

Nos. 12-15388 & 12-15409  
**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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Karen GOLINSKI  
*Plaintiff - Appellee,*

v.

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

and

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

Karen GOLINSKI  
*Plaintiff-Appellee,*

v.

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

and

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

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On Appeal from the United States District Court for the Northern District of California

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**BRIEF OF *AMICI CURIAE* 70 BUSINESS, PROFESSIONAL AND MUNICIPAL EMPLOYERS,  
AND PROFESSIONAL, TRADE, AND CIVIC ORGANIZATIONS REPRESENTING  
EMPLOYERS IN SUPPORT OF APPELLEE AND IN SUPPORT OF AFFIRMANCE OF THE  
JUDGMENT BELOW**

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Dated: July 10, 2012

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Organizations Representing Employers in Support of Appellee  
and in Support of Affirmance of the Judgment Below*

*This brief is filed on behalf of the following businesses:*

<b>ABT Associates, Inc.</b>	<b>Integrated Archive Systems, Inc.</b>
<b>Akamai Technologies, Inc.</b>	<b>Jazz Pharmaceuticals Inc.</b>
<b>AppNexus Inc.</b>	<b>Kimpton Hotel &amp; Restaurant Group, LLC</b>
<b>The Bank of New York Mellon Corporation</b>	<b>Levi Strauss &amp; Co.</b>
<b>Blue Cross and Blue Shield of Massachusetts, Inc.</b>	<b>Loring, Wolcott &amp; Coolidge Trust, LLC</b>
<b>Boston Community Capital, Inc.</b>	<b>The McGraw-Hill Companies, Inc.</b>
<b>Boston Medical Center Corporation</b>	<b>Microsoft Corporation</b>
<b>Broadcom Corporation</b>	<b>The Ogilvy Group, Inc.</b>
<b>Calvert Investments, Inc.</b>	<b>Onyx Pharmaceuticals, Inc.</b>
<b>CBS Corporation</b>	<b>Partners HealthCare System, Inc.</b>
<b>Clean Yield Asset Management</b>	<b>Reproductive Science Center of New England p.c.</b>
<b>Communispace Corporation</b>	<b>Starbucks Corporation</b>
<b>Diageo North America, Inc.</b>	<b>State Street Bank and Trust Company</b>
<b>Eastern Bank Corporation</b>	<b>Sun Life Financial (U.S.) Services Company, Inc.</b>
<b>eBay Inc.</b>	<b>Trillium Asset Management Corp.</b>
<b>Electronic Arts Inc.</b>	<b>Viacom Inc.</b>
<b>Exelon Corporation</b>	<b>W/S Development Associates LLC</b>
<b>FitCorp Healthcare Centers, Inc.</b>	<b>Xerox Corporation</b>
<b>Gap Inc.</b>	<b>ZipCar, Inc.</b>
<b>Google Inc.</b>	<b>Zynga Inc.</b>

*Law and professional firms:*

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**Lieff Cabraser Heimann & Bernstein,  
LLP**

**Burns & Levinson LLP**

**Nixon Peabody LLP**

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**The Parthenon Group, LLC**

**Foley Hoag LLP**

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**Seyfarth Shaw LLP**

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LLP**

**Valdez Noor Todd & Doyle LLP**

*Professional, trade, and civic organizations:*

**Greater Boston Chamber of  
Commerce**

**Out & Equal Workplace Advocates**

**The National Fire Protection  
Association, Inc.**

**Seattle Metropolitan Chamber of  
Commerce**

*And by the following cities:*

**The City and County of San  
Francisco, CA**

**The City of New York, NY**

**The City of Boston, MA**

**The City of Santa Monica, CA**

**The City of Cambridge, MA**

**The City of Seattle, WA**

**The City of Los Angeles, CA**

**The City of West Hollywood, CA**

**CORPORATE DISCLOSURE STATEMENTS OF CORPORATE AMICI**

**ABT Associates, Inc.** is a corporation organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

**Akamai Technologies, Inc.** is a corporation organized under the laws of Delaware with a principal place of business in Massachusetts. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

**AppNexus Inc.** is a corporation organized under the laws of Delaware with a principal place of business in New York. It has no parent company. Microsoft Corporation, a publicly-held corporation, owns 10 percent or more of its stock; no other publicly-held corporation owns 10 percent or more of its stock.

**The Bank of New York Mellon Corporation** is a corporation organized under the laws of Delaware with a principal place of business in New York. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

**Blue Cross and Blue Shield of Massachusetts, Inc.** is a non-profit corporation organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company and issues no stock.

**Boston Community Capital, Inc.** is a non-profit corporation organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

**Boston Medical Center Corporation** is a non-profit corporation organized under the laws of Massachusetts with a principal place of business in Massachusetts. It

has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

**Broadcom Corporation** is a corporation organized under the laws of California and headquartered in California. It has no parent company and no publicly-held company owns 10 percent or more of its stock.

**Calvert Investments, Inc.** is a corporation organized under the laws of Delaware and headquartered in Maryland. Calvert is an indirect, wholly owned subsidiary of Ameritas Mutual Holding Company.

**CBS Corporation** is a corporation organized under the laws of Delaware with a principal place of business in New York. National Amusements, Inc., a privately held company, owns a majority of the Class A voting stock of CBS Corporation. To CBS Corporation's knowledge without inquiry, GAMCO Investors, Inc., on March 15, 2011, filed a Schedule 13D/A with the Securities and Exchange Commission reporting that it and certain affiliates (any of which may be publicly-traded) own, in the aggregate, 10.1% of the Class A voting stock of CBS Corporation. CBS Corporation is not aware of any other publicly-traded corporation that owns 10 percent or more of its stock.

**Clean Yield Asset Management** is a corporation organized under the laws of Vermont and headquartered in Vermont. It has no parent company and no publicly-held company owns 10 percent or more of its stock.

**Communispace Corporation** is a corporation organized under the laws of Delaware with a principal place of business in Massachusetts and is a wholly owned subsidiary of Omnicom Group, Inc.

**Diageo North America, Inc.** is a corporation organized under the laws of Connecticut with a principal place of business in Connecticut. It is an indirect wholly-owned subsidiary of Diageo plc, which is incorporated as a public limited company in England and Wales.

**Eastern Bank Corporation** is a mutual holding company organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company, issues no stock and is not publicly-held.

**eBay Inc.** is a corporation organized under the laws of Delaware and headquartered in California. It has no parent corporations and no publicly-held company owns 10 percent or more of its stock.

**Electronic Arts Inc.** is a corporation organized under the laws of Delaware and headquartered in California. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

**Exelon Corporation** is a corporation organized under the laws of Pennsylvania with a principal place of business in Illinois. It has no parent company and no publicly-held company owns 10 percent or more of its stock.

**Fitcorp Healthcare Centers, Inc.** is a corporation organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

**Gap Inc.** is a corporation organized under the laws of Delaware and headquartered in San Francisco, California. It has no parent corporation and no publicly-held corporation owns 10% or more of Gap Inc.'s stock.

**Google Inc.** is a corporation organized under the laws of Delaware with a principal place of business in California. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

**Greater Boston Chamber of Commerce** is a non-profit corporation organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company and issues no stock.

**The Greater Seattle Chamber of Commerce** (doing business as **Seattle Metropolitan Chamber of Commerce**) is a non-profit corporation organized under the laws of Washington State with a principal place of business in Seattle, Washington. It has no parent company and issues no stock.

**Integrated Archive Systems, Inc.** is a corporation organized under the laws of California with a principal place of business in California. It has no parent company and no publicly-held corporation owns more than 10 percent of its stock.

**Jazz Pharmaceuticals Inc.** is a corporation organized under the laws of Delaware and headquartered in California. It is a wholly owned subsidiary of Jazz Pharmaceuticals, plc of Ireland, a publicly traded company which owns 100 percent of Jazz Pharmaceuticals, Inc.'s stock.

**Kimpton Hotel & Restaurant Group, LLC** is a limited liability company organized under the laws of Delaware with a principal place of business in California. It is wholly-owned by Kimpton Group Holding, LLC, a privately-held limited liability company organized under the laws of Delaware.

**Levi Strauss & Co.** is a corporation organized under the laws of Delaware with a principal place of business in California. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

**Loring, Wolcott & Coolidge Trust, LLC** is a non-depository trust company and limited liability company organized under the laws of New Hampshire with a principal place of business in Massachusetts. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

**The McGraw-Hill Companies, Inc.** is a corporation organized under the laws of New York with a principal place of business in New York. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

**Microsoft Corporation** is a corporation organized under the laws of Washington with a principal place of business in Washington. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

**The National Fire Protection Association, Inc.** is a non-profit corporation organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company and it issues no stock.

**The Ogilvy Group, Inc.** is a corporation organized under the laws of New York with a principal place of business in New York. It is an indirect, wholly-owned subsidiary of WPP plc, a public limited company incorporated under the Companies (Jersey) Law 1991 (as amended).

**Onyx Pharmaceuticals, Inc.** is a corporation organized under the laws of Delaware with a principal place of business in California. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

**Out & Equal Workplace Advocates** is a section 501(c)(3) corporation organized under the laws of California with a principal place of business in California. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.



**The Parthenon Group, LLC** is a limited liability company organized under the laws of Delaware with a principal place of business in Massachusetts. It has no parent company and no publicly-held corporation owns 10 percent or more of its membership interests.

**Partners HealthCare System, Inc.** is a non-profit corporation organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company and issues no stock.

**Reproductive Science Center of New England p.c.** is a professional corporation organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company and issues no stock.

**Starbucks Corporation** is a corporation organized under the laws of Washington State with a principal place of business in Washington. It has no parent company and no publicly-held corporation owns more than 10 percent of its stock.

**State Street Bank and Trust Company** is a trust company chartered and existing under the laws of Massachusetts with a principal place of business in Massachusetts. It is a wholly-owned subsidiary of State Street Corporation, a publicly-traded corporation.

**Sun Life Financial (U.S.) Services Company, Inc.** is a corporation organized under the laws of Delaware with a principal place of business in Massachusetts. It is a wholly-owned subsidiary of Sun Life of Canada (U.S.) Holdings, Inc.

**Trillium Asset Management Corporation** is a corporation organized under the laws of Delaware and headquartered in Massachusetts. It has no parent company and not publicly held corporation owns more than 10 percent of its stock.

**Viacom Inc.** is a publicly-held corporation organized under the laws of Delaware and headquartered in New York, New York. It has no publicly-held parent company and no publicly-held company owns 10 percent or more of its stock

**W/S Development Associates LLC** is a limited liability company organized under the laws of Massachusetts with a principal place of business in Massachusetts. No publicly-traded corporation owns more than ten percent of its membership interests.

**Xerox Corporation** is a corporation organized under the laws of New York with a principal place of business in Connecticut. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

**Zipcar, Inc.** is a corporation organized under the laws of Delaware with a principal place of business in Massachusetts. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

**Zynga Inc.** is a corporation organized under the laws of Delaware and headquartered in California. It has no parent company and no publicly held corporation owns 10 percent or more of its stock.

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### **INTEREST OF *AMICI CURIAE***

This brief is submitted with the consent of all parties pursuant to Fed. R. App. P. 29(a).

*Amici* are financial institutions, medical centers, health-care providers, energy and high technology businesses, manufacturers, media companies, pharmaceutical companies, professional firms, retailers, marketers, non-profit organizations, and the cities of Boston, Cambridge, Los Angeles, New York, San Francisco, Santa Monica, Seattle, and West Hollywood, as well as trade and professional associations.<sup>1</sup> In short, *amici* are employers or associations of employers, and we share a desire to attract, retain and secure a talented workforce. Our enterprises are located in or operate in states that recognize certain marriages of our employees and colleagues to same-sex spouses. At the same time, we are subject to the federal Defense of Marriage Act (“DOMA”)<sup>2</sup>, which precludes federal recognition of these marriages. This dual regime uniquely burdens *amici*. It puts us, as employers and enterprises, to unnecessary cost and administrative complexity, and regardless of our business or professional judgment forces us to discriminate against a class of our lawfully-married employees, upon whose welfare and morale our own success in part depends. *Amici* write to advise the Court concerning the impact on the employer of these conflicting legal regimes.

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<sup>1</sup> Pursuant to Fed. R. App. P. 29(c)(5), *amici* certify that no party’s counsel authored this brief in whole or in part, no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief, and no person contributed money that was intended to fund, prepare, or submit this brief.

<sup>2</sup> Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C). DOMA, in relevant part, directs that all federal legislation and regulation be construed such that “the word ‘marriage’ means only a legal union between one man and one 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.

## ARGUMENT

The House of Representatives argues that Congress, through DOMA, sought to impose a uniform rule of eligibility for federal marital benefits.<sup>3</sup> The perspective of the American employer who must implement DOMA is very different. Because marriages are celebrated and recognized under state law, a federal law withholding marital benefits from some lawful marriages, but not others, creates a *non*-uniform rule. Employers are obliged to treat one employee spouse differently from another, when each is married, and each marriage is equally lawful. In this brief, *amici* show how the burden of DOMA's dual regime is keenly felt by enterprises that conduct operations or do business in jurisdictions that authorize or recognize same-sex marriage.<sup>4</sup>

Ten states and the District of Columbia now either authorize the marriages of same-sex couples, or recognize (to varying degrees) such marriages when performed in other states, while DOMA, operating in each state, precludes federal recognition of these marriages.<sup>5</sup> The burden of a dual regime arises for enterprises that conduct operations or do business in any of these jurisdictions.<sup>6</sup>

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<sup>3</sup> See Br. of Intervenor-Defendant-Appellant, Dkt. 36, at 33-37.

<sup>4</sup> The fact that marriage laws vary from state to state does not create the practical problems we discuss below. Absent DOMA, employers could treat all employees married under the law of any state in a consistent way. Our burden arises because federal law intrudes to conflict with state law, forcing the employer to create two groups of married employees, and to treat one group differently from another.

<sup>5</sup> Marriage between same-sex couples is lawful in Connecticut, Iowa, Massachusetts, New Hampshire, New York, Vermont, and the District of Columbia. See National Conference of State Legislatures, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, available at <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (updated June 2012). Laws that would legalize same-sex marriage in Maryland and in Washington are subject to statewide referenda on November 6, 2012. See John Wagner, *Same-Sex Marriage Headed to Ballot in Md.*, Wash. Post, June 7, 2012, available at <http://www.washingtonpost.com/blogs/maryland-politics/post/same-sex-marriage-headed-to-ballot-in-md/2012/06/07/>

(Footnote Continued on Next Page.)

**A. The Burden of Compliance with DOMA.**

**1. Workplace Benefits and a Workplace Ethos of Transparent Fairness are Critical to Enterprise Success.**

The capital of modern enterprises is in many ways a human capital. Success depends on the talent, morale and motivation of people. To attract the best employees and colleagues, *amici* must offer robust workplace benefits and a workplace ethos of transparent fairness. In 2011, 85% of full-time U.S. workers in private industry had access to medical benefits through their employer, and 73% to

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(Footnote Continued from Previous Page.)

gJQAVCn3LV\_blog.html; Md. State Bd. of Elections, *2012 Presidential Election, available at* <http://www.elections.state.md.us/elections/2012/index.html> (listing the referendum petition on Maryland's Civil Marriage Protection Act); Washington Secretary of State, *R-74 Frequently Asked Questions, available at* <http://sos.wa.gov/elections/R74FAQ.aspx> (describing Referendum 74, the referendum measure on Washington's same-sex marriage law). Maine's November 6, 2012 ballot includes a citizen initiative that would legalize same-sex marriage in Maine. See Maine Dep't of Sec. of State, *Proposed Initiative Ballot Question / Public Comment, available at* <http://www.maine.gov/sos/cec/elec/2012/proposed2012question.html> (discussing "An Act To Allow Marriage Licenses for Same-sex Couples and Protect Religious Freedom").

Rhode Island, Maryland, and New Mexico recognize marriages between same-sex couples lawfully performed in other states. Recognition of Out of State Same-Sex Marriages, R.I. Exec. Order No. 12-02 (May 14, 2012), *available at* [http://www.governor.ri.gov/documents/executiveorders/2012/Executive\\_Order\\_12-02.pdf](http://www.governor.ri.gov/documents/executiveorders/2012/Executive_Order_12-02.pdf); Marriage—Whether Out-of-State Same-Sex Marriage That Is Valid In The State Of Celebration May Be Recognized In Maryland, 95 Md. Op. Atty. Gen. 3, 2010 WL 886002 (Feb. 23, 2010); N.M. Stat. Ann. § 40-1-4; Are same-sex marriages performed in other jurisdictions valid in New Mexico?, N.M. Op. Atty. Gen. 11-01, 2011 WL 111243 (Jan. 4, 2011).

California recognizes marriages between same-sex couples as valid under state law if those marriages were performed in California between June 16, 2008 and November 4, 2008, or were performed outside of California prior to November 5, 2008. See *Strauss v. Horton*, 46 Cal. 4th 364, 397, 470, 207 P.3d 48, 68, 119 (Cal. 2009); Cal. Fam. Code § 308(b).

<sup>6</sup> *Amici* acknowledge that further complexity arises from additional categories of committed relationships, such as domestic partnerships and civil unions, that are recognized by various states; however, because Ms. Golinski is married to her spouse, these other relationships are not presently before the Court in this matter.

an employer-provided retirement plan.<sup>7</sup> Benefits packages—especially health and retirement benefits—are a direct contributor to employee loyalty.<sup>8</sup> Satisfied and engaged workers are more productive and perform better across a variety of metrics than less-satisfied colleagues.<sup>9</sup> Workplace benefits enhance the employer/employee relationship, which in turn is a key to enterprise success. To compete effectively in modern economies and demographic groups, *amici* strive to offer workplace benefits to their employees on an equitable basis.

## 2. **DOMA Burdens *Amici's* Employees and Strains the Employer/Employee Relationship.**

Federal law provides to the working family many benefits and protections relating to healthcare, protected leave, and retirement. These protections provide security and support to an employee grappling with sickness, disability, childcare, family crisis, or retirement, allowing the employee to devote more focus and attention to his work. In California, for example, employees who are married expect that they have “enter[ed] . . . into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage.”<sup>10</sup> They make important personal and financial decisions in reliance

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<sup>7</sup> U.S. Bureau of Labor Statistics, *Employee Benefits in the United States — March 2011* (July 26, 2011), *available at* <http://www.bls.gov/news.release/ebs2.nr0.htm>.

<sup>8</sup> MetLife, 10th Annual Study of Employee Benefit Trends 20 (2012), *available at* <http://www.metlife.com/assets/institutional/services/insights-and-tools/efts/ml-10-Annual-EBTS.pdf>. Sixty-six percent of polled employees agreed that health benefits were “very important for feelings of loyalty to the company,” 59 percent agreed regarding retirement benefits, and 51 percent who agreed regarding dental, disability, vision, and life insurance benefits. *Id.* at 26.

<sup>9</sup> James K. Harter, Frank L. Schmidt & Theodore L. Hayes, *Business-Unit-Level Relationship Between Employee Satisfaction, Employee Engagement, and Business Outcomes: A Meta-Analysis*, 87 *J. Applied Psychol.* 268 (2002).

<sup>10</sup> *In re Marriage Cases*, 43 Cal. 4th 757, 829, 183 P.3d 384, 433-34 (Cal. 2008).

on that promise and expect such protections to be available to them when faced with challenging life circumstances.

DOMA defeats this expectation, to the direct detriment of some married employees of *amici*, and by extension, of *amici* ourselves. As set forth below, DOMA forces *amici* to investigate the gender of the spouses of our lawfully-married employees and then to single out those employees with a same-sex spouse. DOMA enforces discriminatory tax treatment of spousal health care benefits. In many other benefit-related matters, *amici* must incur the cost and administrative burden of “workarounds” (employer-created benefit structures attempting to compensate for the discriminatory effects of DOMA), or leave the married workforce in separate castes.<sup>11</sup>

*Health Insurance and Related Benefits.* While DOMA does not prevent an employer from offering health-care benefits<sup>12</sup> to the same-sex spouse of an employee, it does impose discriminatory tax treatment. Under the Internal Revenue Code, the fair market value of health care benefits for a qualified employee’s spouse who is not otherwise a dependent of the qualified employee is not subject to federal income tax,<sup>13</sup> but DOMA forces both employer and employee to treat that value as taxable income when the qualified employee’s spouse is a

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<sup>11</sup> See, e.g., Human Rights Campaign, *Domestic Partner Benefits: Grossing Up to Offset Imputed Income Tax*, available at <http://www.hrc.org/resources/entry/domestic-partner-benefits-grossing-up-to-offset-imputed-income-tax> (“Human Rights Campaign: Grossing Up”)

<sup>12</sup> Such benefits typically are offered through a “group health plan.” See 29 U.S.C. § 1167(1); 26 U.S.C. § 5000(b)(1).

<sup>13</sup> See, e.g., 26 U.S.C. §§ 105, 106(a), 152; Treas. Reg. § 1.106-1 (excluding from gross income “contributions which his employer makes to an accident or health plan for compensation ... to the employee for personal injuries or sickness incurred by him, [or] his spouse ...”).

same-sex spouse.<sup>14</sup> Even where an employer provides coverage under a “family plan,” in which the addition of a discrete beneficiary may not add a discrete premium cost, an employee who elects such coverage for her same-sex spouse or for the children of her same-sex spouse is taxed on the imputed fair market value of that coverage, unless the individuals covered qualify as tax dependents through independent means.<sup>15</sup>

DOMA creates other tax distinctions with respect to workplace healthcare benefits. An employer may allow a married employee to reduce his taxable income by paying, on a pre-tax basis, the cost of coverage for a different-sex spouse, but not for a same-sex spouse.<sup>16</sup> A married employee may reduce his tax burden through pre-tax contributions to a “cafeteria” plan on behalf of a spouse, or be reimbursed on a pre-tax basis for spousal medical expenses from a health savings account or flexible savings account—but only for a different-sex spouse.<sup>17</sup>

Because of DOMA, the typical paycheck and Form W-2 for a married employee with a same-sex spouse looks quite different from that of her colleague married to a different-sex spouse. The Form W-2 for the first will show higher

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<sup>14</sup> See, e.g., I.R.S. Info. Ltr. 2011-0066, 2011 WL 4626122 (Jul. 27, 2011); I.R.S. Priv. Ltr. Rul. 200524016, 2005 PLR LEXIS 278 at \*23-24 (Mar. 17, 2005); I.R.S. Priv. Ltr. Rul. 200339001, 2003 PLR LEXIS 879 at \*9-11 (June 13, 2003); I.R.S. Priv. Ltr. Rul. 9850011, 1998 PLR LEXIS 1650 at\*10-12 (Sept. 10, 1998); I.R.S. Priv. Ltr. Rul. 9717018, 1997 PLR LEXIS 85 at \*11-12 (Jan. 22, 1997).

<sup>15</sup> See 26 U.S.C. § 152(a) (defining “dependent”).

<sup>16</sup> 26 U.S.C. §§ 105(b), 106(a) (limiting pre-tax treatment of medical expenses to employees, [opposite-sex] spouses and certain dependents).

<sup>17</sup> See 26 U.S.C. § 125(f) (limiting “qualified benefits” under a cafeteria plan to benefits that are “not includible in the gross income of the employee”); Treas. Reg. § 1.106-1 (excluding from gross income “contributions which his employer makes to an accident or health plan for compensation ... to the employee for personal injuries or sickness incurred by him, his spouse” or certain dependents).



taxable wages, due to the addition of the imputed value of the spouse's healthcare coverage, and reduced take-home pay, reflecting the increased withholding on that imputed income. One study shows that, on average, the Form W-2 of the employee married to a same-sex spouse will show \$1,069 more in federal taxes paid than that of her colleague married to a different-sex spouse.<sup>18</sup> The former, unlike the latter, cannot reduce her tax obligation by pooling her same-sex spouse's uncompensated medical expenses to meet the threshold required for a federal tax deduction.<sup>19</sup>

*Continuing Health Coverage and Open Enrollment Periods.* Under COBRA,<sup>20</sup> most private employers must continue to offer existing group healthcare coverage to employees, their spouses and their dependent children upon certain qualifying events, such as job termination and divorce.<sup>21</sup> DOMA excludes same-sex spouses from this default protection. Unless an employer voluntarily extends coverage (which may be difficult as a practical matter in markets where

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<sup>18</sup> M.V. Lee Badgett, Center for American Progress & UCLA Williams Institute, *Unequal Taxes on Equal Benefits*, at 7 (Dec. 2007), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-UnequalTaxesOnEqualBenefits-Dec-2007.pdf> (last visited June 12, 2012).

<sup>19</sup> See 26 U.S.C. § 213(a) (2011) (uncompensated medical expenses of the taxpayer, his or her spouse, or his or her dependents deductible to the extent exceeding 7.5 percent of adjusted gross income). DOMA bars the same-sex married couple from filing federal income tax returns under "married, filed jointly" status—a prerequisite for pooling deductions like uncompensated medical expenses. See generally 26 U.S.C. § 6013 (2011) (joint tax returns).

<sup>20</sup> Consolidated Omnibus Budget Reconciliation Act (COBRA), Pub. L. No. 99-272, 100 Stat. 82 (codified in scattered titles, including at 29 U.S.C. §§ 1161-1169); see also Treas. Reg. § 54.4980B-1. COBRA applies to businesses with 20 or more employees.

<sup>21</sup> See, e.g., 29 U.S.C. § 1163(1)-(6) (defining qualifying events for COBRA coverage); *id.* § 1167(3) (defining "qualified beneficiary," in relevant part, in terms of the covered employee's "spouse").



such coverage is limited or unavailable), the same-sex spouse of a terminated employee will be without the equivalent of federal COBRA protection.<sup>22</sup>

Under HIPAA,<sup>23</sup> an employee who marries may immediately add a new spouse to his health plan that allows for spousal coverage.<sup>24</sup> HIPAA also allows an employee to change his coverage status to cover a spouse under his own plan in special circumstances, including where the spouse loses coverage due to job termination.<sup>25</sup> Because of DOMA, lawfully married same-sex couples lack this federal protection.<sup>26</sup> Equitable treatment can exist only where an employer voluntarily secures a special plan accommodation.<sup>27</sup>

*Protections in Times of Family Crisis and Illness.* If an employee's different-sex spouse becomes seriously sick or injured, federal law permits her up to 12 work weeks of unpaid, protected leave to care for her spouse.<sup>28</sup> In

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<sup>22</sup> Because COBRA does not extend to small businesses, DOMA does not impair the operation of a state statute that provides comparable benefits to businesses with fewer than 20 employees. *See, e.g.*, Cal. Health & Safety Code § 1366.20 *et seq.*; Cal. Ins. Code § 10128.50 *et seq.*

<sup>23</sup> Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 1936 (codified in scattered sections, including at 29 U.S.C. §§ 1181-1183).

<sup>24</sup> *See* 26 U.S.C. § 9801(f) (discussing “special enrollment”); Treas. Reg. § 54.9801-6 (regulating coverage in special enrollment periods).

<sup>25</sup> *Id.* Employees under cafeteria plans may also change their health coverage following triggering qualifying events. *See* Treas. Reg. § 1.125-4.

<sup>26</sup> Similarly, when an employee's same-sex spouse gives birth to or adopts a child, the employee may not be able to immediately enroll the child unless the child otherwise qualifies as the employee's dependent. *See, e.g.*, Treas. Reg. § 54.9801-6(b)(2)(iv)-(vi).

<sup>27</sup> An employer providing such an accommodation may also need to secure the cooperation of any relevant carrier or service provider.

<sup>28</sup> Family and Medical Leave Act of 1993 (“FMLA”), Pub. L. 103-3, 107 Stat. 6 (codified in scattered sections of 5 U.S.C. and 29 U.S.C., including at 5 U.S.C. §§ 6381-6387 and 29 U.S.C. § 2601 *et seq.*).

emergencies, she may use a pre-retirement “hardship distribution” from her 401(k) plan to pay his medical expenses.<sup>29</sup> While the distribution is taxable, the employee will be exempted from certain penalties that would otherwise apply.<sup>30</sup> An employee with a same-sex spouse has no such assurances. Federal law secures her no leave, and she will be subject to early withdrawal penalties (as well as tax) should she take pre-tax distributions to pay for spousal care. At their own cost and administrative burden, some employers extend “FMLA-like” rights to employees with same-sex spouses, allowing them to take protected leave to care for a same-sex spouse. In addition, employers may devise 401(k) plans to permit pre-retirement hardship distributions for a “primary beneficiary” designated by the participant.<sup>31</sup> These workarounds are entirely at the employer’s direct cost. Absent employer-funded programs, the employee will lack the flexibility – enjoyed by her colleague with a different-sex spouse – to care for a same-sex spouse in times of crisis or illness.

*Retirement Protections.* DOMA also strikes at retirement protections. Most employee pension plans are controlled by ERISA, which provides substantive rights to different-sex spouses. For example, most defined-benefit pension plans and certain defined-contribution retirement plans are required to distribute benefits in a form, such as a qualified joint and survivor annuity or qualified preretirement survivor annuity, that ensures that a participant’s opposite-sex spouse may receive

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<sup>29</sup> 26 U.S.C. § 401(k)(2)(B)(i)(IV); Treas. Reg. § 1.401(k)-1(d)(3)(iii)(B)(1).

<sup>30</sup> Under 26 U.S.C. § 72(t), an enrollee may avoid imposition of additional tax on early retirement fund distributions if certain criteria are met, including distributions for spousal medical expenses and qualified domestic relations orders. The same-sex spouses of *amici’s* employees are excluded from these federal benefits under DOMA.

<sup>31</sup> I.R.S. Notice 2007-7, 2007-1 C.B. 395, 2007 WL 60771 (Jan. 27, 2007).

a portion of the participant's benefit absent express waiver by the participant (with spousal consent), and most retirement plans must provide opposite-sex spouses with special rights to the participant spouse's benefit if the participant dies while still employed.<sup>32</sup> The same-sex spouses of *amici's* employees lack these ERISA safeguards. Employers can provide equivalent protections across the workforce only by building workarounds into retirement plans. Even then, the same-sex spouse will not be afforded the full range of federal tax benefits associated with qualified joint and survivor annuities or qualified preretirement survivor annuities that a different-sex spouse enjoys.<sup>33</sup>

*Visa Rights.* Under operative immigration law, employers may recruit certain highly qualified scientists, business executives and scholars.<sup>34</sup> This is of great benefit to those *amici* that actively recruit foreign nationals, or transfer international employees domestically. DOMA burdens an enterprise's ability to do so by precluding it from offering a foreign national's same-sex spouse the shared visa status that a different-sex spouse would receive. A recruited or transferred foreign national married to a same-sex spouse must either leave the spouse behind, or secure an independent visa status for the spouse (at personal expense and effort),

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<sup>32</sup> See 29 U.S.C. § 1055; 26 U.S.C. §§ 401(a)(11), 417.

<sup>33</sup> See, e.g., 29 U.S.C. § 1055(d), (e) (defining qualified joint and survivor annuities and qualified pre-retirement survivor annuities as covering the "surviving spouse" of the plan participant); 26 U.S.C. § 417(b), (c) (same). Benefits under a qualified joint and survivor annuity are excluded for purposes of calculating annual limits on retirement benefits an individual may receive on a tax-deferred basis. 26 U.S.C. § 415(b). A surviving same-sex spouse receives benefits as a straight life annuity, which counts towards these limits without exclusion. A surviving employee is also unable, because of DOMA, to defer the payment of death benefits (and associated taxes) from his spouse's plan. See 26 U.S.C. § 401(a)(9). An opposite-sex surviving spouse, by contrast, may defer to age 70.5. *Id.*

<sup>34</sup> 8 U.S.C. § 1153(b)(1)(A), (B), (C).

and thereafter live with the risk of the expiration or rescission of that visa. For obvious reasons, this is a considerable impediment to attracting foreign nationals. Many may decline to come to a country that will not recognize a marriage that is lawful at home<sup>35</sup>; others may require assurances from the prospective employer that their relationship and marital estate can be adequately protected despite DOMA—assurances that the employer cannot provide. The preclusion of recognition of the foreign same-sex spouse under immigration law also subjects the foreign national, and accordingly the employer, to special taxation problems.<sup>36</sup>

### 3. DOMA Forces Employers to Incur Administrative Burdens and Expense.

DOMA forces *amici* to administer dual systems of benefits and payroll, and imposes on them the cost of the workarounds necessary to protect married colleagues.

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<sup>35</sup> See 8 U.S.C. § 1153(d) (providing that a “spouse” shall share the same visa status of an immigrant granted a visa). Currently, *amici* understand that individuals may lawfully marry a same-sex spouse in Argentina, Belgium, Canada, Denmark, Iceland, the Netherlands, Norway, Portugal, South Africa, Spain, and Sweden. See Law 26.618, July 22, 2010 [CXVIII] B.O. 31.949 (Arg.); Code Civil [Civil Code], art. 143 (Belg.); Civil Marriage Act, S.C. 2005, c. 33 (Can.); Law No. 532, June 12, 2012 (Den.); Law No. 65/2010, June 27, 2012 (Ice.); Burgerlijk Wetboek [Civil Code], Art. 30:1 (Neth.); Act of 27 June 2008 No. 53 (Nor.); Law No. 9/2010, May 31, 2010 (Port.); Civil Union Act 17 of 2006 (S. Afr.); Law 13/2005 Código Civil [Civil Code] 2005, 157 (Spain); Äktenskapsbalk [Marriage Code] 1:1 (Swed.). Mexico City allows same-sex marriages which are recognized in all Mexican states. See Código Civil para el Distrito Federal [Civil Code of the Federal District], art. 146 (Mex. City).

<sup>36</sup> Whereas the same-sex spouse of a foreign national might be considered the tax dependent of the foreign national in the home country, DOMA precludes this treatment for the purposes of federal income taxes (even if the foreign national is the couple’s sole income source). See 26 U.S.C. § 152(a)(3)(A) (foreign national cannot qualify as dependent of taxpayer). Absent DOMA, the same-sex spouse of the foreign national would be eligible for a US resident visa, see 8 U.S.C. § 1153(d), would receive a social security number, and could be claimed as a tax dependent by the foreign national.

*The burden of compliance.* In states recognizing same-sex marriage, DOMA requires *amici* simultaneously to treat employees with same-sex spouses as (1) single for the purposes of federal tax withholding, payroll taxes, and workplace benefits that turn, as most do, on marital status, and (2) married for all other purposes under state law, including state community property laws.<sup>37</sup> This requires *amici* in effect to maintain two sets of books—one for married employees with same-sex spouses, another for married employees with different-sex spouses. The double entries ripple through human resources, payroll, and benefits administration.

Tax treatment of employer-provided healthcare benefits for same-sex married couples is an illustrative (and important) example. When an employee resident in California adds a same-sex spouse to his healthcare plan, the employer must impute the value of that coverage as taxable income under federal law. Because the employer pays a portion of federal Social Security (FICA) and unemployment insurance taxes based on employees' wages, this imputed income increases the employer's overall tax burden as well.<sup>38</sup> How should the imputation be calculated? The I.R.S. declines to provide official guidance, and instead puts the burden (and risk of error) on the employer.<sup>39</sup>

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<sup>37</sup> See, e.g., Cal. Franchise Tax Bd., FTB Publication 776, *Tax Information for Same-Sex Married Couples*, available at [https://www.ftb.ca.gov/forms/2011/11\\_776.pdf](https://www.ftb.ca.gov/forms/2011/11_776.pdf).

<sup>38</sup> Badgett, *supra* n. 18 at 5-7.

<sup>39</sup> See, I.R.S. Priv. Ltr. Rul. 200108101, 2000 PLR LEXIS 2092 at \*24 (Nov. 17, 2000) (ruling that the fair market value of health benefits provided to domestic partners are taxable and declining “to issue a ruling that approves [a given] method of determining the value of the domestic partner health coverage”). While the I.R.S. has since issued various private letter rulings in response to written requests from individual taxpayers regarding specific valuation methods, other taxpayers cannot rely on those private letter rulings as precedent, as they constitute neither

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The California employer must then immediately reverse course, and for purposes of calculating an employee's state income taxes, treat benefits for a same-sex spouse exactly as it does for a different-sex spouse.<sup>40</sup> Because the marriages of same-sex couples are not recognized federally, but are recognized by the state, DOMA thus requires the employer—whether or not it currently has employees married to a same-sex spouse—to have systems capable of separately tracking married employees by reference to the gender of the spouse.<sup>41</sup> Confusion abounds, and even sophisticated employers struggle. Employees of Yale University learned in January, 2011 that the university had failed to withhold taxes for the imputed value of spousal health coverage in 2010, and that these amounts would be deducted from their paychecks in 2011.<sup>42</sup> Such incidents unnecessarily strain the employer-employee relationship and attract unwanted attention from the I.R.S.

These dual regimes have spawned an industry of costly compliance specialists. Some *amici* have had to pay vendors to reprogram benefits and payroll systems, to add coding to reconcile different tax and benefit treatments, to reconfigure at every benefit and coverage level, and to revisit all of these modifications with every change in tax or ERISA laws for potential DOMA

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official I.R.S. guidance on a topic nor have the force or effect of law. *See* 26 U.S.C. § 6110(k)(3).

<sup>40</sup> *See* n. 36, *supra*.

<sup>41</sup> Because changes to payroll/benefits administration require preparation, long lead time, and substantial expenditures, employers in states that recognize same-sex marriage must prepare systems that can address same-sex married employees well in advance of their hiring.

<sup>42</sup> Tara Siegel Bernard, *Yale Payroll Error Gives Gay Employees a New Years Surprise*, N.Y. Times, Jan. 11, 2011 (“Yale Payroll Error”), available at <http://bucks.blogs.nytimes.com/2011/01/11/yale-payroll-error-costs-gay-employees-thousands>.

impact. Attorneys and ERISA advisors must be consulted. Human resources, benefits, and payroll personnel must be trained and retrained as tax or ERISA laws change. Plan documents, enrollment forms, and administrative procedures must be scoured for the word “spouse,” and amendments and disclosures drafted to try to explain the numerous implications and consequences of a given benefits decision on the personal tax situation of an employee with a same-sex spouse. Enrollment systems must be reprogrammed to account for different spousal circumstances, and linked to provider records to ensure the providers extend appropriate coverage. Benefits and Human resources departments, facing questions from employees with same-sex spouses regarding workplace benefit selections and coverage, must be adequately trained and prepared to explain the disparate treatment to employees who may later realize (perhaps too late) that their benefits choices and decisions carried unanticipated and significant financial implications. The complexity and uncertainty saps critical time, focus, and energy from the human resources and benefits administration function.

The burden on the small employer is especially onerous. Regular retention of outside consultants is generally not an option, and many may not be capable of devoting limited resources to understanding and administering the conflicting regimes. Administration of benefits for an employee married to a same-sex spouse is more likely to occur in an ad hoc, piecemeal fashion, and may require that employee to divulge personal information that she would not otherwise be required to make, enhancing a sense of marginalization. Such burdens, standing alone, might chill some employers from employing an otherwise qualified employee because she happens to be married to a same-sex spouse.

The dual regime especially burdens certain providers of workplace benefits, who must counsel their customers struggling with administration of inconsistent regimes. They must keep a roster of attorneys and ERISA consultants on retainer



to grapple with the multi-faceted impact of DOMA on benefits packages. Call center employees and the sales force must be appropriately trained and prepared to respond to questions from both employers and employees about DOMA's impact on health insurance, tax, medical leave benefits, and retirement benefits. The complexities that arise from the variety of individual cases increase the risk that incorrect information may be given.

*Workarounds.* Many employers seek to rectify the invidious treatment of a class of their married employees by creating and funding parallel systems of benefits for employees lawfully married to same-sex spouses. These may include stipends representing the amount of imputed health-care benefits,<sup>43</sup> leave policies modeled to duplicate FMLA-related rights, and retirement plans that safeguard the same-sex spouse. These policies impose a direct cost on the employer. They carry administrative burden, requiring *amici* to retain experts to craft the policies and structure systems that can record and treat gross-up amounts, educate human resources, benefits, and payroll administrators, and manage the dual systems. Workarounds may attract attention from regulators or cause tension with shareholders or investors, all of which consumes time, resources and goodwill.

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<sup>43</sup> See Human Rights Campaign: Grossing Up, *supra* note 11; see generally Tara Siegel Bernard, *For Gay Employers, an Equalizer*, N.Y. Times, May 20, 2011, at <http://www.nytimes.com/2011/05/21/your-money/health-insurance/21money.html> (reporting that “a growing number of companies have taken it upon themselves to make life a little more equal for their gay employees” by “pay[ing] for an extra tax that their gay employees owe on their partners’ health insurance—something that their married heterosexual co-workers don’t have to worry about because the federal government recognizes them as an economic unit.”). For a list of companies currently “grossing up” the pay of employees who must pay federal taxes on the imputed value of health benefits for their same-sex spouses, see Tara Siegel Bernard, *A Progress Report on Gay Employee Health Benefits*, N.Y. Times, Aug. 15, 2011, <http://bucks.blogs.nytimes.com/2010/12/14/a-progress-report-on-gay-employee-health-benefits/> (each website last visited June 12, 2012).



However enlightened and necessary, such voluntary policies perpetuate a caste system among married employees. Unhelpful distinctions are inimical to teamwork and by extension, to the success of the enterprise.

**B. DOMA Forces Employers to Affirm Discrimination They Regard as Injurious to the Corporate Mission.**

DOMA imposes on *amici* not simply the considerable burden of compliance and cost. DOMA conscripts *amici* to become the face of its discrimination. As employers, we must administer employment-related health plans, retirement plans, family leave, and COBRA. We must impute the value of spousal healthcare benefits to our employees' detriment. We must intrude on their privacy by investigating the gender of their spouses, and then treat one employee less favorably, or at minimum differently, when each is as lawfully-married as the other. We must do all of this in states that prohibit workplace discrimination on the basis of sexual orientation and demand equal treatment of all married individuals.<sup>44</sup> This conscription has harmful consequences.

*Litigation Risk.* The American enterprise is accustomed to statutory regimes that are either silent as to, or prohibitive of, workplace discrimination. But a

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<sup>44</sup> See, e.g., Cal. Gov't Code § 12490(a) ("It is an unlawful employment practice . . . (a) [f]or an employer, because of the . . . sexual orientation of any person, to refuse to hire or employ the person . . . or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."); Mass. Gen. Laws ch. 151B, § 4 (unlawful "[f]or an employer... because of ... the sexual orientation ... of any individual ... to discriminate against such individual in compensation or in terms, conditions or privileges of employment...."); N.Y. Exec. Law. § 296(a) ("It shall be an unlawful discriminatory practice . . . [f]or an employer or licensing agency, because of an individual's . . . sexual orientation . . . to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."); Rev. Code Wash. § 49.60.030(1)(a) ("The right to be free from discrimination because of . . . sexual orientation . . . is recognized as and declared to be a civil right. This right shall include, but not be limited to . . . the right to obtain and hold employment without discrimination[.]").

regimen that *forces* it to discriminate imposes subtle, but real risk. For example, DOMA forces upon *amici* conduct (*e.g.*, withholding on wages attributable to the imputed value of the cost of group health plan benefits) that, but for the Supremacy Clause, would be unlawful under state law. More broadly, DOMA forces the employer to determine, at its own risk, where DOMA supersedes state law and where state law continues to protect the employee. Future litigation risk may take other forms, even harder to predict. For example, although constitutional litigation claims typically require state action, and most of the *amici* are not state actors, eight *amici* are cities. Municipal actors often *are* required, in costly litigation, to respond to allegations that they are “state actors.”<sup>45</sup> The practical fact is that DOMA makes the employer the unwilling agent of federally-required disparate treatment of lawfully-married employees. Whatever the lack of merit of a formal legal challenge, disparate treatment in the workplace imposed by DOMA fosters workplace distress, and practical experience teaches that workplace distress increases the risk of the employer’s having to respond, at its own expense, to claims of the aggrieved.

*Morale.* In the modern workplace, the employer becomes the face of DOMA’s discriminatory treatment, and is placed in the role of intrusive inquisitor, imputer of taxable income, withholder of benefits. The employer is thus forced by DOMA to participate in the injury of its own workforce morale. Yale University’s

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<sup>45</sup> See *Board of the County Commissioners of Bryan County v. Brown*, 520 U.S. 397, 400 (1997) (municipal actors may be liable under section 1983 where plaintiff identifies an official policy or “custom” of the municipality that caused injury). The other *amici* assuredly are *not* state actors, but some commentators have sought to discern “state action” where sufficient government command or encouragement is shown. Ronald D. Rotunda & John E. Nowack, 2 *Treatise on Constitutional Law, Substance & Procedure* § 16.3 at 1027-28 (4th ed. 2007) (citing cases where “legislation may encourage an activity so as to give rise to state action in the activities of private persons”).

error in administering DOMA, and its implementation of unexpected tax withholding against employees married to same-sex spouses in 2011,<sup>46</sup> cast the university as the antagonist to its own employees. And the enforced compliance with DOMA's discriminatory regime has another dimension. The employee confused about the conflicting legal rules typically puts his first question to the human resources department. Every benefits administrator must become a constitutional scholar, or give no advice at all.<sup>47</sup> Even the best-informed can provide only a general answer. The wrong answer may lead to harsh tax and financial consequences, and further erosion of workplace morale.

*Our Mission.* The injury runs far deeper than mere litigation risk; deeper even than the morale of the work force. For many employers, DOMA does violence to the morale of the institution itself. Like other persons, legal and natural, *amici* are motivated by core principles. As of March 2011, 86.6% of Fortune 500 companies provided nondiscrimination protection for their gay and lesbian employees.<sup>48</sup> To take one example of many, amicus Starbucks Corporation is "committed to upholding a culture where diversity is valued and respected. So it's only natural that as a guiding principle, diversity is integral to everything we do."<sup>49</sup> The business judgment of other *amici* has been to the same effect.<sup>50</sup> These

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<sup>46</sup> See Yale Payroll Error, *supra* n. 42.

<sup>47</sup> And, in California, employers may be required by law to provide information about "all" benefits and coverage options to their employees. See, e.g., Cal. Lab. Code § 2808.

<sup>48</sup> See Human Rights Campaign, *Employment Non-Discrimination Act: H.R.1397 & S.811*, available at <http://www.hrc.org/laws-and-legislation/federal-legislation/employment-non-discrimination-act>.

<sup>49</sup> See Starbucks Corp., *Diversity at Starbucks*, available at <http://www.starbucks.com/about-us/company-information/diversity-at-starbucks>.


principles spring from hard experience. Our enterprises are engaged in national and international competition—for talent, customers, and business. That competition demands teamwork, and teamwork thrives when the enterprise minimizes distracting differences, and focuses on a common mission. DOMA’s core mandate—that we single out some of our married colleagues, and treat them as a lesser class—upsets this imperative.

Our principles are not platitudes. Our mission statements are not simply plaques in the lobby. Statements of principle are our agenda for success: born of corporate experience, tested in laboratory, factory, and office, attuned to competition. Our principles reflect, in the truest sense, our business judgment.<sup>51</sup> By force of law, DOMA would rescind that judgment, and direct that we renounce these principles, or worse yet betray them.

### CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

  
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(Footnote Continued from Previous Page.)

<sup>50</sup> In an appendix (the subject of an accompanying motion for leave to file), *amici* gather a collection of similar statements of corporate principle.

<sup>51</sup> “[T]he skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

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Support of Appellee and in Support of  
Affirmance of the Judgment Below

Dated: July 10, 2012

**CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 29(d) & 32(a)**

1. Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains 6,032 words, which is less than half the length allowed for a party's principal brief under Fed. R. App. P. 32(a)(7)(B), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally-spaced typeface, using Word 2003 in 14 point Times New Roman font.

Dated: July 10, 2012

/s/ Raymond C. Marshall  
Raymond C. Marshall

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 10, 2012. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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/s/ Raymond C. Marshall  
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