The Williams Institute, Nov. 2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Konnoth-Binational-Report-Nov-2011.pdf>.

preserve and maintain familial contact,⁵⁹ DOMA works to force bi-national married same-sex couples to live in constant fear of separation by preventing federal recognition of their lawful marriages.

The need for immediate resolution of DOMA's constitutionality is illustrated by the experiences of Adi Lavy, a United States citizen, and her wife, Tzila Levy, who is Israeli. Adi, 34, and Tzila, 33, met in 2010 at a Purim party in Tel Aviv, where Lavy, a filmmaker, was working on a film.⁶⁰ The two had an instant connection, fell in love, and were legally married under New York law in October 2012, with a ceremony on the Williamsburg Bridge in Brooklyn.⁶¹

While the couple were together in Israel, Adi, who has kidney disease and is on a New York waiting list for a donor, was told by her doctors that her condition was worsening and that she should return to the United States for treatment.⁶² Today, the couple reside together in New York, but Tzila's tourist visa recently has expired and Adi's petition to

⁵⁹ See 136 Cong. Rec. H8631 (daily ed. Oct. 2, 1990) (statement of Rep. McGrath) ("Family unification is the cornerstone of immigration to the United States. Prolonging the separation of spouses from each other . . . is inconsistent with the principles on which this nation was founded.").

⁶⁰ See Erica Pearson, *Newlywed Lesbians From Brooklyn Hope Feds Decide On Green-Card Bid After Supreme Court Weighs In On DOMA*, N.Y. Daily News (Dec. 12, 2012), available at <http://www.nydailynews.com/new-york/lesbian-couple-waiting-doma-decision-article-1.1218693>.

⁶¹ *Id.*

⁶² *Id.*

sponsor Tzila for a green card is pending.⁶³ Typically, a U.S. citizen such as Adi who marries a non-citizen may sponsor his or her spouse for a green card through a more expeditious process than would otherwise be available; such applications are not subject to the quota system or any waiting lists or priority dates.⁶⁴ Further, a non-citizen spouse of a United States citizen who has been admitted for permanent residence is eligible for U.S. citizenship after only three years, as opposed to five years for other lawful permanent residents.⁶⁵ However, because DOMA prevents USCIS from recognizing same-sex couples' lawful marriages, Adi and Tzila, and many similarly situated married same-sex couples, face the very real prospect of having to

⁶³ *Id.*

⁶⁴ U.S. Citizenship and Immigration Services, *Green Card for an Immediate Relative of a U.S. Citizen*, available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=9c8aa6c515083210VgnVCM10000082ca60aRCRD&vgnnextchannel=9c8aa6c515083210VgnVCM10000082ca60aRCRD> (last visited Feb. 26, 2013).

⁶⁵ U.S. Citizenship and Immigration Services, *Naturalization for Spouses of U.S. Citizens*, available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=a0ffa3ac86aa3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=a0ffa3ac86aa3210VgnVCM100000b92ca60aRCRD> (last visited Feb. 26, 2013). Some estimates put the number of married same-sex couples in situations similar to Adi and Tzila at approximately 36,000. See Pamela Constable, *Federal Marriage Law May Force Deportation Of Many Immigrant Gay Spouses*, Wash. Post (Dec. 29, 2012), available at http://articles.washingtonpost.com/2012-12-29/local/36071393_1_gay-spouses-binational-gay-couples-doma.

choose between separating or remaining together in the United States illegally, which could have serious negative consequences as well.⁶⁶ It is a tragic choice, and one that they would not have to face if Adi or Tzila were of the opposite sex.⁶⁷ A conclusive resolution of DOMA's constitutionality by the Court would aid Adi and Tzila, and many other couples facing this critical and imminent predicament, one that no legally married couple should have to face.

F. Jerry Passaro: A Connecticut Widower Unfairly Denied His Deceased Husband's Pension Annuity Because Of DOMA.

DOMA operates to deny married same-sex couples important retirement benefits that federal

⁶⁶ Relatedly, immigrant workers who are admitted to the United States through sponsorship by an employer may enter the country with their spouses. 8 U.S.C. §§ 1101(a)(15)(H), 1153(b)-(d). However, DOMA denies these workers the right to enter with a same-sex spouse, even if the worker's marriage is lawfully recognized in his or her country of origin and the state in the United States where the immigrant will be working.

⁶⁷ Although a temporary visa could serve as a potential stop-gap solution in certain situations, foreign nationals seeking temporary visas must often demonstrate to immigration officials that they have no intent to remain permanently in the United States, a presumption for many temporary visas. 8 U.S.C. §§ 1101(a)(15), 1184(b). A foreign national married to a U.S. citizen of the same sex faces a cruel catch-22: his marriage does not pave a path to permanent residence and, at the same time, is very likely to prevent him from proving that he does not intend to stay permanently in the United States, making it exceedingly difficult for him to obtain a temporary visa.

law requires most private pension and health plans to make available to their participants' spouses. For example, under the Employee Retirement Income Security Act ("ERISA"), defined benefit or money purchase pension plans are required to offer opposite-sex surviving spouses of plan participants a Qualified Pre-Retirement Survivor Annuity ("QPSA")—generally a 50% annuity for the life of the surviving spouse—unless the spouse affirmatively waives the right to receive it.⁶⁸ DOMA blocks this default protection for surviving spouses of the same sex.

Gerald ("Jerry") Passaro is one of the many surviving spouses that has suffered as a result of DOMA's discriminatory impact on the federal rules and regulations governing private retirement plans.⁶⁹ Jerry lost his husband, Thomas ("Tom") Buckholz, to lymphoma in January 2009.⁷⁰ They had

⁶⁸ 29 U.S.C. § 1055(e); 26 U.S.C. § 417. Under ERISA, defined plans must also offer opposite-sex spouses a Qualified Joint and Survivor Annuity ("QJSA"), which provides an annuity benefit to a retiree during his or her lifetime, then continues the benefit as an annuity paid to the surviving spouse in the amount of at least 50% and not more than 100% of what the retiree received. 29 U.S.C. § 1055(d). Additionally, an opposite-sex spouse may defer the payment of death benefits, as well as any associated taxes, from a decedent's plan until the spouse reaches age 70 and a half. 26 U.S.C. § 401(a)(9).

⁶⁹ See generally GLAD, *The Plaintiffs: Pedersen v. O.P.M., Jerry Passaro*, available at <http://www.glad.org/doma/plaintiffs-pedersen/jerry-passaro>.

⁷⁰ First Am. Compl. ¶ 91, *Pedersen v. Office of Personnel Mgmt.*, No. 10-01750 (D. Conn. Jan. 14, 2011) ("Pedersen Compl.")

been in a committed relationship for over 13 years and were legally married under Connecticut law in November 2008.⁷¹ Prior to his passing, Tom sought to ensure that Jerry, who is disabled and receives a monthly Social Security check, would be taken care of after he was gone.⁷² He did this by attempting to leave Jerry his only significant asset—the pension he had built up as a chemist at Bayer Pharmaceutical, in which he was fully vested.⁷³ Tom named Jerry as his beneficiary under his pension, which is administered by Vanguard, and received assurances that Jerry would receive the pension upon Tom’s death.⁷⁴

Following Tom’s death, Jerry submitted the required paperwork in order to receive the pension that Tom had left him.⁷⁵ After a month with no response, he contacted Bayer and was informed that, because he is a man and was “not legally married” to Tom under federal law, Bayer would not be paying

⁷¹ *Id.* ¶ 92.

⁷² See Aff. of Gerald V. Passaro II ¶ 25, *Pedersen v. Office of Personnel Mgmt.*, No. 10-01750 (D. Conn. July 15, 2011) (“Passaro Aff.”).

⁷³ *Id.*; Pedersen Compl. ¶¶ 94-95.

⁷⁴ Pedersen Compl. ¶¶ 97, 101. Under the terms of the plan, which ERISA governs, when a participant such as Tom is vested and has a nonforfeitable right to benefits under the plan, and, like Tom, dies prior to his annuity start date, the participant’s surviving “spouse”—as defined by federal law—is entitled a QPSA. *Id.* ¶ 111.

⁷⁵ GLAD, *The Plaintiffs: Pedersen v. O.P.M., Jerry Passaro*, available at <http://www.glad.org/doma/plaintiffs-pedersen/jerry-passaro>.

on Tom's pension.⁷⁶ After formally requesting that he be paid the survivor benefits, Jerry received a letter from Vanguard advising him that no benefits were going to be payable to him under the Bayer Plan because of DOMA.⁷⁷ The letter explained that, as a consequence of DOMA, "a pension plan cannot be required to recognize a same-sex spouse even if same-sex marriages are permitted under state law".⁷⁸ Jerry submitted an appeal of the denial of his request to the Bayer ERISA Review Committee. Citing DOMA, the Committee upheld the denial.⁷⁹

Compounding Jerry's injury is the fact that DOMA will prevent him from collecting the Social Security death benefits to which he would have been entitled if Tom had been of the opposite sex.⁸⁰ Because DOMA has made him automatically ineligible for these important benefits, Jerry is having difficulty meeting expenses and paying property taxes on the house he shared with Tom.⁸¹

⁷⁶ *Id.*; Pedersen Compl. ¶ 98.

⁷⁷ Pedersen Compl. ¶¶ 100-01.

⁷⁸ *See* Exh. C to Passaro Aff. (Dkt. No. 65-3); Pedersen Compl. ¶ 101.

⁷⁹ Pedersen Compl. ¶¶ 104, 107.

⁸⁰ *Id.* ¶¶ 115-16, 129.

⁸¹ GLAD, *The Plaintiffs: Pedersen v. O.P.M., Jerry Passaro*, available at <http://www.glad.org/doma/plaintiffs-pedersen/jerry-passaro>; *see also* Passaro Aff. ¶ 32.

G. Michael Dragovich: A California State Employee Prevented From Enrolling His Husband In The Long-Term Care Insurance Program Offered To California Public Employees And Their Families.

Michael Dragovich and Michael (“Mike”) Gaitley are another married same-sex couple who have suffered from the discriminatory effects of DOMA, specifically through DOMA’s impact on state pension and health plans. Michael, a registered nurse and nurse coordinator at the University of California, San Francisco (“UCSF”) Medical Center, and Mike, an attorney with the Legal Aid Society-Employment Center, met in 1979 when both were working as flight attendants.⁸² They have been in a committed relationship for over 30 years, and were legally married under California law in June 2008.⁸³ Because Michael is a California state employee, he is entitled to purchase long-term health care coverage under the California Public Employees’ Retirement System (“CalPERS”) Long-Term Care Program for himself and his “family members”.⁸⁴ Michael applied

⁸² Second Am. Compl. ¶¶ 19-20, *Dragovich v. U.S. Dep’t of Treasury*, No. 10-01564 (N.D. Cal. Sept. 7, 2011) (“Dragovich Compl.”); Decl. of Pl. Michael Dragovich in Supp. of Pls.’ Mot. For Class Certification ¶ 3, *Dragovich v. U.S. Dep’t of Treasury*, No. 10-01564 (N.D. Cal. Apr. 14, 2011) (“Dragovich Decl.”).

⁸³ Dragovich Compl. ¶ 50.

⁸⁴ *Id.* ¶ 10.

for and received coverage under the program for himself in 1997.⁸⁵

Following their marriage in 2008, Michael was eager to acquire the same coverage for Mike, and promptly contacted a CalPERS program representative by phone to request an application.⁸⁶ The representative informed Michael that same-sex spouses are ineligible to apply for enrollment in the program because of federal law.⁸⁷ Following that conversation, Michael's attorney wrote a letter to CalPERS on Michael's behalf, objecting to the exclusion of same-sex spouses from long-term care coverage.⁸⁸ The response from CalPERS's assistant chief counsel explained that, because of DOMA, "enrollment of a same-sex spouse into the [Long-Term Care Program] would . . . make the plan non-compliant with IRC provisions based on DOMA and jeopardize the plan's tax-qualified status".⁸⁹ In this way, DOMA has prevented Michael, and numerous state employees like him, from securing spousal coverage under a plan designed to make it possible for state employees to affordably protect themselves

⁸⁵ *Id.* ¶ 19.

⁸⁶ *Id.* ¶ 59.

⁸⁷ *Id.*

⁸⁸ *Id.* ¶ 60.

⁸⁹ *Id.*

and their families in the event of chronic injury or debilitating illness.⁹⁰

H. Lynda DeForge: A Federal Public Employee Denied Leave To Provide Care For Her Seriously Ill Spouse And To Tend To Her Own Serious Health Concerns.

DOMA unfairly denies working same-sex spouses the same flexibility in providing care for their spouses that similarly situated opposite sex spouses are afforded under the Family and Medical Leave Act (“FMLA”).⁹¹ The FMLA provides twelve work weeks of unpaid leave in any 12-month period to employees whose spouses suffer from a “serious health condition” in order to assist working spouses

⁹⁰ Same-sex couples in other states have been similarly deprived of rights afforded to opposite-sex spouses by state pension and health plans. For example, New Hampshire public employees who have accrued over 30 years of service, as well as their spouses, are entitled to receive a medical cost subsidy through the state’s retirement plan. However, New Hampshire’s retirement plan does not extend this medical cost subsidy to same-sex spouses because, as a result of DOMA, they are not covered individuals under the Internal Revenue Code. Thus the retirement plan could risk its tax-qualified status if it were to extend this benefit to same-sex spouses. Pedersen Compl. ¶¶ 176-199.

⁹¹ See Respect for Marriage Act: Hearing on S. 598 Before the S. Comm. on the Judiciary, 112th Cong. (2011) (written statement of The Williams Institute), *available at* <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Meryer-Gates-Hunter-Pizer-Sears-Testimony-DOMA-Jul-2011.pdf>.

with balancing family and work commitments.⁹² However, because of DOMA, the FMLA does not require employers to provide this benefit to employees married to a spouse of the same sex, and many do not.⁹³ As a result, DOMA works to create serious dilemmas when two same-sex partners both face serious health concerns.

The situation faced by Raquel Ardin and Lynda DeForge illustrates the pain that DOMA causes working same-sex spouses by excluding them from the FMLA's protections. Raquel and Lynda have been in a committed relationship for over 30 years after meeting while both served in the United States Navy, and were legally married in 2009 under the laws of Vermont.⁹⁴ Raquel, 57, was medically discharged from the Navy in 1978 after fracturing and dislocating her neck while abroad in service and undergoing two neck fusion surgeries.⁹⁵ Following her discharge, Raquel was employed by the United States Postal Service in Vermont, but was forced into disability retirement in 2005 due to degenerative arthritis in her neck, which, according to the

⁹² 29 U.S.C. § 2612(a)(1)(C).

⁹³ According to one 2011 analysis, 296 Fortune 500 Companies did not offer FMLA-equivalent benefits to employees with same-sex spouses. See Human Rights Campaign, *Family and Medical Leave Act: FMLA-Equivalent Benefit for LGBT Workers*, available at <http://www.hrc.org/resources/entry/family-and-medical-leave-act-fmla-equivalent-benefit-for-lgbt-workers> (last visited Feb. 26, 2013).

⁹⁴ Pedersen Compl. ¶¶ 132-33, 135.

⁹⁵ *Id.* ¶¶ 135-36.

Department of Veterans Affairs, rendered her “unemployable”.⁹⁶

Since 2005, Raquel’s required course of treatment has consisted of quarterly injections into her neck, three on each side of her spinal cord, to address immobility, spasms and pain caused by her arthritis and the scar tissue from her surgeries. The injections she receives are painful and require bandaging of her neck due to bleeding.⁹⁷ The closest VA facility where Raquel’s injections can be administered is in Newington, CT, about a two-and-a-half-hour drive from the home she shares with Lynda.⁹⁸ The nature of Raquel’s disability and the pain she experiences before and after her treatments make it impossible for Raquel to drive herself to or from her appointments. Therefore, the responsibility falls on Lynda to ensure that Raquel receives the treatment that she critically needs.⁹⁹

Prior to her retirement in late 2012, Lynda worked for the United States Postal Service in Vermont and, as a federal employee, was eligible under the FMLA to receive unpaid leave to care for a “spouse” with a serious health condition.¹⁰⁰ Thus, if Raquel, Lynda’s lawful spouse, were male, Lynda would have been approved to take FMLA leave.

⁹⁶ *Id.* ¶¶ 136, 138, 143.

⁹⁷ *Id.* ¶ 147.

⁹⁸ *Id.* ¶ 148.

⁹⁹ *Id.* ¶¶ 148-49.

¹⁰⁰ *Id.* ¶ 150.

However, because of DOMA, Lynda’s application for FMLA leave to care for Raquel—one day every three months to transport Raquel to and from her appointments—was denied.¹⁰¹ Since that denial, Raquel has undergone a series of surgeries which required Lynda to use a significant amount of her accumulated vacation time in order to care for Raquel.¹⁰² As a consequence, prior to her retirement, Lynda had little vacation time left to tend to her own serious health concerns. For example, Lynda was scheduled to have knee surgery in the spring of 2011; however, Lynda postponed this surgery to accrue more vacation time so as to ensure that she would be paid for all or most of the fourteen weeks that she likely will need to recover from the surgery.¹⁰³ Lynda’s vacation time was simply not sufficient to assure that proper attention was paid to both Lynda’s and Raquel’s health needs. Such dilemmas are precisely what the FMLA was designed to help workers avoid. Raquel and Lynda’s situation thus poignantly illustrates how DOMA impairs the ability of spouses to care for each other and for themselves.

II. Executive Branch “Non-Enforcement” Of DOMA Is No Substitute For Conclusive Judicial Resolution Of DOMA’s Constitutionality.

Any suggestion that the Executive Branch could avert the negative consequences of *Amica’s* proposed

¹⁰¹ *Id.* ¶¶ 152-55.

¹⁰² *Id.* ¶¶ 156-57.

¹⁰³ *Id.* ¶ 161.

“lower court” approach by ceasing to enforce DOMA is misguided. Even if the Executive Branch wanted to and could choose no longer to enforce DOMA, a proposition that is far from well-established,¹⁰⁴ married same-sex couples and surviving spouses would still be forced to turn to the lower courts and administrative agencies in significant numbers to seek relief from DOMA’s harmful effects.

First, many of the rights and benefits affected by DOMA are administered by private parties over whom the Executive Branch does not hold the same power of direction as it holds over its own agencies and departments. Thus, executive non-enforcement would not help individuals in situations similar to Jerry Passaro, who was denied the Bayer Plan annuity earned by his now deceased husband Tom and that, per ERISA, he would be automatically entitled to upon reaching age 55, were he or Tom of the opposite sex.¹⁰⁵

¹⁰⁴ See Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 21 *Hastings Const. L.Q.* 865 (1994) (arguing that executive non-enforcement of unconstitutional statutes will very rarely, if ever, be constitutionally defensible). As Respondent Windsor’s brief on the jurisdictional questions notes, the Appropriations Clause and the Anti-Deficiency Act also may operate to prevent federal agencies from extending to married same-sex couples the benefits that DOMA denies them. See *Brief On The Jurisdictional Questions For Respondent Edith Schlain Windsor* at 33-34.

¹⁰⁵ *Supra* pp. 26-29; see also Jennifer Staman, Congressional Research Service, *Same-Sex Marriage and Employee Benefit Plans: Legal Considerations* (Sept. 12, 2011).

Second, and more fundamentally, Executive Branch non-enforcement of DOMA could never provide the conclusive resolution of the law's constitutionality that is required for married same-sex couples to realize the full range of protections that federal law affords married opposite-sex couples. For opposite-sex couples, a legal marriage provides reasonable certainty that, regardless of what the future holds, a body of rights, benefits and safety nets will be available to them as they plan their futures and live their lives together. Married same-sex couples will never have that same degree of certainty so long as DOMA is on the books as good law—regardless of whether the Executive Branch currently is enforcing it—since a mere shift in the political winds could cause DOMA to swoop back into their lives and take those protections away.¹⁰⁶ As a consequence, a couple like Bette Jo Green and Jo Ann Whitehead—cancer survivors who, as discussed

¹⁰⁶ There have been occasions, historically, where an enacted law has been rendered dormant through non-enforcement by one administration, only to be resuscitated by a successor administration. *See* May, *supra* note 104, at 964-65 (discussing the Carter administration's decision not to enforce § 399 of the Public Telecommunications Act of 1978, which barred public radio and television shows from editorializing, because the administration believed that the provision violated the First Amendment, and the Reagan administration's subsequent decision to enforce the ban). There have also been instances where an administration has declined to defend the constitutionality of a statute or provisions thereof and a successor administration has reversed course and defended the statute. *See* Letter from Andrew Fois, Assistant Att'y Gen., to Hon. Orrin G. Hatch, Chairman, Senate Comm. on the Judiciary 6-7 (Mar. 22, 1996), *available at* <http://volokh.com/wp/wp-content/uploads/2011/02/DOJ1996.pdf>.

above, are unsure whether Bette Jo will be able to afford the home they now share without the Social Security survivor's benefits that, but for DOMA, she would be entitled to should Jo Ann die first—may be forced to make significant cut-backs or even sell their home now because they cannot know whether or not DOMA will be enforced when the time comes that those benefits will be needed.¹⁰⁷

That uncertainty also likely will prevent private sector employers and state-managed pension plans from extending federally regulated spousal benefits to employees married to a spouse of the same sex. For example, as discussed above, many private sector employers will not extend spousal health coverage to employees with spouses of the same sex because, as a result of DOMA, the contributions would be considered taxable income and result in increased payroll tax liability for the employer.¹⁰⁸ But even if the Executive Branch could assure private sector employers that they would not now be assessed additional taxes for contributing to the cost of same-sex spousal coverage, the fact that DOMA is still good law and the prospect that a successor administration would resume its enforcement likely would convince those employers to continue to exclude their employees' same-sex spouses from coverage, in order to avoid the complications and costs that would result from having to revoke spousal coverage at a later point in time. For similar reasons, Executive Branch non-enforcement of

¹⁰⁷ See *supra* pp. 8-11.

¹⁰⁸ See *supra* note 24.

DOMA likely would not prompt state-administered pension funds to extend long-term care insurance to public employees, like Michael Dragovich,¹⁰⁹ with spouses of the same sex—even if the current administration could assure state-managed plans that they would not lose their tax-qualified status for covering their employees’ same-sex spouses now, the fact that a successor administration could swiftly renew enforcing DOMA likely would convince such plans to continue to exclude same-sex spouses from coverage.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge the Court to exercise its jurisdiction in order to conclusively resolve the question of DOMA’s constitutionality.

Respectfully Submitted,

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¹⁰⁹ *Supra* pp. 30-32.