



Judiciary Committee News

United States Senate
Senator Patrick Leahy, Chairman

*Submissions for the Record by Chairman Patrick Leahy (D-Vt.)
Senate Judiciary Committee Hearing On:
"S. 598, The Respect for Marriage Act:
Assessing the Impact of DOMA on American Families"
July 20, 2011*

Testimony From:

- American Civil Liberties Union
- Amnesty International
- Family Equality Council
- GLAD
- Kate O'Hanlan, M.D., Laparoscopic Institute for Gynecologic Oncology
- Interfaith Alliance
- National Gay and Lesbian Task Force Action Fund
- Parents, Families and Friends of Lesbians and Gays
- The Williams Institute



July 20, 2011

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
U.S. Senate
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Charles Grassley
Ranking Member, Committee on the Judiciary
U.S. Senate
224 Dirksen Senate Office Building
Washington, DC 20510

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

LAURA W. MURPHY
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

RE: ACLU Statement for Judiciary Committee Hearing on “S. 598, The Respect for Marriage Act: Assessing the Impact of DOMA on American Families”

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with more than a half million members, countless additional activists and supporters, and fifty-three affiliates nationwide, we thank the Committee for holding this critically important hearing. The Defense of Marriage Act (DOMA) harms married gay and lesbian couples and their families in many ways and Congress needs to pass the Respect for Marriage Act (H.R. 1116 and S. 598). Since the first lawsuit for same-sex couples in 1971, the ACLU has been at the forefront of legal, legislative, and public education efforts to secure the freedom for same-sex couples to marry and to win legal recognition for lesbian, gay, bisexual and transgender (LGBT) relationships. Repealing DOMA through the passage of the Respect for Marriage Act would ensure that all legal marriages receive the respect they deserve under federal law.

When DOMA (Public Law 104-199) was passed by Congress and signed into law in 1996, gay and lesbian couples could not legally marry in any state, and it was not until 2000 that Vermont made national headlines with its civil union law. Today, gay and lesbian couples can legally marry in five states – Connecticut, Iowa, Massachusetts, New Hampshire and Vermont – as well as in the District of Columbia. In a matter of days, gay and lesbian couples will be able to marry in New York, bringing the total number of states with the freedom to marry to six. With the momentous legislative victory in New York, the number of Americans who will enjoy the freedom to marry will jump from nearly 16 million to 35 million. In addition, there

are an estimated 18,000 legally-married same-sex couples in California who married in 2008 prior to the passage of Proposition 8 and whose marriages are still recognized by the state. Maryland, New Mexico and Rhode Island legally recognize out-of-state-marriages of same-sex couples. Eleven additional states have relationship recognition laws such as civil unions and domestic partnerships that, while falling short of marriage, afford gay and lesbian couples a measure of recognition and protections for their families.

It may be self-evident, but America is a much different country for same-sex couples than it was in 1996. A recent study from the Williams Institute at UCLA's School of Law estimated there are 50,000 to 80,000 legally-married same-sex couples in the U.S. With greater numbers and greater visibility comes greater acceptance. A May 2011 Gallup poll found that a majority of Americans (53 percent) favored legalizing marriage for gay and lesbian couples. This poll is consistent with other recent national polls, including a March poll by the *Washington Post* and ABC News, which found majority support for gay and lesbian couples gaining the freedom to marry. The trend lines on this issue are striking and unmistakable.

While LGBT Americans have made many remarkable strides over the last 15 years, the discriminatory Defense of Marriage Act denies all legally-married same-sex couples and their families each of the more than 1,100 federal benefits and protections afforded to opposite sex married couples, according to the non-partisan Government Accountability Office. Basic protections such as Social Security survivor benefits and Family and Medical Leave Act coverage are afforded to all married couples, except for the tens of thousands of legally-married same sex couples. This is discrimination based on sexual orientation plain and simple. DOMA causes these married couples and their families real, and sometimes devastating, harm each and every day.

Edith "Edie" Windsor and Thea Spyer

These couples include people like 82-year-old ACLU client Edie Windsor. Edie and Thea Spyer shared their lives together as a couple in New York City for 44 years. They got engaged in 1967, a couple of years after becoming a couple, and were finally married in Canada in May 2007. Two years later, after living for decades with multiple sclerosis, which led to progressive paralysis, Thea passed away.

When Thea died, the federal government, because of DOMA, refused to recognize their marriage and taxed Edie's inheritance from Thea as though they were strangers. Under federal tax law, a spouse who dies can leave her assets, including the family home, to the other spouse without incurring estate taxes. For the simple fact that Edie was married to woman instead of a man, she had to pay a \$363,000 federal estate tax that would have otherwise been \$0.

Ordinarily, whether a couple is married for federal purposes depends on whether they are considered married in their state. New York recognized Edie and Thea's marriage, but because of DOMA, the federal government refuses to treat married same-sex couples, like Edie and Thea, the same way as all other married couples. After decades together, including many years during which Edie helped Thea through her long battle with multiple sclerosis, it was devastating to Edie that the federal government refused to recognize their marriage.

Teresa Heck and Rebecca Andrews

Teresa Heck and Rebecca Andrews are a married couple in Iowa who have been together for 13 years. In April of this year, Rebecca was diagnosed with a serious form of ovarian cancer. Teresa, who works for the Iowa Department of Corrections, applied to take leave under the Family and Medical Leave Act (FMLA) to help care for Rebecca and ensure she made it to all of her doctors' appointments and surgeries.

The Department of Corrections denied Teresa's FMLA request to help care for her partner – something that other married couples would never have to worry about – claiming that DOMA prevents any legal recognition for the marriages of gay and lesbian couples, including the protections of FMLA. Because the Department of Corrections denied Teresa's FMLA request, she was forced to use her own personal vacation time to care for Rebecca. On two occasions, if Teresa had not used her vacation time to help see to Rebecca's medical needs, Rebecca likely would have died due to complications from cancer surgery. This devastating treatment of a legally-married couple facing an extremely difficult health crisis is a direct result of the senseless discrimination of DOMA.

Defend Marriage by Respecting *ALL* Legal Marriages

Congress should repeal DOMA once and for all by passing the Respect for Marriage Act (H.R. 1116 and S. 598). Such a step would provide critically important federal protections for married same-sex couples like Teresa and Rebecca by providing federal recognition of marriages that are already recognized by states. This legislation would repeal DOMA in its entirety, as well as provide all married couples certainty that regardless of where they travel or move in the country, they will not be treated as strangers under federal law. The Respect for Marriage Act would return the federal government to its historic role in deferring to states in determining who is married.

The Respect for Marriage Act is federal legislation that affects the federal government only. Nothing in the proposed Respect for Marriage Act forces a state to recognize a valid marriage performed by another jurisdiction, and nothing in it obligates any person, religious organization, locality, or state to celebrate or license a marriage between two persons of the same sex. This legislation would, however, end the unconscionable denial of equal treatment under federal law to lawfully married same-sex couples and their families.

As an indication of just how much has changed since 1996, both former Representative Bob Barr (R-GA), the congressional author of DOMA, and former President Bill Clinton have called for DOMA's repeal and passage of the Respect for Marriage Act. Former President Clinton said, "When the Defense of Marriage Act was passed, gay couples could not marry anywhere in the United States or the world for that matter. Thirteen years later, the fabric of our country has changed, and so should this policy."¹ Former Representative Barr remarked that the Respect for

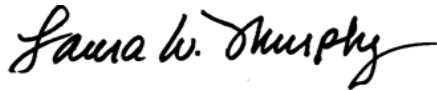
¹The Respect for Marriage Act Garner's Support of President Clinton and Former Rep. Bob Barr, DOMA's Original Author, http://nadler.house.gov/index.php?option=com_content&task=view&id=1307&Itemid=115 (September 2009 Press Release)

Marriage Act would “remove the federal government from involving itself in matters of defining ‘marriage,’ which historically and according to principles of federalism, are properly state matters and not federal.”²

The Respect for Marriage Act currently has the support of 118 members of the House and 27 Senators. A Congress that is genuinely concerned with the defense of marriage could do no better than to extend the 1,100 federal marriage benefits and protections to all 50,000 - 80,000 legally-married same-sex couples and their families across the country. Someone like Edie Windsor who spent a committed lifetime with her spouse and partner should not be punished by the federal government simply because of who she loved and spent her life with. We urge you to support *all* married couples by passing the Respect for Marriage Act (H.R. 1116 and S. 598).

For questions or comments, please contact Ian Thompson at [REDACTED] or [REDACTED]

Sincerely,



Laura W. Murphy
Director, Washington Legislative Office



Christopher E. Anders
Senior Legislative Counsel



Ian S. Thompson
Legislative Representative

² *Id.*



The Honorable Patrick Leahy
Chair
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

July 19, 2011

Dear Chair Leahy,

On behalf of Amnesty International USA's nearly 300,000 members, thank you for holding a hearing on the Respect for Marriage Act ("RMA"), S. 598, which would repeal the discriminatory "Defense of Marriage Act" ("DOMA") and help end discrimination against same-sex couples. We applaud your leadership to protect the human rights of all people, including the lesbian, gay, bisexual and transgender ("LGBT") community.

Amnesty International USA strongly supports the RMA. The "Defense of Marriage Act" is a hurtful law that singles out lawfully married same-sex couples for unequal treatment under federal law, violating their right to be free from discrimination. This law discriminates in two substantial ways. Section 2 of DOMA purports to allow states to refuse to recognize valid civil marriages of same-sex couples performed in other states; and Section 3 of the law carves all same-sex couples, regardless of their marital status, out of all federal statutes, regulations, and rulings applicable to all other married people. As a result, DOMA denies these lawfully married couples access to over 1,100 federal benefits and protections. The RMA, introduced by Sen. Dianne Feinstein, would remedy this injustice by repealing DOMA and ensuring that all lawfully married couples—including same sex couples—are able to receive the benefits of marriage under federal law.

Amnesty International USA believes that all people, regardless of their sexual orientation or gender identity, should be equal under the law and should be able to enjoy the full range of human rights, without exception. Marriage between individuals of the same-sex is an issue of fundamental human rights, the basis of which is enshrined in Article 16 of the Universal Declaration of Human Rights.¹ Amnesty International USA believes that the denial of equal recognition of same-sex relationships prevents many people from accessing a range of other rights, such as rights to housing and social security, and stigmatizes those relationships in ways

¹ Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. Article 16, *Universal Declaration of Human Rights*.

that can fuel discrimination and other human rights abuses against people based on their sexual orientation or gender identity.

Passage of the RMA would help protect these rights and allow same-sex couples and their families eligibility for important federal benefits and protections such as family and medical leave and Social Security spousal benefits.

Thank you again for addressing this urgent human rights issue in the United States. We look forward to continuing to work with you and appreciate your leadership on this issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Larry Cox", written in a cursive style.

Larry Cox
Executive Director
Amnesty International USA

Cc: Senator Diane Feinstein



July 19, 2011

Chairman Patrick Leahy
Senate Judiciary Committee
United States Senate
Washington, DC 20515

**RE: Hearing on S.598, The Respect for Marriage Act: Assessing the Impact of
DOMA on American Families**

Dear Chairman Leahy:

On behalf of the one million lesbian, gay, bisexual, and transgender (LGBT) parents raising two million children across the United States, Family Equality Council – the national organization working to ensure full social and legal equality for LGBT families¹ by providing direct support, educating the American public, and securing inclusion in legislation, policies, and practices impacting families – would like to thank you for holding this historic hearing on S.598, the Respect for Marriage Act.

The federal government does not license marriages and, prior to passage of the so-called “Defense of Marriage Act” (DOMA)² in 1996, has always deferred to a state’s determination of a person’s marital status to determine eligibility for federal marital protections and responsibilities. DOMA overrides a state’s determination of a person’s marital status and renders married same-sex couples “single” thereby disqualifying them from any federal spousal protections and responsibilities.

To-date, with six states³ – Massachusetts, Connecticut, Iowa, Vermont, New Hampshire and New York – and the District of Columbia providing same-sex couples with equal marriage rights, more than 11% of the total U.S. population currently lives in states that provide same-sex

¹ For purposes of this testimony, “LGBT families” refers exclusively to lesbian, gay, bisexual, and transgender parents raising children.

² 1 U.S.C. § 7 (West 1996, current through P.L. 112-23 approved 6-29-11) and 28 U.S.C. § 1738C (West 1996, current through P.L. 112-23 approved 6-29-11).

³ Domestic partnerships have been legal in California since 2005. Cal. Fam. Code § 297 (West 2005). The Supreme Court of California legalized marriage for same-sex couples in 2008, but in November of that same year, Proposition 8 passed, adding an amendment to the California Constitution defining marriage as between one man and one woman. *In re Marriage Cases*, 43 Cal. 4th 757, 183 P.3d 384 (2008), Cal. Const. art. I, § 7.5. There are approximately 18,000 married same-sex couples in California. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010). The district court decision in *Perry v. Schwarzenegger* found the Prop 8 amendment unconstitutional, but the case is still in litigation and the trial court order is stayed. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).



couples with the freedom to marry.⁴ LGBT families live in 99.3% of counties in every state across the nation,⁵ and since 2004, when Massachusetts became the first state to legalize such unions, more than 80,000 same-sex couples have legally married.⁶ Approximately 25% of these couples are raising children.⁷

For these 80,000 married same-sex couples, their families continue to go unrecognized by the federal government, unable to access the 1,138 federal benefits afforded to their opposite-sex counterparts.⁸ When our families are denied access to these critical federal benefits and protections, they face multiple harms – direct and indirect, tangible and symbolic. DOMA sets apart and stigmatizes LGBT families and sends the message that we are less valid, less respected, and less worthy than other similarly situated families.

The current Administration agrees that DOMA is not only harmful to American families, but has determined that the law is unconstitutional and has ceased defending this discriminatory law in federal court. In its recent filing in support of a claim brought by a federal employee seeking to access health insurance benefits for her same-sex spouse, the U.S. Department of Justice stated the following:

Section 3 of the Defense of Marriage Act, 1 U.S.C §7 (“DOMA”), unconstitutionally discriminates. It treats same-sex couples who are legally married under their states’ laws differently than similarly situated opposite-sex couples, denying them the status, recognition, and significant federal benefits otherwise available to married persons.⁹

⁴ Maryland and New Mexico recognize same-sex marriages performed out-of-state.

⁵ David M. Smith & Gary J. Gates, *Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households, A Preliminary Analysis of 2000 United States Census Data*, A Human Rights Campaign Report 2 (August 22, 2001).

⁶ Gary Gates, Williams Distinguished Scholarship, the Williams Institute, University of California Los Angeles.

⁷ 21% of same-sex couples in California are raising children. *California: Census Snapshot: 2010*, the Williams Institute (2011). 28% of Wyoming same-sex couples are raising children. *Wyoming: Census Snapshot: 2010*, the Williams Institute (2011). 27% of Alabama same-sex couples are raising children. *Alabama: Census Snapshot: 2010*, the Williams Institute (2011). 20% of Pennsylvania same-sex couples are raising children. *Pennsylvania: Census Snapshot: 2010*, the Williams Institute (2011).

⁸ In 1997, the Office of General Counsel of the General Accounting Office issued a memorandum to then-Chairman of the House Judiciary Committee stating that the Office had identified 1049 “federal laws classified to the United States Code in which marital status is a factor.” U.S. General Accounting Office, *Defense of Marriage Act*, GAO/OGC-97-16 (Washington, D.C.: January 31, 1997) available at <http://www.gao.gov/archive/1997/og97016.pdf>. This number was updated to 1,138 in 2004. U.S. General Accounting Office, *Defense of Marriage Act*, GAO-04-353 (Washington, D.C.: January 23, 2004) available at <http://www.gao.gov/new.items/d04353r.pdf>.

⁹ Defendant’s Brief in Opposition to Motion to Dismiss, *Golinski v. United States Office of Personnel Management*, et al, N.D. Cal (2011) (No. C 3:10-00257-JSW).



DOMA Harms Families

The U.S. General Accounting Office lists 13 categories of laws impacted by DOMA,¹⁰ which include the federal programs to which married same-sex couples are denied equal access. These programs represent some of the critical legal safety nets that all married couples rely on as they plan futures and raise their children together. Using the stories of LGBT families, we will illustrate how DOMA harms children and tears apart families, how DOMA discriminates against U.S. citizen taxpayers and increases costs to employers as well as employees, threatens the security of our families and disrespects members of the U.S. military who selflessly serve our country. The harms inflicted by DOMA on LGBT families are numerous and the following stories highlight just a few examples of the impact on the families who live under the discrimination of DOMA every day.

DOMA Creates Tax Disparities for Families

The financial harms DOMA inflicts on LGBT families are concrete and numerous. The 2004 GAO report identified a total of 198 statutes involving marital status and taxation.¹¹ DOMA forces the IRS to pretend that married same-sex couples are single individuals or heads of household for purposes of taxation.¹² DOMA makes the very exercise of preparing tax returns exponentially more complicated and more expensive for married same-sex couples than it is for similarly-situated opposite-sex couples. Like all married couples, married same-sex couples typically share finances and expenses, but DOMA requires these couples to separate what is shared and file taxes as individuals. In states that respect the marriages of same-sex couples, those couples must file their state tax returns as married. However, because some items on a “married” state return require the taxpayer to already have a married federal return, many married same-sex couples must also go through the exercise of creating a “dummy” married federal return in order to complete their state tax filings. Preparing an extra federal return is a significant added expense that is unique to married same-sex couples.

¹⁰ U.S. General Accounting Office, Defense of Marriage Act, GAO-04-353 (Washington, D.C.: January 23, 2004) available at <http://www.gao.gov/new.items/d04353r.pdf>. “Social Security and Related Programs, Housing, and Food Stamps; Veterans’ Benefits; Taxation; Federal Civilian and Military Service Benefits; Employment Benefits and Related Laws; Immigration, Naturalization, and Aliens; Indians; Trade, Commerce, and Intellectual Property; Financial Disclosure and Conflict of Interest; Crimes and Family Violence; Loans, Guarantees, and Payments in Agriculture; Federal Natural Resources and Related Laws; and Miscellaneous Laws.”

¹¹ *Id.*

¹² See IRS Publication 201 (2001) available at http://www.irs.gov/publications/p501/ar02.html#en_US_2010_publink1000220742. “**Marital Status.** In general, your filing status depends on whether you are considered unmarried or married. For federal tax purposes, a marriage means only a legal union between a man and a woman as husband and wife.”



In most instances the inability to file jointly increases the tax bill for married same-sex couples. For example, for an LGBT family with only one income, filing separately means that they cannot take advantage of the larger joint deduction, subjecting the income earner to higher tax bills than he or she would pay if the couple filed jointly. This disadvantages many LGBT families, but has a significantly greater impact on those raising children on a single income, for whom every dollar is that much more critical to their family's security. There are some married same-sex couples, however, who will pay *more* in federal income taxes when the federal government respects their marriages because of the "marriage penalty." In fact, the 2004 CBO Report analyzing the budgetary impact of DOMA estimated that federal individual income tax and estate tax revenues would actually increase between \$400 million a year to \$700 million per year if the federal government were not prohibited from recognizing married same-sex couples.¹³

Emily and Sharon, Takoma Park, MD

Emily and Sharon met in 2007 and were married in Boston, MA in June 2010. Sharon and Emily moved from Washington, DC to Maryland in April of 2010. Washington, DC provides equal marriage rights to same-sex couples and while the state of Maryland does not yet provide same-sex couples with the freedom to marry, Maryland does respect marriages performed in other states.¹⁴ When it came time to file their taxes, Emily and Sharon had to file federal returns as well as returns in both DC and Maryland. Even though the state of Maryland respects Sharon and Emily's marriage, state law requires the state tax return to mirror the federal return. Because DOMA prevents Sharon and Emily from filing as married on their federal return, they had no choice but to file as "single" in Maryland as well. However, because the District of Columbia treats all married people equally, Sharon and Emily were required to file as married and had to go through the process of creating a "dummy" federal return so that they could calculate their DC return. Because of the increased confusion and administrative onus, and to ensure they filed their taxes correctly, Emily and Sharon hired an accountant to complete their tax forms which resulted in a significant additional expense that they had not had to incur in previous years.

Through the process of creating the "dummy" federal return, Emily and Sharon discovered that had the federal government respected their marriage, they would be subject to the "marriage penalty" and would have owed in excess of \$3,000 in additional taxes. Emily's income is significantly less than Sharon's, therefore, as a "single" person Emily qualifies for deductions she would not be eligible for had she and Sharon filed jointly with their combined income.

¹³ U.S. General Accounting Office, Defense of Marriage Act, GAO-04-353 (Washington, D.C.: January 23, 2004) available at <http://www.gao.gov/new.items/d04353r.pdf>.

¹⁴ Maryland Attorney General's Office, *Marriage – Whether Out-of-State Same-Sex Marriage That Is Valid in the State of Celebration May Be Recognized in Maryland* (February 23, 2010) available at <http://www.oag.state.md.us/Opinions/2010/95oag3.pdf>.



Spouses have the unlimited ability to transfer property or make gifts to one another without incurring any taxes. DOMA makes this benefit unavailable to married same-sex couples.¹⁵ Married opposite-sex couples also have the ability to pass unlimited assets to a surviving spouse without taxation, but because of DOMA, same-sex spouses are not eligible for this benefit either. Property inherited by a same-sex spouse is subject to double taxation – taxed once upon the death of the first spouse and again upon the death of the second.¹⁶ The burden of double taxation ultimately falls on the shoulders of the children and surviving family. Surviving children of married opposite-sex couples are better situated because they stand to inherit a larger proportion of their parents' property and assets than the surviving children of married same-sex parents. Same-sex couples may attempt to protect their families from higher tax rates by transferring title to assets during their lifetime, this may, however, subject these families to the gift tax.¹⁷ Some same-sex couples choose to create living trusts¹⁸ to avoid this double taxation. Creating a trust is expensive and complicated and will likely result in significant fees for accountants and attorneys that many families cannot afford. A trust may also restrict how and when these assets can be accessed so it further limits the ability of LGBT families to make personal decisions that are best for them.

Brian and Ken, Mt. Kisco, NY

Brian Sheerin and Ken Weissenberg met in New York in 1997. In 2000, the couple registered for a domestic partnership in New York City, the only form of relationship recognition that was available to them at the time, so that Ken could insure Brian under his employer's health care plan. They jointly adopted Jacqueline, their first daughter, in 2000, and Nicole, their second, in 2002. In 2004, almost immediately after it became available to them, Ken and Brian were legally married in Massachusetts. When Brian and Ken moved from Manhattan to their home in the suburbs, their apartment was in Ken's name only. Opposite-sex married couples can exclude the income from the sale of a house on their federal income tax, but because Ken and Brian's marriage is not recognized by the federal government, they were forced to pay \$70,000 more in taxes than a similarly situated married opposite-sex couple would have paid that year.

Ken is a tax attorney and is intimately familiar with the extra federal tax burdens married same-sex couples must face because DOMA prevents federal recognition of their marriage. In order to

¹⁵ 26 U.S.C. § 1041.

¹⁶ 26 U.S.C. § 2056.

¹⁷ 26 U.S.C. § 2523.

¹⁸ *Inter vivos* trust (or "living trust") refers to a trust created and executed during the lifetime of a person. It is created to hold property for the benefit of another person. It is called a "living trust" because it is like a person's will but is prepared and goes into effect while the creator is living, not at the time of her death. Living trusts are created by an individual seeking to preserve his assets from taxation; however, assets preserved in living trusts conveyed upon the death of the creator naturally carry limitations and prohibitions more invasive than those of a general will.



avoid incurring some of these additional tax liabilities Ken and Brian have gone to great lengths and significant expense to create “living trusts.”

While their “living trust” will protect Brian and Ken’s joint property from double taxation, it cost them upwards of \$50,000 for lawyers and accountants to draw up the appropriate documents and will cause complications and hardship for the surviving spouse because they will have more limited access to the funds in the trust. Even with the additional complications and extra expense, Brian and Ken are lucky because they have the knowledge, expertise, and means necessary to protect their assets. While married opposite-sex couples inherit from their spouses tax-free, not all married same-sex couples are able to take the extra steps to protect their families that Brian and Ken were able to take.

DOMA Increases Administrative and Financial Burdens to Both Employers and Employees

DOMA imposes additional financial and administrative burdens on employers who choose to provide equal benefits to their lesbian and gay employees. For example, if an employee is fortunate enough to work for an employer who provides benefits for same-sex spouses and that employee adds her wife to her employer-provided health insurance, that benefit is considered “imputed income” and is taxed by the federal government.¹⁹ Married opposite-sex couples who take advantage of this same employer-sponsored health insurance are able to access this benefit tax-free. Recognizing how unfairly DOMA treats their lesbian and gay employees, an increasing number of employers have begun “grossing up” these employees to mitigate the cost of the increased tax burden to the employee. This results in even higher administrative and financial burdens on the employer because not only are they paying their employees more but the employer is now subject to higher payroll taxes for these employees.

Kathy and Julie, Laguna Niguel, CA

Kathy Kahn and Julie Johnson live in Laguna Niguel, California. Together for 30 years, Kathy and Julie were married in California in October of 2008, during the brief window when the freedom to marry was available to same-sex couples in the state. Julie and Kathy have a son, Reign. Julie is a stay-at-home mom; Kathy is a ballet teacher and an instructor at a community college and feels fortunate that her employer provides benefits for same-sex spouses. If Julie and

¹⁹ See 26 U.S.C § 106 and PLR 9850011, 1998 PLR LEXIS 1650, Private Letter Ruling 9850011 4 (1998) (answering a question regarding the proper federal tax treatment of providing health benefits to same-sex domestic partners.) “(7) If a domestic partner covered under the Family Health Plan does not qualify as a spouse or dependent, the excess of the fair market value of the group medical coverage provided by the Fund to the domestic partner, over the amount paid by the employee for such coverage, is includible in the gross income of the employee under *section 61 of the Code*. . . . (9) The amount includible in the gross income of the employee by reason of the coverage of the domestic partner constitutes “wages” under *section 3401(a) of the Code* and is subject to income tax withholding under *section 3402 of the Code*. Such amounts also constitute “wages” within the meaning of *section 3121(a) of the Code* and *section 3306(b) of the Code* for FICA and FUTA purposes.”



Kathy and Julie were an opposite-sex couple, Julie would have access to Kathy's health insurance coverage tax-free. However, because DOMA prevents the federal government from recognizing Kathy and Julie's marriage, Julie's health insurance benefits are considered "imputed income." This results in a significantly higher tax burden for Kathy and costs her family approximately \$2,800 in additional tax dollars per year. This has made life more difficult for Kathy and Julie as they have stretched to live off of one income while raising their son. If DOMA were repealed, Julie and Kathy would no longer have to incur this additional tax burden.

Married lesbian and gay employees are prohibited from using their pre-tax flexible spending accounts to pay out-of-pocket medical expenses incurred by their same-sex spouses. Employees can use such accounts to pay medical expenses for "dependents," which is statutorily defined as a spouse, child or, other qualifying tax dependent.²⁰ DOMA limits the definition of "spouse" only to a person of the opposite sex who is a husband or a wife.

Emily and Sharon, Takoma Park, MD

Emily and Sharon met in early 2007 and were married in June, 2010 in Boston, Massachusetts. They both work in the public interest field – Emily for a small non-profit and Sharon for the federal government. Both women have access to medical flexible spending accounts which allows each of them to designate a specific pre-tax amount per year to be set aside to use to pay out-of-pocket medical expenses. The effect of this benefit reduces the federal tax on the amount set aside each year by about one-third. The yearly caps on flexible spending accounts are set by each individual employer. Because Emily works for a very small employer her yearly cap is \$2,400 while Sharon's is more than double that amount at \$5,000.

In January of this year Emily and Sharon started working with a fertility specialist to start their family. They decided to use an anonymous donor with Emily serving as the birth parent. The out-of-pocket expenses for office visits, medical testing and medications are significant and the \$2,400 in Emily's medical flexible spending account will run out quickly. Because of DOMA, Sharon is prohibited from using the funds in her flexible spending account to cover Emily's out-of-pocket medical expenses. A similarly-situated married opposite sex couple undergoing the exact same treatment from the same physicians would be able to use either (or both) the husband and wife's flexible spending accounts to cover any out-of-pocket expenses for either of them. DOMA is negatively impacting Sharon and Emily's ability to start their family.

²⁰ 26 U.S.C §§ 105, 106, 152(d).



One of the most significant pieces of pro-family legislation ever passed in this country is the Family Medical Leave Act (FMLA).²¹ FMLA requires public agencies and private employers

with 50 or more employees to offer 12 weeks of unpaid medical leave to care for a new child; an ill spouse, parent, or child; the employee's own illness; an injured service member; or other emergencies arising from deployment. DOMA does not require employers to provide these same protections for lesbian and gay employees. While a parent standing *in loco parentis* can take leave for a child with whom they share no legal or biological relationship – for example the child of a same-sex spouse or domestic partner,²² -- DOMA prevents employees from accessing FMLA leave to care for a same-sex spouse. This prohibition profoundly impacts LGBT families raising children. If a stay-at-home parent is sick, DOMA prevents the working spouse from accessing FMLA to care for him. This may result in a parent not getting the care that they need to recuperate, increased expenses for private at-home health care, and additional stress and strain on the family.

Naz and Lydia, Irvine, CA

Naz Meftah and her wife Lydia Banuelos have been together for more than 10 years. They registered as domestic partners as soon as the benefit became available to California residents back in 2001. They married in San Francisco in 2004, but were quickly informed that their marriage was not a legal one and would not be acknowledged by the state of California. In July of 2008, Naz and Lydia were married again – this time legally – in the state of California. They are one of approximately 18,000 same-sex couples who legally wed in CA before the passage of Proposition 8, which stripped the freedom to marry from same-sex couples in the state.

At the time of their 2008 marriage, Naz and Lydia had one son, born in 2007. Shortly after Naz and Lydia's 2008 marriage, they moved to Arizona where Lydia had secured a position as a pediatric ophthalmologist. Lydia was fortunate to be able to convince her new employer to provide her with access to spousal benefits so that she could add Naz and their son to her health insurance policy. While access to this important benefit was critical for their family, because the federal government refuses to recognize their marriage, Lydia had to pay taxes on this benefit as "imputed income."

Not too long after their move to Arizona, Naz became pregnant with triplets. Several weeks into her pregnancy Naz's doctor informed her that one of the fetuses did not survive. Given the complicating factors of her medical condition, Naz had to fly to California to see a specialist who could perform the necessary surgery to ensure the health of her and her two remaining unborn

²¹ Family Medical Leave Act, 29 U.S.C. § 2601 (West 1993, current through P.L. 103-3) and 29 CFR 825 (West 1993, current through P.L. 103-3).

²² Department of Labor, Wage and Hour Division, *Administrator's Interpretation No. 2010-3*, Clarification of the definition of "son or daughter" under Section 101(12) of the Family and Medical Leave Act (FMLA) as it applies to an employee standing "in loco parentis" to a child (June 22, 2010).



babies. Lydia's employer refused to allow Lydia to take time off to travel with Naz to California for the surgery, citing company policy that required employees to give 30 days' notice to access extended leave. And because the federal government does not recognize Naz and Lydia's marriage, Lydia was not able to access the critical federal benefit of FMLA leave to care for Naz during this time. Because of DOMA, Naz had to make the stressful and unpleasant trip to California alone. Lydia was unable to be with her during the traumatic and dangerous surgical procedure and was prevented from caring for Naz during the week she spent recovering in California after the surgery. No family should have to endure this kind of treatment at the hands of our federal government.

DOMA Hurts Children and Tears Apart Families

Social Security survivor benefits are available to opposite-sex spouses upon the death of their partner.²³ However, due to DOMA, same-sex partners cannot access these benefits. Surviving same-sex spouses are also ineligible for the Social Security one time death benefit.²⁴ Denial of these critical social safety nets can be devastating to the financial security of a family, especially if the primary earner dies and is survived her wife and children. The Social Security Administration has determined that non-legal, non-biological children can access survivor benefits upon the death of a parent,²⁵ but a family cannot survive on a child's benefits alone.

One of the cruelest ways in which DOMA impacts LGBT families is in the immigration context. DOMA prevents American citizens from sponsoring their same-sex spouses for immigration purposes. With 44% of same-sex bi-national couples raising children in America, the inability of these American citizens and their American-citizen children to ensure that their spouse or other parent can stay in the U.S. means an LGBT family must choose between tearing their family apart or leaving the country that they love.

Carmelyn and Lule, New York, NY

Carmelyn and Lule met in 2001 and were married in Connecticut in 2009. They welcomed their daughter, Zelleka Luz, in March 2010. Carmelyn is an attorney and Lule is a managing director with a large financial services firm. Lule was born in Ethiopia and came to the United States on a student visa to finish high school in 1991. She maintained her student status throughout college and was then hired by her current employer, who sponsored her for an H-1B visa. It was during

²³ 42 U.S.C. § 402.

²⁴ *Id.*

²⁵ Social Security Administration, *Memorandum Opinion for the Acting General Counsel*, Whether the Defense of Marriage Act Precludes the Nonbiological Child of a Member of a Vermont Civil Union from Qualifying for Child's Insurance Benefits Under the Social Security Act, The Defense of Marriage Act would not prevent the non-biological child of a partner in a Vermont civil union from receiving child's insurance benefits under the Social Security Act (October 16, 2007).



this time that Lule met Carmelyn and they began to build their life together. Several times over the years Lule's company experienced difficult financial periods and had to reduce their workforce. A job loss for Lule would have been catastrophic; she would have lost her H-1B visa and would have had to leave the country almost immediately.

Because DOMA prevents American citizens from sponsoring same-sex spouses for immigration purposes, Carmelyn is unable to sponsor Lule, so each time the company downsized they worried that they would be separated. Whenever Lule's employment situation became tenuous, the couple would tally all of their assets and begin planning to move to another country with more permissive immigration laws so they could remain together. They were ready to sacrifice the security of Carmelyn's job, their community and their family and friends. They were ready to give up their lives and leave the country they had both grown to call home to keep their family intact. Eventually, Lule's employer decided to sponsor her for a Green Card, providing Lule with the ability to live and work in the United States on a permanent basis. Because of the generosity of Lule's employer, Carmelyn and Lule can continue to raise their daughter in the U.S. without the constant fear of having to choose between tearing their family apart or staying together and leaving the country that they love.

Doug and Alex, Palm Springs, CA

Doug and Alex married in Connecticut in 2010 after over five years together. They currently live in Palm Springs, California, near Doug's two adult children who have grown to see Alex as their step-father. Alex is a Venezuelan citizen and is facing deportation for overstaying his visa, but if DOMA did not prevent the federal government from recognizing Alex and Doug's marriage, Doug could sponsor Alex for citizenship. Instead, Alex and Doug will have to choose between one or both of them leaving their children, perhaps permanently. This is a choice that no family should ever have to make.

DOMA Disrespects U.S. Servicemembers and Federal Employees

Shannon and Casey, Foxboro, MA

Shannon and Casey met in 1999 and married in Massachusetts in July 2010. Shannon is a Dual Status Technician with the Massachusetts National Guard: a federal employee who is required to be a part time Guardsperson. As part of her responsibilities, Shannon reports for work each day in her military uniform. Shannon has served our country honorably for more than ten years and has earned the Meritorious Service Medal and five Army Commendation Medals among other honors. She was deployed for a year after 9/11 and has served on shorter missions OCONUS. Shannon and Casey welcomed their twins, Grant and Gracie, in December 2010. In order to maximize their limited income and to best care for their newly-expanded family, Casey left her full-time tenured position as a high school teacher with the MA public school system. In making the decision to stay at home and raise their children, Casey not only sacrificed her career in

PO Box 206 Boston, MA 02133

p 617.502.8700 f 617.502.8701

visit us at www.familyequality.org



public service but the family also forfeited her benefits including her health insurance and her pension.

DOMA prohibits the provision of equal benefits to federal employees who are married to same-sex spouses. While Casey is ineligible for the majority of benefits that are available to opposite-sex spouses of federal employees (such as use of Shannon's medical flexible spending account, access to Shannon's pension, tax free access to Shannon's 403b plan, etc.) it is the lack of access to health insurance coverage that is proving to be the most significant challenge to the family.

Shannon is able to pay the family rate and cover both children on her federal employee health insurance. However, because DOMA prevents the federal government from recognizing Casey as a spouse, Shannon is unable to cover Casey on the same family health insurance plan. A similarly situated opposite-sex couple would be able to add a covered spouse to the family plan for no additional cost. Due to DOMA, Casey must now access the COBRA coverage offered by her former employer, costing the family an additional \$700 per month. This is an unwelcome expense that has a serious impact on their family finances as Shannon and Casey try to care for their twins and make ends meet on one income.

To offset this additional expense they must now incur for Casey, the couple applied for low cost MassHealth insurance (a benefit available at the state level to Massachusetts residents). Ironically, because Massachusetts recognizes Shannon and Casey's marriage, they had to include Shannon's income on the application, ultimately disqualifying Casey for this benefit.

Since Shannon is a member of the MA National Guard and is frequently "activated" or "put on military orders" she and Casey face additional burdensome hurdles in providing and caring for their family. For example, shortly after Grant and Gracie were born Shannon was activated for more than 30 days. This entitled Shannon to TRICARE, the military's health insurance. Again, the children were covered by this valuable benefit, but because DOMA prevents Casey from being recognized as Shannon's spouse, Casey was not eligible for coverage. Military spouses are also entitled to obtain military dependent ID cards which allow them access to base medical facilities, the commissary and other service privileges located on base. However, because Casey is not recognized as a spouse, she is not eligible for this ID card. What is most troublesome about this situation, however, is that it also means that when Shannon is deployed Casey cannot bring Grant and Gracie on base for their medical appointments or to access any of the other programs and services that the children – as military dependents – are entitled to. Our service members and their families already sacrifice so much for our country and the military is an institution that takes great pride in caring for its families. DOMA prevents the military from fulfilling this mission as it creates two distinct classes of families – those who are respected, validated and cared for in times of great stress and need – and those who are not.

PO Box 206 Boston, MA 02133

p 617.502.8700 f 617.502.8701

visit us at www.familyequality.org



Sarah and Christine, Arlington, MA

Sarah and Christine have been together for eleven years. They met in 2000 and were legally married in the Commonwealth of Massachusetts in 2007. In April 2011 they welcomed their first child, Darcy. Christine is an engineer and works for the Environmental Protection Agency. Sarah is a law professor with Suffolk Law School in Boston, MA. Sarah has a serious chronic health condition requiring expensive medications that without insurance would cost several thousands of dollars each month. A lapse in Sarah's coverage at any time would be financially catastrophic for the entire family.

Once Darcy was born, Sarah and Christine engaged in extensive and expensive financial planning to try to mitigate at least some of the inequities that DOMA creates for married same-sex couples and their children. However, regardless of how much planning they do, there are still federal benefits and safety nets that will be unavailable to them. For example, should Christine die before Sarah, Sarah would not be entitled to Christine's federal pension or any federal death benefits.

In addition to all of the ways in which DOMA harms their family generally, Sarah and Christine face additional obstacles because Christine is a federal employee. DOMA prevents Christine from accessing most of the benefits afforded to federal employees with opposite-sex spouses, the most valuable of which is family health insurance coverage. While Sarah and Christine would prefer to have a family health insurance plan to cover all three of them, DOMA prohibits Christine from adding Sarah to her plan. Christine must purchase a "family" health insurance plan to cover herself and Darcy, and Sarah must purchase a second health insurance plan through her employer. Even with a very generous health insurance employer contribution, Sarah and Christine must pay an additional \$160 per month in health insurance premiums to cover Sarah. When Darcy was born, Sarah and Christine contemplated having Sarah take a leave of absence from work in order to care for their newborn daughter, but because DOMA prevents Sarah from accessing Christine's federal employee health insurance plan they would have to pay out-of-pocket for Sarah's health care, an expense the family cannot absorb.

DOMA Creates a Climate that Breeds Confusion, Delay, and Denial

The tangible harms and direct impact of DOMA on LGBT families are clear. Due to this discriminatory law, married same-sex couples and their children are denied federal benefits and services, are assessed higher tax rates, and face additional financial, administrative and societal burdens. But there are additional indirect harms to families that are caused by DOMA as well. DOMA creates a climate ripe for animus and discrimination against LGBT families and emboldens those in both the public and private sector to disregard an LGBT family's rights to access programs, benefits, and services on which marital status has no bearing. Family Equality Council hears on a regular basis from LGBT families who experience this invidious

PO Box 206 Boston, MA 02133

p 617.502.8700 f 617.502.8701

visit us at www.familyequality.org



discrimination. Following are three examples of the indirect harms DOMA inflicts on LGBT families.

Susan and Sara, West Brookfield, MA

Susan Burns and her partner, Sara, are both legal, adoptive parents of their daughter Nina. When Nina tried to apply for federal student aid using the FAFSA²⁶ form, listing both of her legal parents as the form requires, she received a shocking and hurtful email from the Department of Education referring to her as an “orphan.” Her mother Susan spoke directly with personnel from the Department to explain that Nina has two legal mothers, but according to Susan the official “kept on referring to the Defense of Marriage Act” and was “confused” by the fact that Susan and Sara are both Nina’s legal parents. They asked uninformed and invasive questions that Susan “can’t imagine other adoptive parents being asked,” such as “who is the biological mother” when Susan had clearly indicated that Nina is adopted by both of her parents. Susan was finally able to clear up the confusion by asking Nina’s college for assistance with the FAFSA process. But the indignity and frustration of the process “added to the already tense experience of choosing colleges” and Susan and Nina are “not looking forward” to repeating the annual application process. Federal financial assistance is not dependent upon whether the student’s parents are married. Here, the existence of DOMA only served to confuse the employees of the Department of Education and to insult and degrade Nina and her family.

Brian and Ken, Mt. Kisco, NY

Brian and Ken encountered confusion and delay when they applied for their daughter Nicole’s social security card. Brian and Ken encountered several clerks who asked for proof of the adoption, doctor’s notes indicating that the pair was taking care of their daughter’s health, and utility bills to prove that they shared a residence. None of this information is required to apply for a social security card and it is not likely that an opposite-sex couple would have been asked to provide this documentation. While DOMA should not have been an issue in this instance, because DOMA exists many federal employees are confused about how DOMA applies and what benefits, programs, and services are affected. After four months and numerous visits to the Social Security Administration office, Brian and Ken were finally able to obtain Nicole’s card. DOMA created confusion and unnecessary delays. If not for DOMA, Brian and Ken would have been recognized as Nicole’s legal parents and the application would have been processed smoothly.

²⁶ The Free Application for Federal Student Aid, available online at <http://www.fafsa.ed.gov/fotw1112/pdf/PdfFafsa11-12.pdf> (last visited July 18 2, 2011).



Carmelyn and Lule, New York, NY

Some of the most horrible stories we have heard from our families center around serious health crises. Six weeks prior to her due date, Carmelyn – pregnant with her and Lule’s first child – suffered from severe preeclampsia and required an emergency c-section. Fifteen minutes before the surgery was to begin, there was confusion about Carmelyn’s insurance coverage. Because Lule covered Carmelyn on her employer’s health plan she immediately called her company’s headquarters office, located in Nebraska. Lule explained the situation and was able to verify that Carmelyn was indeed a covered beneficiary on Lule’s health plan. During the call, however, the Nebraska human resources representative told Lule that while Carmelyn was covered, the newborn child would not be covered under Lule’s health plan. This confused Lule because she had already received verification from her local human resources officer in New York that the new baby would be covered at the time of birth. Carmelyn was about to go in for an incredibly dangerous procedure and Lule was concerned for the health of both her wife and her unborn child. This news only served to add to Lule’s stress and anxiety level. When Lule asked the Nebraska office human resources representative to explain why the child would not be covered, his response was that since same-sex marriage is not legal in Nebraska, DOMA meant they did not have to cover the child. Knowing she was not going to resolve this issue with the uninformed representative in Nebraska, Lule cleared up the confusion with her employer in New York the following day. Carmelyn and baby Zelleka came through the surgery and today the family is happy and healthy. No one should ever have to endure the hostility and poor treatment that Lule and Carmelyn’s family had to endure – especially during a severe health crisis.

Respect for Marriage

DOMA effectively erases the existence of married same-sex couples in this country and creates two tiers of families: those who can access the 1,138 federal rights and responsibilities that come with the freedom to marry and those cannot. When married same-sex couples are prevented from accessing the bundle of rights offered through the federal recognition of marriage, married same-sex couples must then make other legal arrangements to try and protect their families and assets. This not only creates undue burdens on LGBT families but it also falls short of providing these families with the security afforded by these valuable federal benefits.

The number of LGBT families living in the United States grows larger each day. DOMA increases the financial burdens on these families through increased federal taxes and costly legal fees when couples attempt to fill in the gaps where they are unable to access the federal benefits and safety nets available to similarly situated opposite-sex married couples. DOMA breeds a climate of discrimination and animus that makes it more difficult for LGBT families to thrive. DOMA stigmatizes LGBT families and sends the message to the children being raised in these households that their families are not valued, that their parents are not respected, and that they are less worthy than other families. This is simply not the best that our country can do for these

PO Box 206 Boston, MA 02133

p 617.502.8700 f 617.502.8701

visit us at www.familyequality.org



children and their parents. Our Constitution requires that all of us be treated equally by our federal government. DOMA violates that Constitutional guarantee; the only way to right this injustice is to pass the Respect for Marriage Act and repeal the discriminatory so-called "Defense of Marriage Act" now.

Thank you,

A handwritten signature in black ink that reads "Jennifer Chrisler".

Jennifer Chrisler
Executive Director
Family Equality Council



How DOMA Hurts Americans: A Summary of the GAO Reports¹ on Section 3 of the Federal Defense of Marriage Act

Executive Overview

The Defense of Marriage Act (DOMA) was enacted in 1996, before any state began issuing marriage licenses to same-sex couples. DOMA has two substantive parts:

- Section 2 permits states to disregard the marriages of same-sex couples, even when the marriage is legally recognized in another state.
- Section 3 of DOMA provides a definition of “marriage” and “spouse” for purposes of all federal laws and programs. It states: “In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only the legal union of a man and a woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” 1 U.S.C. § 7.

This Summary focuses on Section 3 of DOMA and how it harms married same-sex couples in any of the states where their marriages are licensed or recognized in whole or in part. The federal government does not license marriages; it has always deferred in the past to a state’s determination of a person’s marital status to determine eligibility for the protections and responsibilities in those federal laws and programs that affect married persons. But DOMA overrides a state’s determination that a person is married, thus rendering spouses in a same-sex couple “single” and disqualifying them from federal spousal protections and responsibilities across the board.

The federal programs to which same-sex married couples are denied equal access represent some of the critical legal safety nets that couples count on when they marry, as they plan their lives and futures together, as they raise children and deal with hard times, and for which they contribute their U.S. tax dollars. In particular, this document addresses how:

- DOMA Threatens the Security of our Senior Citizens.
- DOMA Adds Costs to Businesses, Employers and Employees.
- DOMA Discriminates Against Taxpayers.
- DOMA Disserves Our Service Members and Veterans.
- DOMA Tears Apart Families and Hurts Children.

¹ Report of the United States General Accounting Office, GAO/OGC-97-16, Defense of Marriage Act (Jan. 31, 1997), at 1, available at <http://www.gao.gov/archive/1997/og97016.pdf>. In 2004, the Government Accountability Office updated its 1997 Report and found 1,138 federal laws implicated by DOMA. Rep. “GAO-04-353R Defense of Marriage Act - Update to Prior Report” (Jan. 24, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

Not surprisingly, some federal marital benefits are premised on the expectation that spouses mutually support one another and thus impose financial responsibilities on spouses. Benefits like Supplement Security Income, Medicaid and Medicare are “means tested” so that a spouse’s income is included as part of the recipient’s income in assessing financial eligibility for the program. Yet, due to DOMA, married same-sex couples do not face the same limitations as other married beneficiaries of these programs because the federal government ignores their marriages. Part of the reason why the Congressional Budget Office estimated that the federal government would save \$1 billion each year through 2014 if the federal government recognized marriages of same-sex couples nationwide is because of projected savings in those very programs, even as the federal government might spend more in areas such as Social Security and Federal Employee Health Benefits.

Some marital protections are non-pecuniary, but still critically important for those who need them. For instance, married persons enjoy the right under federal law to invoke the marital confidences and spousal privileges in federal court, *see* Fed. R. Evid. 501, the right to sponsor a non-citizen spouse for naturalization, *see* 8 U.S.C. § 1430, and to obtain conditional permanent residence for that spouse, *id.* § 1186b(2)(A).

Finally, married persons are also subject to a number of legal obligations, such as conflict-of-interest rules governing federal employment and participation in federally funded programs, *e.g.*, 5 U.S.C. § 3110, and restrictions on employment with or appointment to the judiciary, *see* 28 U.S.C. § 458.

I. DOMA Threatens the Security of Our Senior Citizens.

DOMA exacts substantial costs to older Americans as they near and enter retirement by stripping away the federal safety net that our senior citizens have depended on for generations to grow old with dignity and security.²

Social Security:

The Social Security program was created to provide for workers and retirees in their old age as well as to ensure that a worker’s family will have money to live on if the worker dies or becomes disabled. People are eligible for these invaluable protections only if they have paid into the system for a sufficient amount of time. DOMA denies the following protections to gay and lesbian retirees and widows/widowers.

- **Social Security Disability Benefits:** If a worker is eligible for disability benefits, a spouse and also a divorced spouse may qualify for up to 50% of the disabled worker’s benefit amount.³
- **Social Security Spousal Benefit:** When two people are retired and collecting Social Security, a lower earning or non-earning spouse can increase his or her benefit by up to one half of the higher earner’s payment by virtue of their marriage, as long as they meet age requirements and have been married at least 9 months.⁴

² DOMA’s impact on Medicaid and Medicare is beyond the scope of this summary.

³ 42 U.S.C. § 402 (b), (c).

⁴ 42 U.S.C. § 402 (b), (c). *See also* Social Security Online, Benefits for your spouse, <http://www.socialsecurity.gov/retire2/yourspouse.htm>.

- Social Security Benefit for Surviving Spouse: After death, an individual with a lower Social Security payment may receive his or her spouse's higher benefit, instead of his or her own benefit, as long as they are at least 60 years of age, had been married at least 9 months, and are not currently married to someone else.⁵ Even a divorced spouse benefits from this protection.⁶
- Social Security One Time Death Benefit: This is a one-time lump sum payment made to the surviving spouse or, if no surviving spouse exists, to a minor child of the deceased insured worker.⁷

Retirement benefits:

DOMA strikes at the heart of private spousal retirement protections. Most private retirement plans (whether provided by an employer or employee organization) are subject to a federal law known as ERISA (Employee Retirement Income Security Act) and the federal Internal Revenue Code.⁸ ERISA provides substantive rights to spouses.⁹

- Qualified Joint and Survivor Annuity (QJSA): Under ERISA, the default method of distribution to an employee with a defined benefit or money purchase pension plan is the joint and survivor annuity, unless the spouse affirmatively waives his or her right to receive the survivor annuity.¹⁰ Such an annuity provides a benefit to the retiree during his or her life, and 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 during his or her lifetime.¹¹ These annuity and spousal waiver protections are not required to be available to married same-sex couples and non-spousal annuitants, although an employer may draft a plan to provide annuity options with non-spousal annuitants.
- Qualified Pre-retirement Survivor Annuity (QPSA): Under ERISA, when an employee vested in a defined benefit or money purchase pension plan dies before retirement, an opposite-sex surviving spouse must be offered a QPSA, unless the spouse affirmatively waives his or her right to receive the QPSA. A QPSA generally is a 50% survivor annuity for the life of the surviving spouse. As with the QJSA, the QPSA and spousal waiver protections are not required to be available to married same-sex couples and non-spousal annuitants, although an employer may draft a plan to permit same-sex couples and non-spousal annuitants to receive a pre-retirement survivor annuity.
- Required Minimum Distributions: The tax law provides favorable treatment to a spousal beneficiary of most forms of retirement plans, allowing the spouse to defer the payment of death benefits (and associated taxes) from a decedent's plan until the spouse attains

⁵ 42 U.S.C. § 402 (e), (f).

⁶ *Id.*

⁷ 42 U.S.C. § 402 (i).

⁸ 29 U.S.C. §§ 1001 et seq.; *see also* Health Plans and Benefits, <http://www.dol.gov/dol/topic/health-plans/erisa.htm>.

⁹ 29 U.S.C. § 1002 (2) (employee pension benefit plan). The substantive rights include the right to: (1) approve, with respect to certain types of retirement plans, the method of distribution to the participant; (2) receive benefits in the event of the participant's death as a default beneficiary; and (3) share in the participant's benefits in the event of a divorce or legal separation.

¹⁰ 29 U.S.C. § 1055. *See also* 26 U.S.C. § 417 (spouse may consent to a different form of benefit, such as a lump sum payment).

¹¹ 29 U.S.C. § 1055(d); 26 U.S.C. § 417(b).

age 70½.¹² In contrast, because of DOMA, a surviving spouse of the same-sex whose decedent spouse was older will be required to commence distributions earlier than an opposite sex spouse, resulting in accelerated income and a loss of a valuable tax-deferral opportunity.

- Benefits Upon Divorce: As a general matter, benefits from a retirement plan that is subject to ERISA are reserved to the employee/retiree.¹³ But if that employee or retiree divorces, the retirement assets may be viewed as marital property and some or all may be awarded on a tax-free basis to a non-employee (former spouse) through a “Qualified Domestic Relations Order” (QDRO).¹⁴ Such an order is a court decree that relates to child support, alimony payment or marital rights of a former spouse. A procedure for allowing for the tax-free division of an IRA upon divorce or legal separation is also available.¹⁵ In each case, after any transfer, the non-employee spouse becomes responsible for income taxes on distribution.

Because of DOMA, same-sex couples have no access to a QDRO or other procedure for dividing retirement benefits upon divorce, making it difficult to fairly divide the marital property of a couple upon divorce, such as when one ex-spouse had been the primary earner and the other had primarily cared for children or other dependents.

Federal Civilian Retirement Benefits:

The Federal Employees Retirement System (FERS) and the Civil Service Retirement System (CSRS) provide certain retirement benefits to qualified federal retirees and their spouses, unless they are same-sex spouses.

- FERS provides automatic coverage for employees hired after 1983 and consists of a three-pronged approach to providing retirement security: Social Security, a “Basic Benefit Plan,” and a “Thrift Savings Plan.” All three of these options provide surviving spousal benefits upon the death of a qualified retiree, but do not provide benefits to a surviving spouse of the same sex as the employee.¹⁶
- CSRS covers all employees hired before 1984 who did not transfer into the FERS. It provides an annuity for a surviving spouse of an employee who died during employment¹⁷ or after retirement. However, gay and lesbian surviving spouses are not covered because of DOMA.¹⁸

Retirement Protections with “Spousal IRA”:

Married couples filing their income taxes jointly may fund an IRA for a non-working spouse, who thus may build retirement assets even while taking time out of the workforce to care

¹² 26 U.S.C. § 401(a)(9).

¹³ 29 U.S.C. § 1056(d)(1); 26 U.S.C. § 401(a)(13)(a).

¹⁴ 29 U.S.C. § 1056(d)(3); 26 U.S.C. § 401(a)(13)(B), 414 (p).

¹⁵ 26 U.S.C. § 408(d)(6).

¹⁶ For more detail about FERS and Social Security in general, *see* FERS: An Overview of Your Benefits, <http://www.opm.gov/forms/pdfimage/RI90-1.pdf>.

¹⁷ Retirement Facts 1: Civil Service Retirement System, at 6, <http://www.opm.gov/forms/pdfimage/RI83-1.pdf>.

¹⁸ *Id.* at 7.

for children or elderly parents.¹⁹ This ability does not exist for a non-income earning, same-sex spouse.

II. DOMA Adds Costs to Businesses, Employers and Employees.

In 2010, 86% of full-time U.S. workers in private industry had access to medical benefits, and 74% to an employer-provided retirement plan.²⁰ DOMA harms both employers and employees, by making it more difficult and costly for businesses to provide these benefits on an equal basis to married gay and lesbian employees.

Among the spousal benefits that employers are either prohibited from providing or are unable to provide their gay and lesbian married employees without incurring substantial administrative and financial burdens, are:

- **Tax-advantaged fringe benefits:** Employers may provide a variety of fringe benefits to employees, such as allowing an employee to use pre-tax dollars to pay health insurance premiums, or to fund a “flexible spending account” which is then used to reimburse certain medical costs with pre-tax dollars.²¹ The only persons for whom an employee can use such an account are “dependents” as defined by law, such as a spouse, a child, and other qualifying tax dependents.²²

As a result of DOMA, an employee cannot use any of these tax-advantaged benefits for his or her same-sex spouse, unless the spouse qualifies as a tax dependent. A spouse in a same-sex couple will not qualify as a dependent unless a number of requirements are met, including having little or no earnings.

- **Taxation of spousal benefits:** DOMA imposes discriminatory tax treatment that burdens both employers and employees. When a married employee receives employer-provided health benefits, the value of the health insurance for the spouse, child or other qualifying tax dependent is not subject to federal income tax even though such benefits are a form of compensation to the employee.²³ But as a result of DOMA, that exclusion does not apply to same-sex spouses; the employer and the employee must treat the fair market value of the spouse’s coverage as taxable income to the employee.²⁴ On average, this “imputed”

¹⁹ 26 U.S.C. § 219.

²⁰ METLIFE, 8th Annual Study of Employee Benefit Trends (2010), *available at* www.metlife.com/assets/institutional/services/insights-and-tools/ebts/Employee-Benefits-Trends-Study.pdf. Typically, these benefits are offered through an “employer sponsored group health plan,” or “group health plan.” See 29 U.S.C. § 1167(1).

²¹ See generally 26 U.S.C. § 125(a) (cafeteria plans; pre-tax treatment limited to opposite sex spouses or dependents, as defined under 26 U.S.C. § 152). Amounts received by an employee, directly or indirectly, from a health or accident plan or through a “flexible savings account” are excluded from gross income under 26 U.S.C. § 105.

²² Married employees with spouses of the same sex cannot use these benefits for a spouse by using pre-tax wages unless the spouse is also a tax dependent. For these purposes, a tax dependent is someone who lives in the same household as the taxpayer and the taxpayer furnishes more than one-half of the cost of maintaining such household during the taxable year. 26 U.S.C. §§ 105, 106, 152(d).

²³ 26 U.S.C. § 106.

²⁴ See Private Letter Ruling (“PLR”) 200524016, 2005 PLR LEXIS 278 at *23-24 (Mar. 17, 2005); PLR 200339001, 2003 PLR LEXIS 879 at **9-11 (June 13, 2003); PLR 9850011, 1998 PLR LEXIS 1650 at*10-13 (Sept. 10, 1998); PLR 9717018, 1997 PLR LEXIS 85 at *11-12 (Jan. 22, 1997).

income requires that employees with partners pay \$1,069 more annually than married employees with similar coverage.²⁵

For businesses and employers, determining and recording the amount of “imputed” income due to spousal health coverage adds administrative costs and burdens to payroll systems. There are also increased payroll taxes since employers pay a portion of federal social security (FICA) and unemployment (FUTA) taxes based on employee’s wages.²⁶

A growing number of businesses, including Google, Credit Suisse, JetBlue, and Cisco, have begun reimbursing their gay and lesbian employees for the additional tax burden they must pay due to DOMA’s unfair treatment of their spousal health benefits as taxable income.²⁷ These companies incur even greater costs by reimbursing their employees for the federal government’s discrimination and also paying additional payroll taxes on those reimbursements.

- Family Medical Leave: The Family Medical Leave Act (FMLA) provides 12 work weeks of unpaid leave in any 12-month period to a spouse with a “serious health condition.”²⁸ Because of DOMA, FMLA does not require employers to provide the same protections for gay and lesbian employees. This defeats the FMLA’s goal of helping workers balance family and work commitments, although some employers take on the burden of crafting “workarounds” to provide access to leave.

Generally speaking, access to health coverage through a spouse’s plan is a major benefit of marriage. Unfortunately, many employers refuse to provide spousal health insurance to their gay and lesbian employees, citing DOMA as their reason.

- Health Benefits and “ERISA Plans”: Most large employers as well as unions and employee organizations provide health coverage through “self-insured” arrangements, and, under present law, are exempt from state laws regulating employee benefit plans. These self-insured entities are governed by the terms of the plan document as well as by ERISA.²⁹

Regulation of benefit plans by ERISA rather than by state law has important consequences for married same-sex couples. In contrast to state insurance contracts that recognize same-sex spouses, self-insured plans have the discretion to provide coverage to employees with spouses of the same sex, or not to, even as they cover other married employees.³⁰ Some self-insured entities have chosen not to provide the same coverage for

²⁵ See Center for American Progress & UCLA Williams Institute, *Unequal Taxes on Equal Benefits*, at 7 (Dec. 2007).

²⁶ *Id.* at 5-7.

²⁷ See generally <http://bucks.blogs.nytimes.com/2010/12/14/a-progress-report-on-gay-employee-health-benefits/>.

²⁸ 29 U.S.C. § 2612(a)(1)(A)-(D). FMLA covers many, but not all employers. See, e.g. 29 U.S.C. § 2611(4)(A)(i) (FMLA applies to employer “who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year”); 29 U.S.C. § 2611(2)(B)(ii) (worker is not an “eligible employee” if the employee is at a worksite with less than 50 employees and the employer has less than 50 employees within 75 miles of that worksite).

²⁹ 29 U.S.C. §§ 1001 et seq.; see also Health Plans and Benefits, <http://www.dol.gov/dol/topic/health-plans/erisa.htm>.

³⁰ See, e.g., New Jersey Civil Union Review Comm., First Interim Report of the New Jersey Civil Union Review Commission, February 19, 2008, <http://www.state.nj.us/lps/dcr/downloads/1st-InterimReport-CURC.pdf>.

same-sex spouses and point to their interest in conforming to the federal definitions of “marriage” and “spouse” in DOMA as the basis for their decision.³¹

In addition, there are a number of health insurance-related spousal benefits that employers are otherwise required to provide to their employees on an equal basis, unless that married employee is gay or lesbian. These include:

- Continuing Health Coverage: COBRA requires private employers with 20 or more employees to offer continued coverage for a defined period of time to employees and their covered dependents under certain circumstances, such as job termination, death and divorce.³² DOMA excludes married gay and lesbian couples from automatic protection, leaving it up to the individual employer to decide on continuing coverage.
- Open Enrollment Periods: Under “HIPAA” (Health Insurance Portability and Accountability Act), marriage is a “qualifying event” that allows an employee to immediately add a new spouse to his health plan if the health plan allows for spousal coverage.³³ Upon marriage to a spouse of the same sex, however, the employee must defer enrolling for coverage until the annual open enrollment period.
- Hardship Distributions From Retirement Accounts: In emergencies, an employee may use a pre-retirement “hardship distribution” from a retirement plan (such as a 401(k) plan) to pay a spouse’s medical expenses. Married same-sex couples facing the same emergencies do not have this automatic protection, although some employers assume the burden of crafting their plans to permit pre-tax hardship distributions for a “primary beneficiary” designated by the participant.³⁴

Finally, due to DOMA, federal employees are denied certain spousal employment benefits, including:

- Federal Employee Health Benefits: The Federal Employees Health Benefits Program (FEHB) is the key program providing health benefits (including dental, vision, and participation in Health Care Flexible Savings Accounts, among others) to federal employees, retirees and their survivors. A “member of family” includes “the spouse of an employee or annuitant.”³⁵ Under existing law and regulations, the spouse of an employee who selects “Self and Family” coverage is automatically enrolled for purposes of the FEHB program and receives health care coverage.³⁶ All of these protections are denied to the employee for the benefit of his or her spouse of the same sex.

³¹ Cf. Anthony Faiola, Civil Union Laws Don’t Ensure Benefits, Wash. Post, June 30, 2007, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/29/AR2007062902201.html> (references situation where Federal Express refused to provide benefits to employees with same-sex partners in New Jersey on the basis of federal law while similarly providing benefits in California as a result of specific legislation signed into law to mandate coverage by employers doing business with the state).

³² Continuation of Health Coverage-COBRA, *available at* <http://www.dol.gov/dol/topic/health-plans/cobra.htm>. Since COBRA is a right available through federal law, DOMA allows employers to deny COBRA continuation coverage to same-sex spouses.

³³ Health Insurance Portability and Accountability Act, 29 U.S.C. §§ 1181-1183. *See also* Portability of Health Coverage, *available at* <http://www.dol.gov/dol/topic/health-plans/portability.htm>.

³⁴ IRS Notice 2007-7 (Jan. 27, 2007); *see also* Pension Protection Act of 2006, (P.L. 109-280).

³⁵ 5 U.S.C. § 8901(5).

³⁶ FEHB For Dependents, *available at* <http://www.opm.gov/insure/health/eligibility/dependents.asp>. *See also* 5 U.S.C. §§ 8701-8914.

- Health Benefits – Continuation after Death and Divorce: Family health insurance through the FEHB program continues for the family as long as a spouse or dependent child receives a survivor benefit.³⁷ Some divorced spouses may retain FEHB coverage indefinitely as long as they pay for the coverage,³⁸ while others can retain coverage for 36 months as long as they pay the premiums and an administrative fee.³⁹
- Family Leave: Most federal employees may use up to a total of 12 administrative workweeks of sick leave each year to care for a family member with a serious health condition. Spouses are included as family members.⁴⁰
- Compensation for Work-Related Injury or Death: If a federal employee becomes disabled from a work-related injury, the employee is paid 33% of his or her salary if the employee has no dependents, and 75% if the employee does have dependents, such as a spouse.⁴¹ If death results from the injury, a surviving spouse receives either 50% of the deceased employee's salary, or 45% plus another 15% for each additional child.⁴²

III. **DOMA Discriminates Against Taxpayers.**

The 2004 GAO report identifies a total of 198 statutes involving marital status and taxation.⁴³ DOMA essentially forces the IRS to ignore reality and pretend that gay and lesbian married couples are single individuals or a head of household for purposes of taxation. The following are just a few examples of how DOMA discriminates against gay and lesbian taxpayers.

Income Taxation:

- Filing Status: Marital status is the central consideration in determining filing status, as only married couples have the option to file joint or separate returns.⁴⁴ Only married couples filing jointly may pool deductions on such a return, such as the deduction for uncompensated medical expenses to meet the required threshold for a federal tax deduction.⁴⁵ Yet, DOMA forces gay and lesbian taxpayers to disrespect their very own marriages when they complete and sign their federal forms by requiring married same-sex couples to file their federal tax returns as unmarried persons. No one likes being compelled to tell an untruth, even if it is a lawful one.

³⁷ OPM-Federal Retirees – FAQ: Death Benefits, *available at* <http://www.opm.gov/retire/faq/post/faq4.asp#survivingspouse>.

³⁸ FEHB Continuation Coverage for Former Spouses, *available at* http://www.opm.gov/insure/health/eligibility/former_spouses.asp.

³⁹ FEHB Frequently Asked Questions About Divorce, *available at* <http://www.opm.gov/insure/archive/health/qa/qa.asp?divorce#15> (no gay or lesbian married federal employee or his or her divorced or surviving spouse has these benefits).

⁴⁰ 5 U.S.C. §§ 6382-6383. *See also* Sick Leave to Care for a Family Member, *available at* <http://www.opm.gov/oca/leave/HTML/12week.asp>.

⁴¹ U.S. Department of Labor, Employment Standards Administration, Division of Federal Employees' Compensation, CA-11: When Injured at Work: Information Guide for Federal Employees, *available at* <http://www.dol.gov/owcp/dfec/regs/compliance/ca-11.htm>.

⁴² 5 U.S.C. § 8133.

⁴³ Report of the United States General Accounting Office (1997), *supra* note 3, at 5-6, 11.

⁴⁴ 26 U.S.C. § 6013.

⁴⁵ 26 U.S.C. § 213 (uncompensated medical expenses of the taxpayer, his or her spouse, or his or her dependents are deductible from income to the extent that such expenses exceed 7.5 percent of the taxpayer's adjusted gross income). The taxpayers must file as "married filing jointly" in order to pool such deductions. 26 U.S.C. § 6013.

- Tax Preparation: DOMA also makes tax preparation complicated and expensive. Like others, married same-sex couples typically commingle their finances and share expenses. However, for tax reporting, DOMA requires them to unwind what is joint and re-allocate expenses on an individual basis.

In states that respect the marriages of same-sex couples, those couples must file their state tax returns under the correct married status. However, some items on a “married” state return require the taxpayer to have a married federal return in place first. This means that married same-sex couples must still prepare a *pro forma* “married” federal return (that is never actually filed because the IRS cannot accept due to DOMA) in order to complete their state income taxes returns correctly. Preparation of a federal “dummy” return can be as significant additional expense.

Of course, some married same-sex couples will pay more in federal income taxes when the federal government respects their marriages because of the so-called “marriage penalty.” Typically, spouses who earn comparable amounts will pay more tax than if they had filed two returns as unmarried persons. *But see* Section V, *below*. The 2004 CBO Report analyzing the budgetary impact of federal recognition of marriages between persons of the same sex estimates that federal individual income tax and estate tax revenues would actually increase between \$400 million a year to \$700 million per year if DOMA did not mandate the nonrecognition of marriages of same-sex couples.⁴⁶

- Divorce Taxation: Beyond division of retirement accounts (*see above*, Section I), tax laws help a married couple unwind their economic partnership and divide their marital assets equitably during a divorce, without extra tax burdens.
 - Property transferred between spouses due to a divorce is not taxable.⁴⁷ But if a same-sex couple divorces, transfers of the home and other assets are taxable.
 - If alimony (also known as “spousal support”) or separate maintenance payments are ordered to be paid to a former spouse, the amounts paid are deductible to the person making the payments on his or her tax returns, thereby lowering the amount of tax due.⁴⁸ None of these exemptions from taxation extend to same-sex divorced couples as a result of DOMA.

Gift and Estate Taxation:

- Transfers between Spouses: Spouses have an unlimited ability to make gifts and transfer property to one another without incurring taxes. But this is not true for same-sex married spouses because of DOMA.⁴⁹ As a practical matter, a homeowner may be reluctant to make his or her same-sex spouse a joint owner of the home because of the gift tax consequences.
- Bequests to Surviving Spouses and Estate Tax: The estate tax marital deduction allows a full deduction from an individual's gross estate tax equal to the fair market value of any

⁴⁶ The Potential Budgetary Impact of Recognizing Same-Sex Marriages (June 1, 2004), *available at* <http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf>. The CBO reaches this result by assuming access to equal marriage in all 50 states and the recognition of those marriages by the federal government.

⁴⁷ 26 U.S.C. § 1041 (no gain or loss realized on transfers between spouses related to divorce).

⁴⁸ 26 U.S.C. § 215 (a).

⁴⁹ 26 U.S.C. § 1041.

property passing to the decedent's spouse.⁵⁰ This marital deduction lets married couples postpone the federal estate tax that otherwise would have to be paid on a married person's estate by deferring any tax on property that passes to the surviving spouse until the surviving spouse's death. DOMA strips away this crucial deduction from surviving gay and lesbian spouses.

IV. DOMA Disserves Our Service Members and Veterans.

A critical injustice created by DOMA is the discrimination imposed on married gay and lesbian service members and veterans. The following are invaluable protections that DOMA denies to our service members and veterans.

Service Members:

- Health Care: Gay and lesbian spouses of qualified active duty military, active duty service families, and retirees are denied health coverage through TRICARE, the Department of Defense's managed health care program, due to DOMA.⁵¹
- Retirement: Members on active duty for 20 years or more are eligible for retirement under a number of different systems that depend on the date the retiree first entered the military. Surviving spouses generally receive 55% of the retired pay under the Uniformed Services Survivor Benefit Plan or one of its corollaries, which is denied to same-sex surviving spouses due to DOMA.⁵²
- Death Gratuity: A one-time non-taxable cash payment of \$100,000 is made in the event that a service member on active duty or in a variety of other circumstances dies. It is paid to survivors in a prescribed order, starting with the surviving spouse, unless that spouse is gay or lesbian.⁵³

Veterans:

The 2004 GAO found 104 statutes related to marriage and veterans, none of which apply to married gay and lesbian veterans. All of these benefits are denied to the spouse or surviving spouse of a gay and lesbian veteran due to DOMA. A sampling is below.

- Death Benefits: There are several spousal benefits related to a veteran's death. If the veteran's death is service connected, the surviving spouse may choose either monthly dependency and indemnity compensation payments or a death pension.⁵⁴ Such a spouse is also entitled to a one time payment, and if there is no spouse, it is provided to the next of kin.⁵⁵

⁵⁰ I.R.C. § 2056 (a) (bequests, etc., to surviving spouse).

⁵¹ *TRICARE Eligibility*, available at

<http://www.tricare.mil/mybenefit/home/overview/Eligibility/WhoIsEligible/ActiveDutyAndFamilies>.

⁵² *Spouse Coverage*, http://www.defenselink.mil/militarypay/survivor/sbp/04_cost_spouse.html.

⁵³ 10 U.S.C. 1475-1476. *See also*, *Death Gratuity*,

<http://www.military.com/benefits/survivor-benefits/death-gratuity>.

⁵⁴ 38 U.S.C. §§ 1311 (entitlement to monthly dependency and indemnity compensation), 1317 (survivor's choice regarding benefits).

⁵⁵ 10 U.S.C. § 1477(b) (automatic distribution of benefit to spouse in the absence of any designated recipient). Note that a service member may designate someone to receive this benefit under §§ 1475 or 1476 even if not legally related to the eligible individual.

In some instances, death pensions may be available to low-income survivors of service members.⁵⁶ “Dependency and Indemnity Compensation” or “Death Pension” is available when the veteran was 100% disabled for a period of 10 or more years immediately prior to death and the surviving spouse is income eligible.

- Disability Benefits: Veterans with at least a 30% disability are entitled to increased disability compensation if they have a spouse.⁵⁷ In 2010, that amount was \$150/month.
- Other Allowances: There is an allowance for spousal benefits when a service member has disappeared.⁵⁸
- Other Benefits: There are a variety of benefits that flow to spouses by virtue of being married to a veteran. These include:
 - Being interred at military cemeteries with the deceased veteran, if the veteran is eligible;⁵⁹
 - Educational assistance for spouses, including payments for college education and training;⁶⁰
 - Job counseling, training and placement services for the spouses of veterans;⁶¹
 - Employment preferences with the federal government for widows and widowers as well as certain disabled veterans;⁶² and
 - Medical care from the government for spouses of certain veterans.⁶³

V. DOMA Tears Apart Families and Hurts Children

All of the harms described above not only harm same-sex married couples but any children they may have. Denying federal marital protections to the parents affects the economic stability of the entire family. Just a few examples include:

- Social Security Parent Benefits: Sometimes tragedy strikes and a parent dies in his or her working years. The spouse of a qualified deceased worker may be entitled to a benefit as a spouse (“parent’s benefits”)⁶⁴ in addition to Social Security payments for the children through age 18 (“children’s benefits”). Children may be 19 if still enrolled full time in primary or secondary school or 22 if diagnosed with a disability.⁶⁵ Gay and lesbian parents who are married to a deceased worker are not eligible for this crucial protection.
- Federal Income Taxes: Many married same-sex couples have children, and in those families, some have only one working parent or a parent or parents working a reduced schedule in order to care for those children. These families are the ones most likely to “benefit” from being able to file their taxes jointly as “married” rather than as an

⁵⁶ 38 U.S.C. § 1543 (net-worth limitation on non-service connected death pension).

⁵⁷ 38 U.S.C. § 1115.

⁵⁸ 38 U.S.C. § 1158.

⁵⁹ 38 U.S.C. § 2402.

⁶⁰ 38 U.S.C. § 3501.

⁶¹ 38 U.S.C. § 4101 (establishing eligibility of spouses).

⁶² 5 U.S.C. § 2108.

⁶³ 38 U.S.C. § 1781.

⁶⁴ 42 U.S.C. § 402 (g).

⁶⁵ 42 U.S.C. § 402 (d).

“individual” or “head of household.” However, these couples pay more in federal income taxes than identically-situated taxpayers whose marriages the federal government respects, thereby taking money away that could be used for the family’s needs.

Most harmful to children is when DOMA literally tears a family apart because one parent is not a lawful permanent resident of the United States. Although family unity has been a staple of our immigration law since at least 1952,⁶⁶ DOMA withholds important protections to gay and lesbian families, some of whom are parents to children living in the United States.

- Immediate Relative Spousal Visas: A citizen of the U.S. may file a petition⁶⁷ for an “immediate relative” visa for a non-citizen spouse, unless that spouse is gay or lesbian due to DOMA.⁶⁸ Immediate relatives are not subject to any direct numerical limitations on entry visas.⁶⁹
- Naturalization for Spouses of U.S. Citizens: A U.S. citizen’s spouse, who has obtained the status of lawful permanent resident, may become a United States citizen if the spouse has: (1) continuously resided in the United States for at least 3 years since being admitted for permanent residence; (2) lived “in marital union” with the citizen spouse during that 3-year period; (3) been physically present in the United States for periods totaling at least 18 months of that 3-year period; (4) continuously resided in the United States from the time of application for citizenship to admission; (5) for all relevant times been a person of good moral character; and (6) complied with all other requirements for naturalization.⁷⁰ This invaluable protection to keep a family together in the same country is denied to same-sex married couples due to DOMA.

Conclusion

While the breadth of DOMA’s harms is breathtaking as laid out in the 1997 and 2004 GAO reports, when one considers the groups of individuals who are hurt the most – including senior citizens, service members and veterans, taxpayers, employers and employees, and families and children – the stark picture of DOMA’s discrimination comes into focus. DOMA is counterproductive in that it burdens the ability of married gay and lesbian Americans to grow old with dignity and security, fulfill their constitutional obligation as citizens and taxpayers, and protect their families and children.

⁶⁶ See, e.g., *Fornalik v. Perryman*, 223 F.3d 523, 525 (7th Cir. 2000) (“United States immigration law ... sets family unity as one of the principal goals of the statutory and regulatory apparatus”).

⁶⁷ Form I-130 “Petition for Alien Relative” (Rev. 06/05/02) Y (Fee Change 01/21/05), available at <http://www.uscis.gov/files/form/i-130.pdf>.

⁶⁸ 8 U.S.C. § 1154(a)(1)(A)(i), (b) and (c) (the right to file a petition and investigation of facts); 8 U.S.C. § 1151(b)(2)(A)(i) (“Immediate relative” means “the children, spouses and parents of a citizen of the United States”). See also 8 CFR §§ 103.2, 204.1, 204.2 (general information about immediate relative and family-sponsored petitions).

⁶⁹ See 8 U.S.C. § 1151(b).

⁷⁰ 8 CFR § 319.1. For other circumstances in which spouses of U.S. citizens can be admitted to citizenship, see generally 8 U.S.C. §§ 1430(a), (b), (d), (e) (married persons and employees of certain non-profit organizations); 8 CFR §§ 319.2, 319.3.

Kate O’Hanlan, M. D.
F. A. C. O. G., S. G. O., F. A. C. S.
Gynecologic Oncology Associates
4370 Alpine Road, Suite 104
Portola Valley, CA 94028-7927

Phone: (650)-851-6669

ohanlan.com

FAX: (650) 851-9747

**REVIEW OF LIBRARY OF CONGRESS LITERATURE
AND HEALTH POLICY REGARDING
HOMOSEXUALS AND ACCESS TO CIVIL MARRIAGE**
(Testimony to Judiciary Committee, July 17, 2011)

I. Medical science is unanimous in endorsing absolute equality for same-sex couples, including access to civil marriage.p 1

II. Biologic Origin of Sexual Orientation: The evidence it is not a choice to be homosexual.....p 3

III. Frequently asked questions with scientifically accurate answers.....p 8

This nation’s premier medical associations representing over 400,000 specializing in mental health, psychological health, women’s health and family health have reviewed the research and issued policy statements **endorsing equal access to civil marriage** because it would improve mental and physical health and family health, and harm no one. (1)

- The [American Psychiatric Association](#) and [American Psychological Association](#) says it would “promote mental health”(2) and “well being.”(3)
- The [American Academy of Pediatrics](#) confirms that children of homosexual couples have exactly similarly healthy developmental outcomes as those of heterosexual couples,(4) say that same-sex marriage “would further strengthen their families” with the social, psychological, and financial benefits and responsibilities that are deemed so important for children of heterosexual couples.(4)
- The [American Medical Association](#) confirms that homosexuality is not learned, contagious, or imposable, but it is innate and unchangeable(5, 6) with no associated mental pathology, criminality, or harmfulness. “The American Medical Association: (1) recognizes that denying civil marriage based on sexual orientation is discriminatory and imposes harmful stigma on gay and lesbian individuals and couples and their families; (2) recognizes that exclusion from civil marriage contributes to health care disparities affecting same-sex households; (3) will work to reduce health care disparities among members of same-sex households including minor children; and (4) **will support measures providing same-sex households with the same rights and privileges to health care, health insurance, and survivor benefits, as afforded opposite-sex households.**(7)

- The [American College of Obstetricians and Gynecologists, District IX](#), views sexual orientation “as neutrally as we view handedness, skin color or any other biological trait: without discrimination.”(8)

The science is unambiguous and unanimous in endorsing the absolute equality of homosexuals, including marriage equality, for the betterment and health of Americans.

The [Child Welfare League of America](#) and the [American Academy of Child and Adolescent Psychiatry](#) issued policy stating that gays and lesbians have equal parenting skills, child-centered concerns and parent-child attachments.” (9, 10) Research confirms that their children have equally healthy development and outcomes, but would benefit from having two legal parents, especially in the event of the loss of a parent from divorce, death, or disability.

The [National Association of Social Workers](#) has endorsed equal access to civil marriage because same-sex couples will have similar rights for the responsibilities they already undertake for each other.”(11) Marriage will increase the number of families covered by health insurances, and decrease the number of state dependents. More people will have routine and preventive care, reducing disease burden and improving self-care. Clinicians can give more accurate care if they know the orientation. Stigma will decrease, as will the resultant psychic distress. Families will be more accepting and supportive of their children, and these youth will experience less school violence and less suicidality.

The [American Anthropological Association](#), experts in world culture and tradition, explicitly states that “...more than a century of anthropological research provides no support whatsoever for the view that either civilization or viable social orders depend upon marriage as an exclusively heterosexual institution. Rather, anthropological research supports the conclusion that a vast array of family types, including families built upon same-sex partnerships, can contribute to stable and humane societies.”(12)

Stanford University Medical Faculty Senate and the University of California Medical School Faculty Senate both endorsed marriage access to same-sex couples in 2011.

More than seventy years of published scientific research confirm that sexual orientation and gender identity are innate and immutable; as biologic and congenital as race and gender.(13, 14) This scientific evidence demands that sexual orientation be viewed as neutrally as we view handedness, hair color, or any other biologically-conferred trait.

II. Biologic Origin of Sexual Orientation: evidence that it is not a choice, with Library of Congress references

During the first trimester of pregnancy, fetal brain circuitry is permanently organized by the influence of various hormones and hormone-like substances which influence innate thoughts, abilities and behaviors that children gradually express as a sexual orientation and gender identity.(15) Any subtle or not-so-subtle exposure to androgenic substances during early gestation of a 46XX fetus can influence neural patterns in the phenotypic female child to manifest as more active play patterns, a slightly masculinized somatic skeletal and neural structure, behavioral and biophysiologic skills, gynephilic sexual orientation, and possibly confer a male gender identity. (14, 16-19)

Congenital adrenal hyperplasia (CAH) provides evidence for these effects in humans, and demonstrates the biological effects of prenatal hormones on sexual orientation and gender identity. CAH is a condition in which an enzyme (C-21 hydroxylase) in the cortisone synthesis pathway is missing or dysfunctional, resulting in buildup of precursor androgens in the fetal blood. Female infants with this condition can have ambiguous genitalia, or overt virilization of their external genitals. Since 1968, 13 published studies revealed that 20-50% of females with CAH will identify as lesbian or bisexual in adulthood.(14) A smaller proportion will come to recognize a male gender identity, particularly when their CAH was the more severe salt-wasting type.(19) Female youth with CAH also have more male-like active play patterns, and some of the skeletal changes of boys.(16)

Homosexual orientation is also more frequent among women who had prenatal exposure to the complex steroid diethylstilbesterol,(20) and those with polycystic ovarian syndrome.(21) Further evidence of prenatal androgen exposure influencing female's sexual orientation toward homosexual is seen among females who were gestated with a fraternal male co-twin.(22, 23) These girls have been shown to have more aggressive play patterns during childhood, male like somatic bone structure, and male-like brain function,(24) and more likely to identify as lesbian or transgender later in life.

Female to male transgender individuals have been shown to have higher adult androgen levels, more polycystic ovarian syndrome, and more histories of congenital adrenal hyperplasia.(25, 26) There are many endogenous and exogenous sources of androgen-like substances measurable in human blood, from maternal adrenal steroid elevations due to high stress(27), to subclinical variations of fetal C-21 hydroxylase concentration or efficiency (28), as well as anabolic steroids ingested from fish, poultry or beef (29). No genetic transmission has been observed in families with homosexual females.(30)

Among males, a genetic factor may account for as much as one fourth of men with homosexual orientations.(31, 32) Transmission of sexual orientation could be affected by genetic or epigenetic factors acting on the x chromosome (33) or on autosomal genes such as 7q36, 8p12 and Xq28 in males (34).

Prenatal hormone variability also appears to play a role in male sexual orientation and gender identity. Variable timing or concentration of the late first trimester spike in androgen secretion may result in a males having androphilic thought patterns, an androphilic orientation or female identity. Over 20 years of studies document that increasing fraternal birth order affects male

sexual orientation, likely as a result of maternal immunization processes from antibody development to circulating fetal male proteins, thereby reducing synthesis of androgens.(35-37) Severely reduced prenatal androgen effects in genetic males due to absence or defects in the androgen receptor, as in Androgen Insensitivity Syndrome (AIS), have partial or complete bodily feminization and results in individuals who are psychologically and socially female, and androphilic.

Homosexuals and transsexuals have been repeatedly recorded to be statistically significantly more like the opposite sex in their voices (38), phonation (39), visuospatial ability (40), spatial memory (18), spatial processing and mental rotation (41), motor skills (42), left-handedness (43, 44), otoacoustic function (45, 46), gait (47), hand anatomy (48), and brain anatomy (17, 49). It is doubtful that all homosexuals or transsexuals were influenced by some form of first trimester androgen excess or deficit, but the evidence is compelling that fetal neuroendocrine influences are the mediators of orientation and identity. Because prenatal hormone variations have been repeatedly highly correlated with so many neurological, physiological and anatomical traits as well as sexual thought patterns, sexual orientation, and gender identity, they are all considered to share this mutual biological causality.(50)

The various patterns of preferred partner characteristics of all humans confirms that brain differentiation is neither discrete nor categorical, but rather our sexual orientations and gender identities manifest as a variety of patterns on a spectrum of innate human sexual expressions.(51)

In recognition of the scientific evidence, the American Academy of Pediatrics and the American Psychiatric Association, The American College of Obstetricians and Gynecologists IX, the American PsychoAnalytic Association, the American Association Child and Adolescent Psychiatrists, and National Association of Social Workers have issued policy statements endorsing civil marriage access to same-sex couples. The American Psychological Association has published a pamphlet that states:

“Both heterosexual behavior and homosexual behavior are **normal aspects** of human sexuality. Both have been documented in many different cultures and historical eras. Despite the persistence of stereotypes that portray lesbian, gay, and bisexual people as disturbed, several decades of research and clinical experience have led all mainstream medical and mental health organizations in this country to conclude that these orientations represent normal forms of human experience. Lesbian, gay, and bisexual relationships are normal forms of human bonding.”(52)

References from the Library of Congress:

1. O'Hanlan K, A. Health policy considerations for our sexual minority patients. *Obstet Gynecol* 2006 Mar;107(3):709-14.
2. American Psychiatric Association. Same Sex Marriage Resource Document. Resource Documents Approved by The Board of Trustees American Psychiatric Association 2004 November;available at http://www.psych.org/edu/other_res/lib_archives/archives/200417.pdf:1-3.
3. American Psychological Association. APA Supports Legalization Of Same-Sex Civil Marriages. Washington, DC: APA Public Affairs Office; 2004 July 28,.

4. Pawelski JG, Perrin EC, Foy JM, Allen CE, Crawford JE, Del Monte M, et al. The effects of marriage, civil union, and domestic partnership laws on the health and well-being of children. *Pediatrics* 2006 Jul;118(1):349-64.
5. American Psychiatric Association. Position statement on therapies focused on attempts to change sexual orientation (reparative or conversion therapies). *Am J Psychiatry* 2000;157(10):1719-21.
6. American Psychological Association Working Group on Same-Sex Families and Relationships. APA Briefing Sheet on Same-Sex Families and Relationships. Washington, DC; 2004 June.
7. American Medical Association. H-65.973 Health Care Disparities in Same-Sex Partner Households. Report 15 of the Board of Trustees (A-11) on Marriage Equality 2011 June 27, 2011:23-31.
8. American College of Obstetricians and Gynecologists District IX. Letter to the Honorable Dave Jones,. In: Honorable Dave Jones, Chair of Judiciary Committee, editors. Sacramento, CA: California district of the American College of Obstetricians and Gynecologists; 2007.
9. Child Welfare League of America. Position Statement on Parenting of Children by Gay, Lesbian, and Bisexual Adults. 2006 [cited March 26, 2006; Available from: <http://www.cwla.org/programs/culture/glbtposition.htm>
10. American Academy of Child and Adolescent Psychiatry. Policy statement: gay, lesbian, and bisexual parents. 1999 August 9, 2006 [cited; Available from: <http://www.aacap.org/page.ww?section=Policy+Statements&name=Gay%2C+Lesbian+and+Bisexual+Parents+Policy+Statement>
11. National Association of Social Workers. Same-Sex Marriage- Fact Sheet. In: NASW National Committee on Lesbian Gay & Bisexual Issues, editor. 750 First Street, NE, Suite 700, Washington, DC 20002-4241: National Association of Social Workers,; 2004.
12. American Anthropological Association. Statement on Marriage and the Family from the American Anthropological Association. 2004 August 9, 2006 [cited; Available from: http://www.aaanet.org/press/ma_stmt_marriage.htm
13. Meyer-Bahlburg HF. From mental disorder to iatrogenic hypogonadism: dilemmas in conceptualizing gender identity variants as psychiatric conditions. *Arch Sex Behav* 2010 Apr;39(2):461-76.
14. Meyer-Bahlburg HF, Dolezal C, Baker SW, New MI. Sexual orientation in women with classical or non-classical congenital adrenal hyperplasia as a function of degree of prenatal androgen excess. *Arch Sex Behav* 2008 Feb;37(1):85-99.
15. Rahman Q. The neurodevelopment of human sexual orientation. *Neurosci Biobehav Rev* 2005;29(7):1057-66.
16. Pasterski V, Hindmarsh P, Geffner M, Brook C, Brain C, Hines M. Increased aggression and activity level in 3- to 11-year-old girls with congenital adrenal hyperplasia (CAH). *Horm Behav* 2007 Sep;52(3):368-74.
17. Savic I, Lindstrom P. PET and MRI show differences in cerebral asymmetry and functional connectivity between homo- and heterosexual subjects. *Proc Natl Acad Sci U S A* 2008 Jun 16.
18. Rahman Q, Koerting J. Sexual orientation-related differences in allocentric spatial memory tasks. *Hippocampus* 2008;18(1):55-63.
19. Meyer-Bahlburg HF, Dolezal C, Baker SW, Ehrhardt AA, New MI. Gender development in women with congenital adrenal hyperplasia as a function of disorder severity. *Arch Sex Behav* 2006 Dec;35(6):667-84.

20. Ehrhardt AA, Meyer-Bahlburg HF, Rosen LR, Feldman JF, Veridiano NP, Zimmerman I, et al. Sexual orientation after prenatal exposure to exogenous estrogen. *Arch Sex Behav* 1985 Feb;14(1):57-77.
21. Agrawal R, Sharma S, Bekir J, Conway G, Bailey J, Balen AH, et al. Prevalence of polycystic ovaries and polycystic ovary syndrome in lesbian women compared with heterosexual women. *Fertil Steril* 2004 Nov;82(5):1352-7.
22. Bailey JM, Pillard RC, Neale MC, Agyei Y. Heritable factors influence sexual orientation in women. *Arch Gen Psychiatry* 1993;50(3):217-23.
23. van Anders SM, Vernon PA, Wilbur CJ. Finger-length ratios show evidence of prenatal hormone-transfer between opposite-sex twins. *Horm Behav* 2006 Mar;49(3):315-9.
24. Cohen-Bendahan CC, Buitelaar JK, van Goozen SH, Cohen-Kettenis PT. Prenatal exposure to testosterone and functional cerebral lateralization: a study in same-sex and opposite-sex twin girls. *Psychoneuroendocrinology* 2004 Aug;29(7):911-6.
25. Baba T, Endo T, Honnma H, Kitajima Y, Hayashi T, Ikeda H, et al. Association between polycystic ovary syndrome and female-to-male transsexuality. *Hum Reprod* 2006 Dec 13.
26. Bosinski HA, Peter M, Bonatz G, Arndt R, Heidenreich M, Sippell WG, et al. A higher rate of hyperandrogenic disorders in female-to-male transsexuals. *Psychoneuroendocrinology* 1997 Jul;22(5):361-80.
27. Hall PA, Schaeff CM. Sexual orientation and fluctuating asymmetry in men and women. *Arch Sex Behav* 2008 Feb;37(1):158-65.
28. Nordenskjold A, Holmdahl G, Frisen L, Falhammar H, Filipsson H, Thoren M, et al. Type of mutation and surgical procedure affect long-term quality of life for women with congenital adrenal hyperplasia. *J Clin Endocrinol Metab* 2008 Feb;93(2):380-6.
29. Singh PB, Singh V, Nayak PK. Pesticide residues and reproductive dysfunction in different vertebrates from north India. *Food Chem Toxicol* 2008 Jul;46(7):2533-9.
30. Pattatucci AM, Hamer DH. Development and familiarity of sexual orientation in females. *Behavior genetics* 1995 Sep;25(5):407-20.
31. Hamer DH, Hu S, Magnuson VL, Hu N, Pattatucci AM. A linkage between DNA markers on the X chromosome and male sexual orientation. *Science* 1993 Jul 16;261(5119):321-7.
32. Hu S, Pattatucci AM, Patterson C, Li L, Fulker DW, Cherny SS, et al. Linkage between sexual orientation and chromosome Xq28 in males but not in females. *Nat Genet* 1995 Nov;11(3):248-56.
33. Bocklandt S, Horvath S, Vilain E, Hamer DH. Extreme skewing of X chromosome inactivation in mothers of homosexual men. *Human genetics* 2006 Feb;118(6):691-4.
34. Mustanski BS, Dupree MG, Nievergelt CM, Bocklandt S, Schork NJ, Hamer DH. A genomewide scan of male sexual orientation. *Human genetics* 2005 Mar;116(4):272-8.
35. Bogaert AF. Extreme right-handedness, older brothers, and sexual orientation in men. *Neuropsychology* 2007 Jan;21(1):141-8.
36. Blanchard R, Lippa RA. Birth order, sibling sex ratio, handedness, and sexual orientation of male and female participants in a BBC internet research project. *Arch Sex Behav* 2007 Apr;36(2):163-76.
37. McConaghy N, Hadzi-Pavlovic D, Stevens C, Manicavasagar V, Buhrich N, Vollmer-Conna U. Fraternal birth order and ratio of heterosexual/homosexual feelings in women and men. *J Homosex* 2006;51(4):161-74.
38. Nygren U, Sodersten M, Falhammar H, Thoren M, Hagenfeldt K, Nordenskjold A. Voice characteristics in women with congenital adrenal hyperplasia due to 21-hydroxylase deficiency. *Clin Endocrinol (Oxf)* 2009 Jan;70(1):18-25.

39. Munson B. The acoustic correlates of perceived masculinity, perceived femininity, and perceived sexual orientation. *Language and speech* 2007;50(Pt 1):125-42.
40. Collaer ML, Reimers S, Manning JT. Visuospatial performance on an internet line judgment task and potential hormonal markers: sex, sexual orientation, and 2D:4D. *Arch Sex Behav* 2007 Apr;36(2):177-92.
41. Rahman Q, Wilson GD. Large sexual-orientation-related differences in performance on mental rotation and judgment of line orientation tasks. *Neuropsychology* 2003 Jan;17(1):25-31.
42. Hall JA, Kimura D. Sexual orientation and performance on sexually dimorphic motor tasks. *Arch Sex Behav* 1995;24(4):395-407.
43. Lippa RA. Handedness, sexual orientation, and gender-related personality traits in men and women. *Arch Sex Behav* 2003 Apr;32(2):103-14.
44. Lalumiere ML, Blanchard R, Zucker KJ. Sexual orientation and handedness in men and women: a meta-analysis. *Psychol Bull* 2000;126(4):575-92.
45. Loehlin JC, McFadden D. Otoacoustic emissions, auditory evoked potentials, and traits related to sex and sexual orientation. *Arch Sex Behav* 2003 Apr;32(2):115-27.
46. McFadden D. Masculinization effects in the auditory system. *Arch Sex Behav* 2002;31(1):99-111.
47. Johnson KL, Gill S, Reichman V, Tassinari LG. Swagger, sway, and sexuality: Judging sexual orientation from body motion and morphology. *J Pers Soc Psychol* 2007 Sep;93(3):321-34.
48. Breedlove SM. Minireview: Organizational hypothesis: instances of the fingerpost. *Endocrinology* 2010 Sep;151(9):4116-22.
49. Swaab DF, Garcia-Falgueras A. Sexual differentiation of the human brain in relation to gender identity and sexual orientation. *Funct Neurol* 2009 Jan-Mar;24(1):17-28.
50. Swaab DF. Sexual differentiation of the human brain: relevance for gender identity, transsexualism and sexual orientation. *Gynecol Endocrinol* 2004 Dec;19(6):301-12.
51. Muscarella F, Elias VA, Szuchman LT. Brain differentiation and preferred partner characteristics in heterosexual and homosexual men and women. *Neuro Endocrinol Lett* 2004 Aug;25(4):297-301.
52. American Psychological Association. *Answers to Your Questions For a Better Understanding of Sexual Orientation & Homosexuality*. Washington DC: APA Online; 2009.

III. Frequently asked questions with scientifically accurate answers

1) Is there any disagreement in the medical field about the position you are advocating?

Yes, National Association for Research and Therapy of Homosexuality represents that is has 1,000 members vs. over 400,000 members represented by the below organizations who endorse homosexuality as a natural expression of sexuality. We in medicine do not adhere to the conclusions of a fringe .2%, many of whom have had their membership revoked by their licensing organizations for using unscientific methods.

Year endorsed	Association	# members
2007	American College of Obstetricians / Gynecologists, Dist IX	5000
2006	American PsychoAnalytic Association	3,500
2006	American Association Child and Adolescent Psychiatrists	7,500
2006	American Academy of Pediatrics	60,000
2004	American Psychological Association	148,000
2004	American Psychiatric Association	35,000
2004	National Association of Social Workers	150,000
TOTAL PROFESSIONALS ENDORSING EQUALITY:		409,000
National Association for Research / Therapy of Homosexuals		1,000

2) Aren't there medical organizations whose mission it is to convert homosexuals?

Yes, some religious-based associations have clinics that offer reparative therapy that typically enforces celibacy while not changing the orientation. The AMA and the APA have both declared such "reparative" therapy malpractice:

It stigmatizes a normal behavior.

The therapy will fail because orientation is an unchangeable trait.

When one fails in therapy, they are further stigmatized as failures.

In 1400, Galileo revealed that his scientific observations showed that the earth rotated around the sun. The Church insisted that the sun rotated around the earth, and excommunicated him to his death, only to apologize 500 years later. Speaking science to faith systems is difficult because people have to release their dogmatic, but incorrect thinking; which is why only scientific research should be the basis for our laws in this country.

3) Where does your research come from? Why haven't we seen this before?

The scientific evidence is multispecialty, coming from experts and journals of neuroscience, pediatrics, endocrinology, psychiatry, gynecology, pathology, genetics and genomics. While many doctors are experts in their narrow fields, few will study in depth so many other fields unless legislation is pending.

All of the references are from the National Library of Medicine (NLM) of the Library of Congress in Washington, DC, or from the expert association websites with their policy reviews, which rely on the 40+ years of research retained in the NLM, from which to draw their conclusions.

4) What about children? Don't they suffer from having same-sex parents? Doesn't research show that children are better off with a mother and a father?

There is a research study that shows that children do better in a two-parent home than with a singular parent. But the data comparing outcomes of children from two male parents or two female parents with those who come from a male-female household show no differences in the children's outcomes.

5) Are children with same-sex parents more likely to be gay?

Not according to the research. Only one study mentioned that some of the boys might be less sexually aggressive and more nurturing, and those girls might be more sexually adventurous, but I doubt that would be a problem for society.

6) Aren't gay people more likely to be depressed?

Homosexuality does not cause depression. But stigma and discrimination, especially constant stigma and discrimination, do cause depression, isolation, poor self-concept, and low self-care. And since the very laws of our country discriminate in so many ways—telling our gay and lesbian citizens that they are undesirable—they contribute to the great harm that discrimination inflicts on the psyche of each new generation of children.

7) Aren't domestic partnerships enough to ensure the health and well-being of same-sex couples?

No. The very name conveys disdain from our state for our families to our children, because children understand marriage, and the understand discrimination. Marriage is the standard for uniting a family all over the school, because most of his friends' parents are married. The word marriage conveys to the country that all the families of all our citizens are equal, and all are ready to access the 1,138 federal rights and responsibilities of marriage that the United States government deems so essential for the health of the heterosexual family.

8. Access to civil marriage results in no further rights in California since there is already RDP. What is the point of this law?

We in American society were raised with the concept that marriage is the standard for the ultimate commitment of one's life and love to another. Assigning only RDP to some humans, and denying them marriage does not meet that standard. Imagine in 1922 giving women a limited "advisory vote" that is recognized only state by state, but not by the national elections. Women would not stand for the message of persistent disdain that the limited rights given them conveys, and they would continue to fight for exactly equal rights for all humans throughout the nation. Separate is not equal. This law conveys to the United States that we will not discriminate by sexual orientation, and it states that we are prepared for national marriage equality when they get around to it.

9. What is the benefit to heterosexuals from having civil marriage endorsed?

Currently, our children must be taught in early school that the RDP some kids' parents are relegated to is not the same as the marriage that most other kids' parents have. Telling kids that their parents are treated as different destabilizes their trust in their parents. With all families treated equally, all kids (96% heterosexual) of same-sex households will have more confidence in their parents and their family's position in society.

By removing the stigma against homosexuality, heterosexual parents will come more quickly into securely accepting their pre-homosexual children (3%), and feel more assured of their child's safety in the schools, and likelihood of a satisfying life after that. They will deal less often with other families condemning their child, using cruel words such as "Hate the sin, love the sinner," which effectively calls their child a sinner. Extended families will feel less stigma about incorporating their gay relatives into family traditions, providing more extended family closeness, maintaining family traditions, and enhancing support to children.

10. Isn't homosexuality unnatural, at least biologically, since the genitals do not have the natural anatomic fit, and they cannot produce children?

Sexual orientation appears to be a natural phenomenon influenced by many known and unknown hormones that affect the developing fetal brain during the first third of pregnancy. There is a whole spectrum of orientations from exclusively heterosexual to exclusively homosexual with shades of bisexual in the middle.

The evidence is that there are physical anatomy traits as well as special behavioral traits in humans that typically distribute along this spectrum such as one's sense of gender and orientation. Research on brain anatomy, physiology, and behavior skills and traits confirm a total body physical, behavioral, and anatomic effect that correlates with homosexuality. It is biological and natural. Some 4% of children simply come out of the womb perfectly destined to be LGBT. We cannot alter that process, but like some other harmless inborn traits, (left-handedness, hair color, skin color, gender, ability) our civilized government accommodates all American citizens and legislates for their fair and equal treatment, and for the mental and physical health and well-being and safety of all Americans.

Over 450 species of animals and birds have been observed to perform homosexual acts, repeatedly, in the presence of the opposite sex, with some pairs bonding together for a lifetime. From Bagemihl B. *Biological Exuberance: Animal Homosexuality and Natural Diversity*: St. Martin's Press; 1999.

**Written Testimony of
Rev. Dr. C. Welton Gaddy, President of Interfaith Alliance
Submitted to
U.S. Senate Committee on the Judiciary
for the Hearing Record on
“S.598, The Respect for Marriage Act: Assessing the Impact of DOMA on American
Families”
July 20, 2011**

By almost any measure, the United States of America is clearly moving toward marriage equality. Respectfully, I ask you, our elected representatives, not to hold back the egalitarian movement of fair-minded American citizens. Though I would like to say that the time for the Defense of Marriage Act has passed, the reality is that at no time should this piece of legislation have had any place in our nation. You surely understand that you are neither protecting anyone’s religious freedom by allowing DOMA to continue, nor are you preserving the sanctity of marriage. As a Christian, a Baptist minister, a married man and a patriotic American, I ask you to place yourselves on the right side of history and in compliance with the Constitution and end DOMA’s discriminatory compromise of basic equality for all citizens.

I offer these thoughts not as a casual observer or a passive supporter of marriage equality. For many years I personally struggled with this issue. That struggle eventually brought me to a place at which arguments against gay marriage, against even accepting civil unions, were no longer credible or sustainable when held up to the light of my faith commitment and my devotion to the Constitution. Over the last few years, I have researched the issue of same-gender marriage thoroughly and written about it extensively. I have traveled across the United States speaking to people—gay and straight, Christians and atheists, liberals and conservatives. What has become undeniably apparent to me is, thankfully, that the vehemence with which many of you, our elected officials, continue to oppose same gender marriage is not shared by the majority of Americans¹.

As the President of Interfaith Alliance, a national, non-partisan organization that celebrates religious freedom and is dedicated to protecting faith and freedom and whose 185,000 members nationwide belong to 75 faith traditions as well as those without a faith tradition, I have written a paper that could be of use in the debate over this legislation entitled *Same-Gender Marriage and Religious Freedom: A Call to Quiet Conversations and Public Debates*, available at www.interfaithalliance.org/equality. The conversation around and support of same-gender marriage is a large part of our work.

The so-called Defense of Marriage Act has denied same-gender couples (including those married in states where same-gender marriage is legal) the federal recognition and benefits allowed to all other married Americans for far too long. The passage of the Respect for Marriage Act is a crucial step forward in the fight to right this national wrong and uphold the religious freedom and equality of all Americans, regardless of their religious beliefs or sexual orientation.

The constitutional guarantee of religious freedom is the best perspective from which to view the subject of same-gender marriage and around which to convene a national dialogue on the legality of

¹ “Majority of Americans say they support same-sex marriage, adoption by gay and lesbian couples,” Public Religion Research Institute, May 19, 2011 <http://www.publicreligion.org/research/published/?id=579>

same-gender marriage. Law, not scripture, is the foundation of government regulations related to marriage in our nation. In America's diverse religious landscape there are many theological positions on same-gender marriage, some of which support the institution and some that oppose the institution. But the First Amendment's religious freedom provisions ensure that repealing DOMA and legalizing same-gender marriage on a federal level will not result in a government imposition on religious institutions of a particular view of marriage or limit their speech as it relates to marriage.

Many people seem either to ignore or to be unaware of the fact that, despite the soaring language and lofty images used to describe marriage in most religious traditions, in the United States, marriage is a civil institution. Decisions about who is married and who is not married are the prerogative of the government--not a house of worship, a spiritual leader, or a religious tradition. Lawful marriage does not occur in the United States without a marriage license and a certificate of marriage, both of which must be acquired from an agency of the civil government. The government of the United States recognizes marriage completely without reference to religion. In the United States, marriage is a legal institution--sanctioned and restricted by government. To confuse the civil institution of marriage with a religious institution to be protected by the government is to seriously misunderstand marriage and its relationship to government in the United States.

Our religious freedom protects every house of worship from government intrusion to impose a particular view of marriage or to demand a religious blessing for a special kind of marriage -- such as same-gender marriage. The United States Constitution provides a way for the government to keep its promise of guaranteeing equal rights for all people while, at the same time, protecting the freedom of religious institutions to practice their respective doctrines and values. Both religious bodies and governmental institutions can function with integrity while supporting liberty for everybody.

Our elected representatives have a sworn obligation to make decisions guided by the U.S. Constitution, not the sectarian morality derived from a singular religious tradition. To them is entrusted responsibility for providing for the public welfare of all individuals. When it comes to the question of same-gender marriage, the goal should not be to demand that people change their theology. A far better goal is to ask people not to attempt to impose their theology on those who hold a different theological point of view. Marriage should be a right that is available to *every* citizen, but never an act, ritual, or formal ceremony that any house of worship, denomination, or religious leader should be required to legally perform in contradiction to his or her beliefs.

By passing the Respect for Marriage Act, same-gender couples will no longer be denied equal rights by their government, based on a civil prohibition shaped by one American group's theological beliefs. And all religious communities will have the religious freedom to refrain from conducting marriages that violate the teachings of their faith, just as those religious communities whose faith teaches the value and holiness of same-gender marriages will have the religious freedom to sanction these unions.

Thank you for the opportunity to submit testimony on this important issue.



Build **Power** Take **Action** Create **Change**

Written Testimony Submitted to the
Committee on the Judiciary
U.S. Senate

On S. 598 (Respect for Marriage Act)

July 20, 2011

By
Rea Carey
Executive Director
National Gay and Lesbian Task Force Action Fund

We thank Chairman Leahy and the Committee for this opportunity to provide testimony on the Respect for Marriage Act, S.598. On behalf of the National Gay and Lesbian Task Force Action Fund — the oldest national organization advocating for the rights of lesbian, gay, bisexual, and transgender (LGBT) people — we urge you to repeal section 3 of the Defense of Marriage Act (DOMA) by passing the Respect for Marriage Act.

DOMA is one of the most discriminatory and farthest-reaching laws ever to emerge against our community. The law is grossly unjust and places significant harm on far too many families in our country. It is shocking that in 2011, legally married couples in the United States are being singled out and selectively denied fundamental rights by their own federal government. Too many have been hurt for too long because of DOMA, and its repeal is long overdue.

DOMA Causes Financial Hardships and Dignitary Harms

Same-sex couples whose relationships are legally recognized by their states are denied the 1,138 federal benefits, rights, and privileges available to married opposite-sex couples. The denial of these benefits, rights, and privileges harms our families' economic security and dignity.

For example, the Family Medical Leave Act (FMLA) requires employers to allow married couples to take unpaid leave to care for their sick spouses. Because of DOMA, same-sex married couples are not eligible to take FMLA leave to care for each other when they are sick.

Because of DOMA, the IRS must interpret the tax code in a way that denies federal tax benefits to same-sex couples that other married couples receive. Same-sex couples cannot file joint tax returns, which would accurately and honestly reflect their relationships and families. Further, when one member of an opposite-sex married couple provides benefits to the other — such as adding him or her to an employer's health insurance plan — those benefits are excluded from the taxpayer's gross income (or deducted from taxable income). Because of DOMA, however, same-sex spouses do not qualify for that exclusion. Ineligibility for federal tax benefits takes on a further dimension of harm at the end of life. Because of DOMA, when one member of a same-sex couple dies, any assets left to his or her spouse are subject to a federal estate tax. Other married couples' bequests are not taxed under the federal estate laws.

Because of DOMA, same-sex couples are excluded from the vast array of Social Security benefits that flow from marriage. These benefits include the upward adjustment in benefits a surviving spouse receives when a spouse with more generous benefits dies, as well as mothers' and fathers' Social Security benefits. Children of a same-sex couple may also be affected: if they live in a state that does not allow second-parent adoption and a nonbiological parent dies, they cannot receive surviving child benefits. These benefits are crucial to individuals', couples', and families' economic security. Like all working Americans, LGBT people have paid for these benefits throughout their working lives. But because of DOMA, same-sex couples — and, often, their children — cannot receive these benefits.

Federal employees experience further significant harms as a result of DOMA. The following is a message from Ralph Cherry, a retired federal employee:

I am a sixty-five-year-old federal retiree in a same-sex domestic partnership of thirty-two years. Because of DOMA, my partner is not eligible for any survivor benefits from me, and I cannot add him to my health insurance. In order to ensure that he is looked after if I should die first, I have been forced by this situation to take out a life insurance policy. As to health benefits: he has a chronic health issue which we must cover in the individual insurance market at exorbitant rates; in fact, as I write, he is in severe pain which we cannot treat because on the individual market he cannot get coverage for the condition for a year. Members of Congress: I am on the exact same Federal Employees Health Benefits Plan as you; imagine yourselves in this ridiculous position to know my frustration. The federal government is shooting itself in the foot with this outdated law, discouraging talented potential civil servants from applying for employment because they happen to be gay and can get humane treatment for their family members in the private sector. For heaven's sake, drag yourselves into the twenty-first century.

The harmful effects of DOMA compound the other obstacles to economic security that LGBT couples and families face. LGBT people are generally poorer than the general population, and poverty rates are especially high for LGBT couples within communities of color. Moreover, children of gay and lesbian partners are twice as likely to be poor as are children of married same-sex couples, a pattern that is consistent across race and ethnicity.

DOMA Harms People Across the United States

Although national data are not yet available from the 2010 census, the 2000 census counted 594,000 same-sex unmarried-partner households in the United States. Analysis of the data by the Williams Institute reveals that more than 250,000 children in the United States are being raised by same-sex parents.

Six states and the District of Columbia have full marriage equality, and nine more states have broad relationship recognition laws. Because of DOMA, however, same-sex couples whose relationships are legally recognized in their states are nevertheless denied all the federal benefits, rights, and privileges available to married opposite-sex couples.

Most Americans Support the Provision of Benefits to Same-Sex Married Couples

A 2008 survey by Newsweek/Princeton Research reported that sizeable majorities of Americans were in favor of same-sex couples' having inheritance rights (74%), Social Security benefits (67%), health insurance and other employment benefits (73%), and hospital visitation rights (86%). A 2010 survey by the Human Rights Campaign revealed that a majority of Americans supported the repeal of DOMA. This year, polls by Gallup, CNN, and ABC News/Washington Post all have shown that majorities of Americans favor same-sex marriage.

Conclusion

The stories of hardship under this law are heartbreaking. With the passage of the Respect for Marriage Act, Congress would begin to close this ugly chapter in our nation's history. It would

end an egregious injustice against thousands of loving, committed couples who simply want the protections, rights, and responsibilities already afforded other married couples.

We thank the many Senators who support the Respect for Marriage Act and full, swift repeal of DOMA.

We at the National Gay and Lesbian Task Force Action Fund, along with people all across the country — from every town and every background — recognize that our entire country benefits when everyone is allowed to contribute their talents and skills, free from discrimination. That's why we urge the passage of the Respect for Marriage Act.

Thank you.



PFLAG National

1828 L Street, NW Suite 660 * Washington, D.C. 20036

(202) 467-8180 * www.pflag.org * info@pflag.org

Statement of Jody M. Huckaby, Executive Director, PFLAG National In Support of the Respect for Marriage Act of 2011 (S. 598)

July 20, 2011

Mr. Chairman and Members of the Committee:

My name is Jody M. Huckaby, and I am the Executive Director of PFLAG National (Parents, Families and Friends of Lesbians and Gays) - the nation's largest grassroots-based organization for families, friends and allies of lesbian, gay, bisexual and transgender (LGBT) people. Started by the simple act of a mother supporting her son more than 35 years ago, we are a chapter -based organization comprised of highly engaged local community members. Our 200,000 members and supporters and our 350 chapters located in all fifty states are committed to promoting the health and well-being of LGBT individuals, their families and friends by offering support, education and advocacy at the federal, state and local levels. On behalf of PFLAG, I am honored to submit this statement in support of S. 598, the Respect for Marriage Act of 2011, and I thank you for your leadership in hosting today's historic hearing that will assess the impact of the Defense of Marriage Act (DOMA) on American Families before the U.S. Senate's Committee on Judiciary.

Why is the Respect for Marriage Act (S. 598) of 2011 Necessary?

Social Implications of DOMA

The Defense of Marriage Act is a discriminatory law that must be repealed without delay because it overtly singles out legally married same-sex couples and treats them unfairly under federal law. The effects of this treatment have very substantial social implications that create challenging situations for same-sex couples. For example, without the legal recognition of marriage, many same-sex couples often experience situations where they are forced to explain the nature of their relationships and how they are equivalent to a different-sex couple's marriage. According to the New Jersey Civil Union Review Commission, conversations like these "include the indignities of having to explain the legal nature of their relationship, often in times of crisis, and the obstacles and frustrations encountered when using government employer, or health care forms that do not address or appropriately deal with the status of [their relationship]."¹

Furthermore, discriminatory laws like DOMA inflict significant psychological harm on LGBT youth, as well as straight youth being raised in same-sex headed households. According to Marshall Forstein, M.D.,

¹ New Jersey Civil Union Review Commission. (2008) *The Legal, Medical, Economic & Social Consequences of New Jersey's Civil Union Law*. Retrieved on July 18, 2011, from www.state.nj.us/lps/dcr/downloads/CURC-Final-Report-pdf



Moving equality forward through support, education and advocacy.

an associate of psychiatry at Harvard University Medical School and a Distinguished Fellow of the American Psychiatric Association:

For young people coming out, which is about 5 to 15 percent of the overall U.S. population, the presence of role models who have equal status via marriage in society has significant meaning both internally and socially and has potential for reducing their isolation [and] sense of stigma that [LGBT] teens face in their everyday lives. And I point out here the data on suicide among [LGBT] teens, which is about three times that of the general teenage population. Same-sex marriages provide stability for couples in terms of public acknowledgement of their commitment and provide legitimacy for the children being raised by [same-sex] parents.²

* * *

Nothing is more basic from a mental health perspective to happiness and liberty than the right to love another human being with the same privileges and responsibilities as everyone else.³

According to Dr. Judith Glassgold, Psy.D., President of the New Jersey Psychological Association and a licensed psychologist who has provided psychotherapy to children, adolescents and their families, including same-sex individuals and families, for 17 years:

Children of same-sex relationships must cope with the stigma of being in a family without the social recognition that exists through marriage. Children of same-sex relationships are the secondary targets of the stigma directed at their parents because of their parents' sexual orientation. Such stigma may be indirect such as the strain due to lack of social support and acceptance. Also, some children may be targeted due to teasing in school or from peers.⁴

* * *

As a result of the lack of marriage equality, both [LGBT] adolescents and children of same-sex relationships face continued stigma. The stigma has negative mental health effects. Children of same-sex families and [LGBT] adolescents would benefit from their reduction of the stigma and having any future threat of discrimination and stigma removed from their lives.⁵

According to Meredith Fenton, national program director of Children of Lesbians and Gays Everywhere (COLAGE):

Many youth we work with have reported that one of the common ways that they have been teased by other kids is that kids have questioned the validity of their families because their parents aren't able to get married. Young people often equate the notion of a real family with the idea of a family that has married parents. A recent study that COLAGE co-published with GLSEN (the Gay, Lesbian, and Straight Education Network) showed that around 43 percent of students with one or more LGBT

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

parents experienced verbal harassment from their peers in their schools on a regular basis. And denying families marriage equality merely gives more fodder to those bullies who can say, “Your family is not a real family, your parents can’t get married.” We also find youth in COLAGE who report that hearing that their family can’t have the same rights as other families leads them to feeling scared or confused when they hear that folks are against their families being married. They say that they think somebody is going to come and break up their family.

Clearly, for same-sex couples, their children and LGBT children and young adults, marriage equality is enormously significant from a psychosocial perspective. The distress and suffering imposed from anything less than marriage for same-sex couples and their families creates a stigma that imposes barriers beyond the traditional legal and economic challenges that are often described in the existing research body. The social implications can be overcome through marriage equality, as noted in M. V. Lee Badgett’s most recent publication, *Social Inclusion and the Value of Marriage Equality in Massachusetts and the Netherlands*. The findings published in this report support the idea that legally recognizing same-sex marriage and repealing restrictive laws like DOMA positively impacts a same-sex couple and their family’s feelings and experiences of social inclusion improving overall psychological well-being.⁶

Legal Exclusions

Research and personal narratives also substantiate the legal and economic inequalities that leave same-sex couples and their families vulnerable to health disparities, job insecurity and poverty. From a legal perspective, there are two key distinctions in how DOMA discriminates and unnecessarily targets same-sex married couples; 1) Section 2 of DOMA allows states to refuse to recognize valid civil marriages of same-sex couples, and 2) Section 3 of the law mandates the categorical exclusion of all same-sex couples, regardless of their marital status, from all federal statutes, regulations, and rulings applicable to all other married people, which effectively denies them from over 1,100 federal benefits and protections.⁷

This categorical exclusion prevents legally married same-sex couples from accessing federal benefits extended to legally married different sex couples such as:

- Parental rights
- Health Insurance
- Unpaid leave to care for a sick or injured spouse
- Social Security benefits
- Survivor benefits
- Property rights
- Important tax benefits

Fifteen years after the passage of DOMA, six states and the District of Columbia have extended equal marriage benefits to legally married same-sex couples along with 10 countries abroad. Since the first same-sex married couples were legally recognized by Massachusetts in 2004, an estimate of 50,000

⁶ Badgett, M. V. Lee. (2011) *Social Inclusion and the Value of Marriage Equality in Massachusetts and the Netherlands*. The Journal of Social Issues, Vol. 67, No. 2, 2011, pp. 316-334.

⁷ Badgett, M.V. Lee. (2010) *The Economic Value of Same-Sex Marriage*. Retrieved on July 18, 2011 from <http://students.law.drake.edu/lawReview/docs/lrVol58-badgett.pdf>.

couples are now married in the United States along with another 30,000 living in the U.S. who are estimated to have married abroad.⁸ In addition to these 80,000 couples, an additional 18,000 same-sex couples are recognized as legally married in California before the passage of Proposition 8, and approximately 85,000 same-sex couples have secured civil unions and domestic partnerships in the states that offer them⁹. Additionally, Maryland also recognizes and provides statewide benefits to same-sex couples but it does not provide civil marriage licenses to same-sex couples. Currently, DOMA prevents the federal government from honoring its equal obligations under state law in these states along with the District of Columbia.

Economic Inequality

Overall, we know that LGBT people on average experience disproportionate rates of unequal wages and employment discrimination, health disparities and poverty.¹⁰ Given this reality, when denied the right to marry, same-sex couples are much more likely to endure direct and indirect economic inequalities given the absence of the rights and responsibilities accessed through civil marriage. Same-sex couples are far more vulnerable to those factors that threaten an individual and a family's economic well-being. The restrictions imposed by DOMA exacerbate these threats and unnecessarily create financial hardships for LGBT individuals and their families impacting nearly every aspect of their lives.

On the most basic level, marriage equality provides economic benefits for same-sex couples and their families.¹¹ Direct benefits include employer and state institutional benefits for a primary recipient's spouse, along with federal, state and local tax benefits and federal program benefits like Social Security, Medicare, Medicaid, TANF, SNAP, and other social safety net programs that promote marriage and family security. Obviously, when the marriages of a same-sex couple are not, or cannot be recognized due to laws like DOMA, substantial economic harm is endured.

When denied the right to marry, same-sex couples also cannot access the enhanced economic efficiency and security that often results from indirect benefits of marriage. Some of these benefits include building stronger families through economies of scale, or the phenomenon that occurs when the size of a household doubles, but the size of work necessary to operate the household does not.¹² Social insurance against a disability, death, or the loss of a job also improves greatly when a couple is legally recognized as married.¹³ Additionally, publicly signaling a couple's commitment through marriage increases the chance that the relationship will endure over time, and should the relationship dissolve, a fair settlement to terminate the long-term relationship will protect both individuals from unnecessarily experiencing extreme financial hardships.

⁸ Williams Institute. (2011) Press Release Commenting on the Department of Justice DOMA Ruling. Retrieved on July 18, 2011 from <http://www3.law.ucla.edu/williamsinstitute/pdf/Pressrelease2.24.pdf>.

⁹ Ibid.

¹⁰ Albelda, R., Badgett, M.V. L., Gates, G., & Schneebaum, A. (2009) *Poverty in the lesbian, gay, and bisexual community*. Los Angeles, CA: Williams Institute. Retrieved on July 18, 2011 from <http://www.law.ucla.edu/WilliamsInstitute/pdf/LGBPovertyReport.pdf>.

¹¹ Badgett, M.V.L. (2010) The Economic Value of Marriage for Same-Sex Couples. Retrieved on July 18, 2011, from <http://students.law.drake.edu/lawReview/docs/lrVol58-badgett.pdf>.

¹² Ibid.

¹³ Ibid.

Therefore, when same-sex couples are denied the right to marry due to restrictions imposed by laws such as DOMA, important direct and indirect benefits are lost, leaving these couples more vulnerable to economic inequalities. Barriers to these benefits limit a same-sex couple's options when trying to inform important life decisions related to healthcare, employment, family creation, education, savings and retirement options, and it's because of these constraints that institutionalize unequal economic outcomes between same-sex couples and their married different-sex counterparts.¹⁴

PFLAG Experience: Personal Stories of Discrimination

PFLAG remains committed to promoting the health and well-being of LGBT individuals by influencing policy and legislation aimed at recognizing marriage equality for same-sex couples. That is why so many PFLAG parents, families and allies, continue to educate their communities about the importance of marriage equality and to advocate for state and local laws that legally recognize same-sex couples and extend equal rights to these couples and their families. Through our grassroots work, we have learned about inequalities suffered by far too many couples that have endured legal discrimination leading to the adverse economic and social impacts described above.

Below, we would like to share a few examples of the challenges some of our members have experienced due to the inequalities imposed by DOMA:

Dr. Elizabeth Hane lives in Canandaigua, NY with her same-sex spouse of 10 years. In 2002 the couple entered a civil union in Vermont, and now with the recent passage of marriage equality in New York, they plan to marry in August, 2011. While the couple will begin to receive state benefits from New York in the coming months, they will be denied federal benefits due to the restrictions DOMA imposes. Dr. Hane is a Fulbright Scholar this year, sponsored by the U.S. Department of State and administered by the Council for International Exchange of Scholars (CIES). This prestigious program requires that Dr. Hane undertake an educational exchange abroad where she will be teaching at a university in Dubrovnik, Croatia in the fall, representing the United State. Dr. Hane's partner will be traveling with her, but because the U.S. government does not recognize the relationship, her partner is not eligible to receive any of the benefits that the spouse of a married, different-sex couple receives. Such benefits include travel reimbursement, health insurance and living stipends. DOMA's restrictions create additional inequities when it comes to negotiating the visa process for the couple.

Rozanne Gates lives in Westport, Connecticut with her same-sex spouse, Suzanne Sheridan, of 15 years. Last year the couple legally married in Connecticut, and subsequently they entered a civil union in Connecticut in 2005. The couple filed their tax returns this year for the first time as a married couple and realized that they were lying on their forms since the federal government will not recognize their legal marriage. Despite their legally recognized marriage at the state level, the couple had no other choice but to each file as a single individual on the federal return, and in the State of Connecticut, they had to file as single to avoid confusing the IRS. Additionally, Rozanne is troubled to realize that her wife will not be able to access her Social Security benefits, similar to different-sex, married couples, should anything happen to her. Clearly these inequalities must be rectified.

¹⁴ Ibid.

Michelle J. McLeod, lives in Germantown, Maryland with her spouse, Sarah Bard, of 10 years. In 2009, the couple entered a legal marriage in Connecticut. While the state of Maryland does not grant marriage licenses to same-sex couples, it does recognize the marriage of same-sex couples from other states and the District of Columbia. Unfortunately, private employers in the state are not legally required to extend health insurance benefits to spouses of same-sex couples who were married elsewhere. Due to DOMA, Sarah was not able to add Michelle to her private employer's health insurance – a benefit that is extended to the spouses of different-sex married couples. Since Michelle is diabetic, not being able to access her spouse's health insurance created significant barriers to access coverage due to her graduate student status. The expenses associated with the necessary medication and visits required to manage her medical condition caused the couple to endure extreme financial hardships. For example, Michelle needed to see an endocrinologist, podiatrist, and primary care physician on a regular basis. While Michelle has used student and state insurance on-and-off over the past two years, she has still experienced coverage gaps resulting in uncovered medical bills. In order to manage these expenses, she is now on payment plans, and Sarah is looking for a new job to meet the bills. Had the couple been considered married by Sarah's previous employer, both Sarah and Michelle would have received the necessary health coverage they so desperately need.

Policy Solution: Support the Respect for Marriage Act of 2011 (S.598)

On March 16, 2011, Senator Diane Feinstein introduced the Respect for Marriage Act (RMA) in the U.S. Senate. This historic legislation would repeal Section 2 of DOMA and restore the rights of all lawfully married couples – including same-sex couples – to receive the federal benefits of marriage under the law for those individuals living in any state, territory, possession, or Indian tribe respecting a same-sex marriage. If passed, this law would allow the U.S. federal government to extend benefits to the same-sex couples entering marriages in the six states – Connecticut, Iowa, Massachusetts, New Hampshire, New York, Vermont – and the District of Columbia that honor these marriages. It would also provide certainty to these couples that federal benefits and protections would flow from a valid marriage celebrated in these states (and the District of Columbia), even if a couple moves or travels to another state.

The bill also amends the federal rules of construction concerning the definitions of “marriage” and “spouse” to provide that, for purposes of any federal law in which marital status is a factor, an individual shall be considered married if that individual's marriage is valid in the state where the marriage was entered, or in the case of a marriage entered into outside any state, if the marriage is valid in the place where entered into and the marriage could have been entered into in a state the marriage also qualifies.

Enacting RMA and repealing Section 2 of DOMA, would restore the Constitutional principles of comity and Full Faith and Credit.¹⁵ The federal benefits denied to legally recognized same-sex couples would be restored, and at the same time, the federal government would still respect states rights. In other words, RMA does not require states that have not yet enacted legal protections for same-sex couples to recognize a marriage, nor would it mandate any person, state, locality, or religious organization to recognize or license a marriage between two individuals of the same sex. Simply put, RMA only requires the federal

¹⁵ CRS Annotated Constitution; http://www.law.cornell.edu/anncon/html/art4toc_user.html.

government to equally apply its policy and practice of deferring to the states in determining what legal relationships are eligible for federal benefits.

The system of federal benefits has always been based upon marriage, and because of this tradition, polling shows strong public support for extending federal benefits and protections to same-sex couples in states that recognize these unions. For example, according to a December 2008 Newsweek/Princeton Research survey, more than 7 in 10 Americans believe that same-sex couples should have inheritance rights, Social Security benefits, insurance benefits, and hospital visitation rights. As outlined earlier in this testimony, RMA would provide to same-sex couples these benefits along with full range of federal benefits and responsibilities already associated with long-term, committed relationships that different-sex married couples receive.

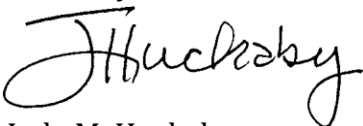
Move Equality Forward Now

The Respect for Marriage Act (S. 598) is life-saving legislation desperately needed for the more than 50,000 legally married same-sex couples who struggle daily with the economic and social challenges DOMA imposes. Passage of this legislation will help strengthen and support our families against the overt discrimination of DOMA. For too long Congress has ignored the inequalities our families continue to endure. RMA offers a solid legislative solution empowering the Congress to strike discrimination from the U.S. code and support marriage equality for all legally married couples today.

Support for this measure is strong and continues to grow in both the House and the Senate. The House version of this bill (H.R. 1116) already has 118 cosponsors, and 27 in the Senate. Additionally, the American public supports extending federal benefits and protections to same-sex couples in states that recognize these unions. Moreover, as more states like Maryland, Oregon and Washington consider granting marriage licenses to same-sex couples seeking the rights and responsibilities of marriage, additional legal headaches will occur for same-sex couples when trying to overcome the many legal hurdles DOMA imposes.

Mr Chairman, 15 years of DOMA is 15 years too long. The time to make a legislative fix and pass the Respect for Marriage Act is now. As evidenced by some of the troubling narratives shared above, the inequality in our current law weakens our families and leaves them vulnerable to economic and social hardships. I, along with the more than 200,000 members and supporters of PFLAG National, urge you to pass S. 598 and give loving, committed same-sex couples and their families the right to equal treatment under federal law. Thank you again for your extraordinary leadership on this legislation and for holding this historic hearing. PFLAG mothers and fathers all over the country look forward to the day when they can celebrate the marriages of their sons and daughters that are honored and recognized by the U.S. federal government. They, and we, look to your for your continued leadership to make this celebration a reality.

Sincerely,

A handwritten signature in black ink, reading "J Huckaby". The signature is stylized with a large, flowing "J" and a cursive "Huckaby".

Jody M. Huckaby
Executive Director



the
Williams
INSTITUTE

United States Senate
Committee on the Judiciary

Hearing on “S.598, The Respect for Marriage Act:
Assessing the Impact of DOMA on American
Families”

Written Testimony of
The Williams Institute, UCLA School of Law

July 20, 2011

Professor M.V. Lee Badgett
Research Director
The Williams Institute

Ilan H. Meyer
Senior Scholar of Public Policy
The Williams Institute

Gary J. Gates
Williams Distinguished Scholar
The Williams Institute

Professor Nan D. Hunter
Legal Scholarship Director
The Williams Institute

Jennifer C. Pizer
Legal Director
Arnold D. Kassoy Senior Scholar of Law
The Williams Institute

R. Bradley Sears
Assistant Dean and Executive Director
The Williams Institute

The Williams Institute, an academic research center of UCLA School of Law, advances sexual orientation and gender identity law and public policy through rigorous, independent research and scholarship, and disseminates it to judges, legislators, policymakers, media and the public.

We are pleased to offer testimony that summarizes demographic data about same-sex couples and the serious financial, legal, social and health consequences of the Defense of Marriage Act (DOMA) for them and their families. While the Williams Institute and other scholars have documented many of these consequences through academic research, DOMA also has the impact of impairing further research on same-sex couples and their families, and the consequences that DOMA has on them.

I. Same-Sex Couples and Their Families in the United States

The Census Bureau's 2009 American Community Survey (ACS) estimates that there are 581,300 same-sex couples in the United States. More than half of lesbians and gay men are in committed cohabiting relationships.¹

Counts from state administrative agencies show that more than 50,000 same-sex couples have married. Analyses of the 2010 Williams Institute/Harris-Interactive Same-sex Couple Survey show that nearly 14% of same-sex couples in the United States are legally married under state law.² This study along with the state administrative agency counts imply that there are 50,000 to 80,000 legally married same-sex couples in the United States today. In addition, another 85,000 same-sex couples are in civil unions or registered domestic partnerships.

ACS data also suggest that approximately 20% of same-sex couples are raising nearly 250,000 children. Rates of child-rearing are even higher among members of same-sex couples who are racial and ethnic minorities. For example, an analysis of 2008 ACS data reveals that 38% of African-American and 27% of Latino/a members of same-sex couples are raising children. Studies also suggest that half of gay men and more than 40% of lesbians who have not yet had a child want to have children some day.³

Census and ACS data also reveal that members of same-sex couples are diverse in terms of race and ethnicity, income, veteran status, and age. According to ACS data, almost one in four members of same-sex couples is a person of color. Although 93% of members of

¹ C. Carpenter & G.J. Gates, *Gay and Lesbian Partnership: Evidence from California*, 45 DEMOGRAPHY 573 (2008).

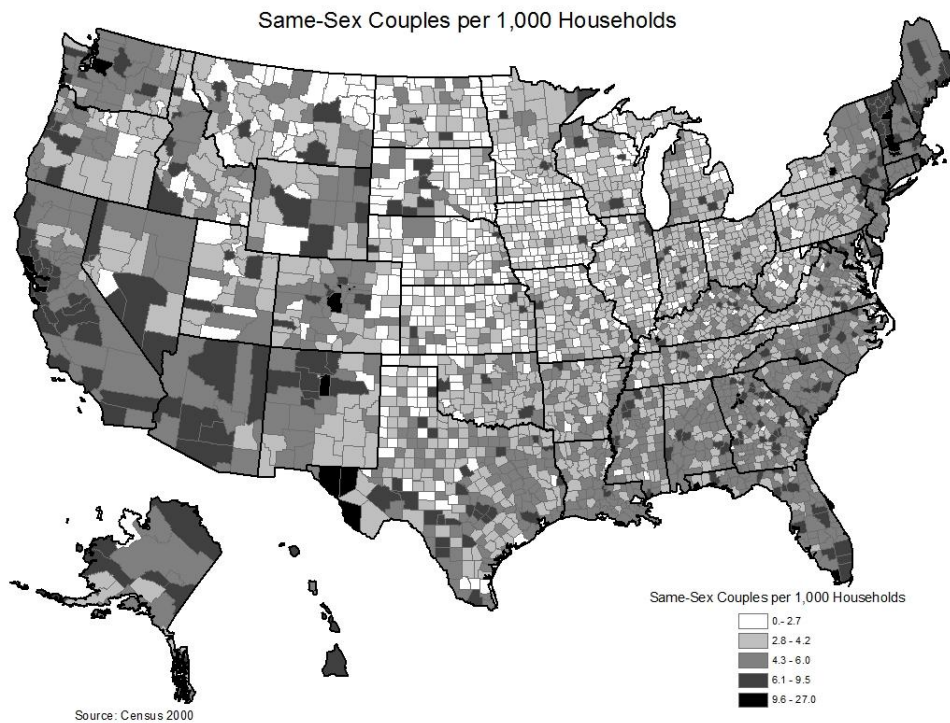
² GARY J. GATES, SAME-SEX COUPLES IN U.S. CENSUS BUREAU DATA: WHO GETS COUNTED AND WHY (2010), *available at* http://www3.law.ucla.edu/williamsinstitute/pdf/WhoGetsCounted_FORMATTED1.pdf.

³ GARY J. GATES ET AL., ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES (2007) *available at*

<http://www3.law.ucla.edu/williamsinstitute/publications/FinalAdoptionReport.pdf>.

same-sex couples in the labor force are employed, and 45% of members have college degrees, they come from every economic class. A Williams Institute report analyzing data from the 2002 National Survey of Family Growth found that 15% of gay men and 24% of lesbians live in poverty. In particular, analysis of Census 2000 data revealed that one in five children being raised by a same-sex couple lives in poverty. Analyses of 2009 ACS data show that over 7% of individuals in same-sex couples, approximately 85,000 individuals nationally, are veterans of the armed forces and almost 5% are 65 years of age or older.

U.S. Census and ACS data also reveal that same-sex couples live throughout the United States. Census Bureau data has identified same-sex couples in every congressional district and in almost every county in the United States. According to 2009 ACS data, approximately 15% of male same-sex couples and 19% of female same-sex couples live in rural areas.



As a result of DOMA, legally married same-sex couples and individuals who have had a same-sex spouse are not recognized as such by the federal government. This lack of recognition results in legal, financial, social, and psychological hardships for many of these couples and their families. These hardships have tangible negative effects on their health and welfare.

II. Legal and Financial Consequences of DOMA

The federal non-recognition of marriage for same-sex couples articulated in DOMA imposes substantial legal and financial costs on married same-sex couples and their

families by denying them the benefits and protections that federal law affords to married couples and their families.

By failing to be recognized by the federal government, an individual who needs to take time off work to care for their same-sex spouse is not protected. Similarly, both same-sex spouses might lose their home if one of them enters long-term care covered by Medicaid. DOMA imposes barriers that prevent them from receiving benefits, including health care benefits that are otherwise provided to different-sex spouses of federal employees, veterans, and employees in the private sector. Employees whose same-sex spouses are provided with health benefits by their employers have to pay a tax on these benefits that employees with different-sex spouses do not. Same-sex couples may also face higher income and estate taxes. For bi-national same-sex couples, DOMA can mean that the couple must choose between not living together, or living outside the United States. The Williams Institute has conducted research to assess and quantify many of these impacts of DOMA on same-sex couples and their families:

A. Family Medical Leave Act (FMLA) Benefits

The FMLA allows an individual to take employment leave to care for various family members, including a different-sex spouse. However, employees cannot take leave under the FMLA to care for a same-sex partner. A recent Williams Institute research brief uses 2008 Census Bureau data to estimate that approximately 38% of same-sex partners (approximately 430,000) are both employed and would be eligible for FMLA benefits to care for same-sex spouses if the FMLA covered same-sex partners.⁴

B. Benefits for Spouses of Federal Employees

Because DOMA prohibits federal recognition of same-sex married couples, it means that same-sex spouses of federal employees cannot receive all of the same employee benefits that are provided to an employee with a different-sex spouse. A 2008 Williams Institute report found that the federal government has approximately 34,000 employees with same-sex partners.⁵ Of these, approximately 30,200 employees are partnered with a non-federal employee. The remaining 3,000 employees are partnered with another federal employee, who already receives federal benefits. Benefits denied to spouses of federal employees, who are not employed by the federal government, include coverage for health insurance, retiree health insurance and annuities, and work injury/death compensation.

C. Veteran Partner Benefits

Based on analyses of 2009 ACS data, 7.3% of individuals in same-sex couples, or approximately 85,000 individuals, are veterans of the armed forces. Of these, nearly

⁴ M.V. LEE BADGETT, THE IMPACT OF EXPANDING LEAVE RIGHTS TO CARE FOR CHILDREN OF SAME-SEX PARTNERS (2010) *available at* http://www3.law.ucla.edu/williamsinstitute/pdf/FMLA_Final.pdf.

⁵ NAOMI G. GOLDBERG, CHRISTOPHER RAMOS & M.V. LEE BADGETT, THE FISCAL IMPACT OF EXTENDING FEDERAL BENEFITS TO SAME-SEX DOMESTIC PARTNERS (2008), *available at* http://www3.law.ucla.edu/williamsinstitute/publications/S2521FiscalAnalysis_WilliamsInst.pdf.

68,000 veterans have same-sex partners who are not also veterans. Spouses of veterans are eligible for a variety of benefits including pensions, educational assistance, and vocational training. Same-sex partners are not eligible for any of these benefits.⁶

D. Taxation of Employee Health Benefits for a Same-Sex Spouse

Even when employers do offer health insurance to same-sex spouses and domestic partners, because of DOMA these benefits are taxed under federal law burdening both employees and employers. Recognizing the benefits created by workplace equality for recruitment and retention, numerous companies offer the same health benefits for their employees' same-sex domestic partners and spouses as they do for employees' different-sex spouses.⁷ However, though the benefits received by different-sex spouses are tax-exempt, the federal government taxes the benefits received by same-sex spouses and domestic partners. Same-sex spouses and domestic partners cannot claim the same tax exemptions as different-sex spouses under current federal law. A 2007 Williams Institute and Center for American Progress study found that an employee with a same-sex spouse or domestic partner pays \$1,069 more in taxes per year than an employee receiving the same health benefits for a different-sex spouse.⁸ This results in these employees paying 11% more in taxes than they would pay if they were married and the federal government recognized that marriage.⁹ The 2007 study shows that 41,000 same-sex couples have to pay this imputed income tax for these spousal and domestic partner health insurance benefits.

E. Private Employment Health Insurance Benefits Affected By ERISA

The federal Employee Retirement Income Security Act (ERISA) limits the power of states to control benefits in the private sector.¹⁰ ERISA preempts state laws that attempt to regulate benefits that “relate to”¹¹ the benefits provided as part of group plans offered to employees by private sector employers; such plans are governed only by ERISA. Because of the so-called “savings clause,”¹² which exempts state insurance laws from preemption, states can require insurance carriers doing business in the state to sell only plans that offer coverage to same-sex partners on the same terms as apply to different-sex spouses.¹³ Because ERISA does not apply to government-sponsored health plans, state

⁶ Analysis of 2009 ACS PUMS, Craig Konnoth, Fellow, Williams Institute, Jul. 15, 2011.

⁷ See HUMAN RIGHTS CAMPAIGN, CORPORATE EQUALITY INDEX (2011) available at <http://www.hrc.org/cei2011/index.html>.

⁸ M.V. LEE BADGETT, UNEQUAL TAXATION OF DOMESTIC PARTNER BENEFITS (2007) available at http://www.americanprogress.org/issues/2007/12/pdf/domestic_partners.pdf.

⁹ *Id.* at 7.

¹⁰ 29 U.S.C. § 1001 et. seq. (2009).

¹¹ For a discussion of the current “relate to” test, see *Shaw v. Delta Airlines*, 463 U.S. 85 (1983) and progeny (in particular *N.Y. State Conf. of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), which modifies the test, but does not explicitly overrule prior cases).

¹² 29 U.S.C. §§ 1144(a), (b)(2)(A) (“savings clause”); 1002(32); 1003(b)(1) (non-application to government-sponsored plans).

¹³ Jeffrey G. Sherman, *Domestic Partnership and ERISA Preemption*, 76 TUL. L. REV. 373 (2001) (citing *Metropolitan Life Ins. Co. v. Mass.*, 471 U.S. 724 (1985)).

laws can require state and local government employers to offer equal benefits.¹⁴ Numerous states, including states which do not recognize marriage between same-sex partners such as Hawaii, Oregon, Maine and New York (before it passed its marriage equality law), require insurance carriers to provide coverage to same-sex partners.¹⁵

The biggest impact of ERISA preemption is therefore on self-funded (or self-insured) employer-sponsored health insurance plans.¹⁶ When an employer elects to self insure, ERISA effectively bars the state from setting criteria for how its workplace benefits plans are structured. As a result, none of the states listed above require self-funded plans to insure same-sex partners. Indeed, Oregon's Act explicitly states that it does "not require the extension of any benefit under any employee benefit plan that is subject to federal regulation under the Employee Retirement Income Security Act of 1974 [ERISA]."¹⁷

Employers' treatment of same-sex spouses of employees in Massachusetts demonstrates the harm that can result. Data from 2009 shows that almost all, or 93%, of employers who offered employee health coverage also covered different-sex spouses. However, only 71% of those employers provided coverage to same-sex spouses of employees. The Massachusetts Division of Health Care Finance and Policy believes the difference is a result of the fact that some employers are self-insured and are therefore regulated by federal law rather than state insurance law.¹⁸

F. Spousal Impoverishment Protections for Medicaid Long Term Care (LTC)

Medicaid's long-term care program covers long-term care facility costs for those eligible and expected to remain in the care facility for at least 30 days.¹⁹ As with other Medicaid programs, income and assets are evaluated to determine whether an individual is eligible for Medicaid-covered long-term care. If a Medicaid recipient in long-term care moves into a facility without the intent to return home, transfers a home for less than fair market

¹⁴ 29 U.S.C. §§ 1002(32); 1003(b)(1).

¹⁵ New York Office of the General Counsel representing the State Insurance Dep't, Re: Health Insurance for Same-Sex Spouses in Legal Out-of-State Marriages, OGC op no 08-11-05 (Nov. 21, 2008), *available at* <http://www.ins.state.ny.us/ogco2008/rg081105.htm> (before the passage of marriage equality law in New York); HAW. REV. STAT. § 572C (2009) (Hawaii's reciprocal beneficiary law providing for extension of several benefits, including employer-based non-self-funded health insurance, to reciprocal beneficiaries of insured employees); David A. Weber, Deputy Att'y Gen., Health Insurance Coverage for Reciprocal Beneficiaries, Haw. Att'y Gen. Opinion 97-10, Dec. 2, 1997, *available at* http://hawaii.gov/ag/main/publications/opinions/1993_1999/97-10.pdf; ME. INS. CODE tit. 24-A, ch. 33, § 2741-A (2009); ORS § 106.300 et seq. (2009).

¹⁶ Under self-funded employer-sponsored plans, the employer is responsible for funding the plan out of its general assets; no third party insurance carrier is involved. Janice Kay McClendon, *A Small Step Forward in the Last Civil Rights Battle: Extending Benefits under Federally Regulated Employee Benefit Plans to Same-Sex Couples*, 36 N.M. L. REV. 99, 108 (2006).

¹⁷ *Id.* at § 106.340(7).

¹⁸ See discussion in M. V. Lee Badgett, "The Economic Value of Marriage for Same-sex Couples," *Drake Law Review*, Vol. 58, No. 4, 2010, p. 1088.

¹⁹ U.S. Dep't of Health and Human Svcs, Medicaid Treatment of the Home: Determining Eligibility and Repayment for Long-Term Care (Apr. 2005), *available at* <http://aspe.hhs.gov/daltcp/reports/hometreat.htm> (last visited Jan. 31, 2011).

value, or dies, the home becomes a countable resource.²⁰ Furthermore, income received by the recipient is countable after he or she moves to long-term care.²¹ The practical effect is that these assets and income will be spent down to pay for long-term care as part of the Medicaid program.²² If the participant in the long-term care program is married to a different-sex spouse, the program will protect the spouse who remains in the family home from being left destitute due to the asset and income long-term care rules. Congress enacted protections known as “spousal impoverishment provisions” to accomplish this goal. These provisions operate by exempting certain income and assets from being used 1) to determine Medicaid eligibility under the long-term care program; and 2) to offset Medicaid expenditures for the recipient’s long-term care, as required by the Medicaid program.²³ Therefore, the different-sex spouse who is not in long-term care will not be forced to lose the couple’s home or to subsist without adequate income.²⁴ Although DHHS has recently issued guidance that states can include same-sex couples under existing spousal impoverishment protections, states are not required to include same-sex couples and no state has yet changed its policies as a result of this guidance.

Almost 1.2 million individuals live with a same-sex partner. Of those individuals, 4.8% are 65 years of age or older. Since 1.4% of those younger than 65 require LTC and 14% of those 65 or older require LTC,²⁵ we estimate that 23,300 of people with same-sex partners require LTC of some kind. Most will not need formal care, but 22% will require at least some formal paid care.²⁶ After adjusting the estimate upward to account for the fact that 14% of people will be receiving care in an institution, such as a skilled nursing facility, we estimate that about 6,000 people in same-sex couples are receiving paid LTC.

Medicaid pays for about half of all spending on LTC,²⁷ although approximately 29% of recipients of LTC receive Medicaid.²⁸ We use both percentages to provide a conservative range of estimates. Therefore, our best estimate is that about 1,700-3,000 individuals with same-sex partners receive Medicaid-financed long-term care.²⁹

²⁰ *Id.*

²¹ U.S. Dep’t of Health and Human Svcs, Spouses of Medicaid Long-Term Care Recipients (Apr. 2005), available at <http://aspe.hhs.gov/daltcp/reports/spouses.htm> (last visited Jan. 31, 2011).

²² U.S. Dep’t of Health and Human Svcs, *supra* note 10.

²³ U.S. Dep’t of Health and Human Svcs, Centers for Medicare & Medicaid Svcs, Medicaid Eligibility: Spousal Impoverishment, available at https://www.cms.gov/MedicaidEligibility/09_SpousalImpoverishment.asp#TopOfPage (last visited Jan. 31, 2011).

²⁴ SERVICES & ADVOCACY FOR GAY, LESBIAN, BISEXUAL & TRANSGENDER ELDERS & MOVEMENT ADVANCEMENT PROJECT, IMPROVING THE LIVES OF LGBT OLDER ADULTS 15 (2010), available at <http://www.lgbtmap.org/file/improving-the-lives-of-lgbt-older-adults.pdf>.

²⁵ GEORGETOWN UNIVERSITY, LONG-TERM CARE FINANCING PROJECT, WHO NEEDS LONG-TERM CARE? (2003), available at <http://ltc.georgetown.edu/pdfs/whois.pdf>.

²⁶ *Id.*

²⁷ JUDITH FEDER, HARRIET L. KOMISAR, ROBERT B. FRIEDLAND, GEORGETOWN UNIVERSITY, LONG-TERM CARE FINANCING PROJECT, LONG-TERM CARE FINANCING: POLICY OPTIONS FOR THE FUTURE 5 (June 2007), available at <http://ltc.georgetown.edu/forum/ltcfinalpaper061107.pdf>.

²⁸ This percentage is derived from figures showing that 3 million people receive Medicaid for LTC out of 10.3 million needing LTC, in KAISER COMMISSION ON MEDICAID FACTS, MEDICAID AND THE UNINSURED (2010), available at <http://www.kff.org/medicaid/upload/2186-07.pdf>.

²⁹ Analysis by M.V. Lee Badgett, Research Director, Williams Institute, Feb. 10, 2011.

It is harder to estimate the number of people who would gain eligibility for LTC under Medicaid if the income and assets of both members of same-sex couples were to be counted (called “spousal deeming”), but it is conceivable that some people in same-sex couples would become eligible. For instance, a wealthier partner requiring LTC would have some assets shifted by the program’s rules to a partner with fewer economic resources, and thus would qualify without as much spending down. If these types of situations are distributed fairly evenly across same-sex couples, then about half of the time the wealthier partner will need LTC, and half the time the partner with fewer resources will need LTC.

Our estimates above imply that about 3,000-4,500 people are receiving LTC and are paying for it through some other means than Medicaid. In addition to Medicaid, LTC care is also paid for by Medicare (19%), private health and LTC insurance (7%), out-of-pocket payments (19%), and other private (3%) or public (3%) sources.³⁰ If the share of recipients in each category is at least roughly similar to the shares of payments from those sources, then we can estimate an upper bound: about one-fifth of those individuals, or 600 to 900 are paying for LTC out-of-pocket but might possibly now qualify for Medicaid if they were treated as spouses.

G. Inheritance Tax

In 2009, the Williams Institute released a report detailing the estate tax disadvantages that same-sex couples face under federal law since they cannot be recognized as a married couple.³¹ The report documents that assets inherited from a different-sex spouse are largely not subject to inheritance tax. One consequence of DOMA is that same-sex spouses are treated as legal strangers and thus subject to different taxation rules. Analyses conducted in 2011 by the Williams Institute suggest that in 2011 and 2012, it is likely that more than 9,000 same-sex couples will file estate tax returns. Of that group, more than 40 couples will have assets that exceed allowable non-taxable transfer of assets, adding an average tax burden of nearly 4 million dollars to these estates.

H. Filing Income Taxes Jointly

While many same-sex couples avoid the so-called “marriage penalty” associated with filing joint tax returns, many same-sex couples would gain from being able to file joint tax returns. Currently, those same-sex couples cannot take advantage of the option to reduce their tax burden. Moreover, many same-sex couples must calculate two sets of state tax returns. In some states, same-sex couples can file their state returns as a married couple. But because federal law prohibits same-sex couples from filing as married couples, federal forms require tax calculations from state returns completed as if they were single.

³⁰ GEORGETOWN UNIVERSITY, LONG-TERM CARE FINANCING PROJECT, NATIONAL SPENDING FOR LONG-TERM CARE (2007), available at <http://ltc.georgetown.edu/pdfs/natspendfeb07.pdf>.

³¹ MICHAEL D. STEINBERGER, FEDERAL ESTATE TAX DISADVANTAGES FOR SAME-SEX COUPLES (2009), available at http://www3.law.ucla.edu/williamsinstitute/pdf/EstateTax_FINAL_Nov2009.pdf.

I. Social Security Survivor or Spousal Benefits

Under the current system of Social Security, different-sex spouses of insured workers can get a monthly check for half their spouse's benefit if it is higher than what he or she would get on his or her own. Also, when one spouse dies and both receive social security, the surviving spouse gets the higher of the pair's monthly benefit amount. For example, for a married different-sex couple, the husband may receive \$12,073 each year while his wife may receive \$6,835 each year. When the wife passes away, the husband continues to receive his monthly payment of \$12,073. However, if the husband dies first, the wife would then begin receiving the higher of their payments, or \$12,073.

Because the federal government does not recognize same-sex partners, same-sex couples do not benefit from this potential survivor benefit. This loss can be sizable. Recent data on same-sex couples aged 65 or older shows the difference in social security income between partners is \$5,700 for female same-sex couples and \$5,770 for male couples. If the partner receiving higher social security payments dies first, the surviving same-sex partner would lose this amount in potential benefits.³²

Social Security also provides a survivor benefit to some widows and widowers whose spouses have paid into the system but have not yet retired. According to the Social Security Administration, a surviving spouse is eligible not only for a \$255 lump-sum benefit on the death of a covered worker, but he or she is also provided with survivor benefits that can be worth as much as a \$433,000 life insurance policy to a young family. Because their marriages are not recognized, members of married same-sex couples are not allowed this survivor benefit at all, nor are they eligible for the lump-sum benefit.

If a covered worker becomes disabled, his or her spouse—if 62 or older—receives a benefit of one-half the disabled recipient's Social Security benefit. For example, in December 2008, the average spousal disability benefit in Massachusetts was \$265 per month, or \$3,180 per year. Again, members of same-sex couples are not allowed this spousal disability benefit at all.

J. Immigration for Bi-National Couples

While current United States immigration policy is based primarily on family reunification, it does not provide any rights for unmarried partners of citizens. As a result, gay and lesbian couples that include a U.S. citizen and a non-citizen (referred to as bi-national couples) can be forced to separate if the non-citizen partner is not able to legally remain in the country. A forthcoming report from the Williams Institute reveals that nearly 26,000 same-sex couples in the United States are bi-national couples who could be forced to separate because they cannot participate in green-card and accelerated

³² NAOMI G. GOLDBERG, THE IMPACT OF INEQUALITY FOR SAME-SEX PARTNERS IN EMPLOYER-SPONSORED RETIREMENT PLANS 9 (2009), *available at* http://www3.law.ucla.edu/williamsinstitute/pdf/RetirementAnalysis_Final.pdf.

citizenship mechanisms offered to non-citizen spouses of American citizens.³³ In addition to the emotional toll incurred by same-sex couples who live under the threat of forced separation if one partner cannot acquire legal residency, economists also demonstrate that there are clear financial repercussions. There are significant financial benefits of naturalization due to increased labor mobility and employment opportunities, which means that wages of naturalized citizens increase more rapidly than among immigrants who are not naturalized.³⁴

III. Social and Health Consequences of DOMA

One of the most harmful effects of DOMA is the imposition of a government sanctioned stigma on same-sex couples and their families. Psychologists define stigma as “having an attribute that conveys a devalued social identity.”³⁵ DOMA constitutes structural (or institutional) stigma. This “represents the policies of private and governmental institutions that restrict the opportunities of stigmatized groups.”³⁶ Structural stigma burdens the liberty and dignity of members of a stigmatized group by legitimizing the unequal treatment of some groups in society. Laws like DOMA uphold and enforce stigma toward same-sex couples and their families by asserting that their relationships are not deserving of equal status when compared to different-sex couples and their families. More broadly, such laws reinforce negative attitudes toward LGBT people and create conditions where these negative attitudes are not only socially acceptable, but also viewed as legally desirable. Ample evidence shows that in our society, negative attitudes toward LGBT people are too often expressed as prejudice, discrimination and even violence against them.³⁷

A central aspect of the stigma directed toward LGBT people concerns family relations and intimacy. LGBT people have long been seen as incapable of—and even uninterested in—sustained intimate relationships. Thus, stigma about LGBT people often promotes the perception that because they cannot or do not want intimate partners, families, and children, they live isolated lives and are destined to die lonely.³⁸ As summarized above, ample research exists to contradict such views.

³³ CRAIG J. KONNOTH & GARY J. GATES, SAME-SEX COUPLES AND IMMIGRATION IN THE UNITED STATES (forthcoming 2011).

³⁴ Bernt Bratsberg, James F. Ragan, Jr. & Zafar M. Nasir, *The Effect of Naturalization on Wage Growth: A Panel Study of Young Male Immigrants*, 20 J. OF LABOR ECON. 568 (2002).

³⁵ J. Crocker, B. Major & C. Steele, *Social Stigma*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 504, 506 (D. Gilbert et al, eds., 4th ed. 1998).

³⁶ Patrick W. Corrigan, et al., *Structural stigma in state legislation*, 56 PSYCHIATRIC SERVICES 557, 557 (2005).

³⁷ Gregory M. Herek, *Sexual Stigma and Sexual Prejudice in The United States: A Conceptual Framework*, in CONTEMPORARY PERSPECTIVES ON LESBIAN, GAY AND BISEXUAL IDENTITIES: THE 54TH NEBRASKA SYMPOSIUM ON MOTIVATION 67 (D. A. Hope, ed., 2009); Gregory M. Herek, *Hate Crimes and Stigma-Related Experiences among Sexual Minority Adults in the United States: Prevalence Estimates from a National Probability Sample*, 24 J. OF INTERPERSONAL VIOLENCE 54 (2009).

³⁸ Ilan H. Meyer & L. Dean. *Internalized Homophobia, Intimacy, and Sexual Behavior among Gay and Bisexual Men*, in 4 PSYCHOLOGICAL PERSPECTIVES ON LESBIAN AND GAY ISSUES: STIGMA AND SEXUAL ORIENTATION 160 (Gregory Herek, ed., 1998).

By explicitly denying married same-sex couples full legal equality and recognition under federal law, DOMA strengthens the structural stigma affecting LGBT persons by limiting their access to a cherished social institution that is rich with both symbolic meaning and tangible privileges. The harm of DOMA to LGBT people is especially enhanced because of the importance and esteem of marriage in our society. Marriage is the social institution that largely governs intimate relations in the United States. Marriage not only provides tangible benefits to married individuals, it also provides social approval and recognition. DOMA both reflects and propagates the stigma that LGBT people do not have and cannot obtain intimate relations that are of similar value and respect as those of heterosexual couples.

By preventing same-sex relationships from obtaining the respect paid to other marital relationships, DOMA essentially enshrines the age-old stigma of LGBT people as lonely and incapable of healthy and happy relationships into the law of the United States. A survey of people married to a same-sex spouse in Massachusetts finds that couples gain social support from their families and a greater level of commitment to their partners when they are allowed to marry.³⁹ Same-sex couples who can marry report that they feel more socially included,⁴⁰ but they are still critically aware that they are excluded from legal recognition and treated as second-class citizens by the federal government as a result of DOMA.⁴¹

Stigma can produce serious adverse impacts on the health of LGBT people by causing stress and disease. This has been recognized by public health authorities including Healthy People 2010 and 2020, which sets health priorities for the United States.⁴² Healthy People objectives identify the LGBT population as a group targeted to reduce health disparities in the United States. In explaining the reason for the inclusion of the LGBT population as one of the groups requiring special public health attention, the Department of Health and Human Services noted: “The issues surrounding personal, family, and social acceptance of sexual orientation can place a significant burden on mental health and personal safety.” This conclusion was reiterated by the Institute of Medicine of the National Academies, an independent body of scientists that advises the federal government on health and health policy matters, in its recent report, *The Health of Lesbian, Gay, Bisexual and Transgender People*, where it noted, “LGBT people . . . face a profound and poorly understood set of . . . health risks due largely to social stigma.”⁴³

³⁹ C. RAMOS, N. GOLBERG, & M. V. L. BADGETT, THE EFFECTS OF MARRIAGE EQUALITY IN MASSACHUSETTS: A SURVEY OF THE EXPERIENCES AND IMPACT OF MARRIAGE ON SAME-SEX COUPLES (2009), available at http://www3.law.ucla.edu/williamsinstitute/publications/Effects_FINAL.pdf.

⁴⁰ M. V. Lee Badgett, *Social Inclusion and the Value of Marriage Equality in Massachusetts and the Netherlands*, 67 J. OF SOCIAL ISSUES 316 (2011).

⁴¹ M. V. Lee Badgett, *The Economic Value of Marriage for Same-sex Couples*, 58 DRAKE L. REV. 1100 (2010).

⁴² U.S. Dep’t of Health and Human Svcs., Healthy People 2020, http://www.healthypeople.gov/Document/html/uih/uih_2.htm#goals, last accessed July 19, 2011. .

⁴³ INSTITUTE OF MEDICINE, THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING (2011).

The stress that comes from social exclusion takes an emotional toll that can lead to adverse health outcomes and a poor sense of well-being. Researchers have shown that LGBT people are harmed by the impact of stress related to stigma. Indeed, LGBT populations have higher prevalence of such health outcomes as depression, anxiety, substance use disorders, and suicide attempts. It is reasonable to conclude that DOMA's categorical disrespect by the federal government of the actual legal status of tens of thousands of married lesbian and gay couples inflicts similar stigma, with similar attendant harms. In contrast, early research shows that where gay people have been allowed to legally marry, marriage confers mental health benefits, reversing some of the effects of stress related to stigma.⁴⁴

IV. DOMA Impedes Further Research and Understanding of Same-Sex Couples

DOMA has also impaired the ability of researchers to assess its impact on same-sex couples and their families. Throughout the last decade, the U.S. Census Bureau maintained that DOMA restricted it from reporting any information about married same-sex couples. Legally married same-sex couples who responded that they were spouses on the American Community Survey were publically reported to be same-sex "unmarried partners" even though many were, in fact, legally married.

Recently, the Bureau has begun to reevaluate this policy and has made some positive changes to their procedures. However, a legacy of DOMA is evident in a general resistance on the part of federal statistical agencies to collect detailed, accurate, and reliable data on same-sex couples and their families. This means that policy debates on laws like DOMA have too often been driven as much by anecdote and stereotype as by sound social science research and facts.

V. Conclusion

The best data available reveal that there are over 580,000 same-sex couples in the United States and that over 50,000 to 80,000 of these couples are married and over 85,000 are in civil unions and registered domestic partnerships. By denying same-sex couples the federal benefits and obligations that are designed to strengthen families, DOMA imposes legal, financial, social and psychological burdens on same-sex couples and their families that result in tangible harms. Moreover, DOMA impedes the very research that is necessary to understand these families and the impact that DOMA has upon them.

⁴⁴ E.D.B. Riggle, S.S. Rostosky, & S.G. Horne, Psychological Distress, *Well-Being, and Legal Recognition in Same-Sex Couple Relationships*, 24 J. of Family Psychology 82 (2010).