NO. 12-307

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, in her capacity as Executor of the estate of THEA CLARA SPYER, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Amicus Curiae Brief of the Center for Fair Administration of Taxes (CFAT) in Support of Respondents

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INTEREST OF *AMICUS*

Amicus Center for the Fair Administration of Taxes ("CFAT") is a section 501(c)(3) non-profit organization seeking to promote fairness in the administration of the tax laws to taxpayers as a whole. Currently, the primary means utilized to achieve this goal is through the filing of briefs as *amicus curiae* in tax-related cases throughout the United States. CFAT works jointly with the Chapman University School of Law Appellate Tax Clinic, offering law students the opportunity to assist in the preparation of the *amicus curiae* briefs filed by CFAT. CFAT acknowledges the valuable assistance provided by Roman Macias, a J.D. Candidate at the Chapman University School of Law, in drafting this Brief. A. Lavar Taylor, the Director for CFAT and Adjunct Professor of Law at Chapman Law School, has over 31 years of experience in the handling of civil and criminal tax controversies, both in government and in private practice.[1]

Amicus is filing this brief in support of Respondent Edith Windsor to demonstrate that, for purposes of determining whether a person is "married" or "not married" under the federal income tax laws, Courts have traditionally looked to state

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[1] No person other than the named *amicus* or their counsel authored this brief or provided financial support for this brief. This *Amicus* Brief is being filed with the blanket consent filed by all parties other than Edith Windsor. Counsel for Edith Windsor consented to the filing of this Brief via email.

law to determine whether a valid marriage exists. *Amicus* also discusses the practical problems that will continue to result in the administration of the federal tax laws if section 3 of the Defense of Marriage Act (DOMA) is held to be constitutional.

Determining whether a person is "married" or "not married" for purposes of the federal tax laws has consequences far beyond those at stake in the present case. The term "spouse" appears in over 170 different sections of the Internal Revenue Code. These Code sections deal with a wide variety of subjects, including a) the avoidance of income tax and gift tax consequences for transfers of property between "spouses" b) the avoidance of income tax consequences for transfers of funds held in retirement accounts to a "spouse" or former "spouse," c) the imposition of excise taxes on persons such as the "spouses" of certain persons, d) taxation of alimony payments made to "spouses" and former "spouses," e) the taxation of income derived by Native Americans from exercise of fishing rights through a qualified entity owned by a Native American and his or her "spouse," and f) establishing a retirement annuity for Tax Court Judges and their surviving "spouse." Thus, the effect of DOMA on the question of whether a person is considered "married" for purposes of the federal tax laws is extremely far reaching.

SUMMARY OF ARGUMENT

Courts and the Internal Revenue Service (IRS) have traditionally looked to state law to determine whether an individual is "married" or "not

married" for purposes of the administration of the tax laws. This is true in a variety of contexts. Thus, whenever a same sex couple has or had a valid marriage under state law, DOMA requires results under the Internal Revenue Code that are inconsistent with the results for other identically situated opposite sex couples who have or had a valid marriage under state law. DOMA thus compels outcomes under the Internal Revenue Code that are completely at odds with a long tradition of looking to state law to determine the validity of a marriage for federal income tax, gift tax and estate tax purposes.

The inconsistent results under DOMA create a number of difficulties. First, there is a lack of horizontal equity with respect to couples who are (or were) validly married under state law. The mere lack of horizontal equity discourages compliance with the tax laws. Second, same-sex couples who are (or were) validly married under state law are deprived of "tax benefits" that are available to other couples who are (or were) validly married under state law.

Third, the IRS is hamstrung in preventing abuses of the tax laws where enforcement of these abuses is linked to the status of a person as another person's "spouse." Finally, where state law recognizes same sex marriages and bestows the same privileges and obligations under the tax laws on all couples who are "married" under state law, same sex married couples in these states will be

subject to inconsistent treatment by federal and state taxing agencies.

CFAT urges this Court to uphold the ruling of the Second Circuit in order to avoid the numerous problems that will continue to result in the administration of the tax laws under DOMA.

ARGUMENT

A. Courts and the Internal Revenue Service Have Traditionally Looked To State Law in Determining Whether a Valid Marriage Exists for Federal Tax Purposes

Prior to the enactment of DOMA, it was well established that the status of an individual as "married" or "not married" for purposes of the Internal Revenue Code and federal tax administration depended on whether that individual was validly "married" under applicable state law. While federal law establishes the obligations and privileges for married individuals under the tax laws, the status of individuals as "married" or "not married" for purposes of tax administration was always determined by looking to state law. This created certainty and uniformity in the application of federal tax laws for all persons living in a particular state. Each state was allowed to determine when a person was married, and that determination was respected by the IRS in the administering of the tax laws.

There is a wide variety of judicial decisions which illustrate how this principle has operated in practice. In 1953, the Fourth Circuit affirmed a Tax Court decision that plainly and unambiguously stated that "Marriage, its existence and dissolution, is particularly within the province of the states." *Eccles v. Commissioner*, 19 T.C. 1049, 1051 (1953) *aff'd*, 208 F.2d 796 (4th Cir. 1953). In *Eccles*, the taxpayer was divorced under an interlocutory decree on August 2nd, 1949, but the divorce became final six months later. The taxpayer filed a joint return for 1949, and the Commissioner assessed a deficiency, claiming that the taxpayer was not allowed to file a joint return because he was no longer married as of August 2nd, 1949.

The Fourth Circuit held for the taxpayer. The Court stated that, because the laws of the state provided that the type of decree entered did not end a marriage until after the close of the taxpayer year in question, the taxpayer was entitled to file a joint return for 1949. *Id*.

Since the decision in *Eccles*, multiple Courts of Appeal have reiterated the principle that state law determines whether a valid marriage existed for purposes of administering the tax laws. In 1976, the Second Circuit affirmed a Tax Court decision, holding that, in determining whether an individual qualifies as a "surviving spouse" for purposes of federal estate tax law, "there is no alternative but to follow the law of the state" where the individual is domiciled. *Estate of Goldwater v. Commissioner,* 539 F.2d 878, 881 (2d Cir. 1976). The issue decided in

Goldwater is the same issue presented here, without the overlay of DOMA.

In *Estate of Steffke v. Commissioner*, 538 F.2d 730 (7th Cir. 1976), *cert. denied*, 429 U.S. 1022 (1976), the Seventh Circuit looked to state law to determine whether a Mexican divorce should be recognized for federal estate tax purposes. The Court held that, because the Mexican divorce was not recognized by state law, the decedent's "new spouse," whom he had "married" after the Mexican divorce, was not the decedent's wife. Thus, the "new spouse" could not qualify for an estate tax marital deduction.

The Fifth Circuit similarly acknowledged that state law controls whether a person was married for purposes of administering the federal tax laws in *Glaze v. United States*, 641 F.2d 339 (5th Cir. 1981). *Glaze* addressed the ability of a putative surviving spouse to elect to file a joint return with the decedent. At the time of the decedent's death, a proceeding was instituted in State Court to determine whether the decedent was married at the time of death.

After the court proceeding determined that the decedent was in fact married, the administrator filed an amended joint tax return. The United States argued that the three-year statute of limitations for filing an amended joint return under Internal Revenue Code § 6013(b)(2) had run. The Court, in addition to holding that this limitations period only applied to married taxpayers who previously filed separate returns, held that the "decedent's

administrator could not have filed a joint return within the meaning of §6013(b)(2)" before state law could determine whether the decedent was in fact married at the time of death. *Id.* at 341.

The Ninth Circuit held, in *Gersten v. Commissioner,* 267 F.2d 195 (9th Cir. 1959), that a person could not file a joint federal income tax return because his Mexican divorce was not recognized as valid under California law.

The Tenth Circuit likewise affirmed a Tax Court decision in applying the principle discussed in *Eccles*. *See Commissioner v. Evans*, 211 F.2d 378, 379 (10th Cir. 1954) (Holding that since the taxpayer wife was not divorced under state law, income received by her under an interlocutory divorce decree did not constitute taxable income).

Lower courts have likewise relied upon state law to determine the marital status of an individual in various contexts for purposes of administering the federal tax laws. *See, e.g., Schmidt v. Commissioner*, 41 T.C.M. (CCH) 793 (1991) (Court looked to Texas law to determine whether there was a valid marriage and thus whether the taxpayer was required to report income generated by putative community property), *Nicholas v. Commissioner*, 62 T.C.M. (CCH) 467 (1970) (Taxpayer not allowed to claim his putative spouse as a dependent because Utah did not recognize common law marriage), *Ross v. Commissioner*, 31 T.C.M. (CCH) 488 (1972) (Taxpayer allowed to claim putative spouse and her parents as dependents because the District of Columbia recognized common law marriage), and

Gaitan v. Commissioner, 103 T.C.M. (CCH) 2010) (Court looked to state law to determine marital status for purposes of deciding whether to allow competing claims for "innocent spouse" relief under the Code).

This Court has looked to state law for purposes of determining which spouse must report community property income on their federal income tax return. *United States v. Mitchell*, 403 U.S. 190, 197 (1971).

The IRS itself has administratively announced that state law determines the marital status of individuals under the Internal Revenue Code. See Revenue Ruling 58-66, 1958-1 C.B. 60 ("the marital status of individuals as determined under state law is recognized in the administration of the Federal income tax laws").

In sum, the result reached by the Second Circuit below is consistent with the historical approach applied by the IRS and by the courts, including this Court, in administering federal tax laws. The application of DOMA to the facts of this case would run counter to this historical approach.

B. DOMA Creates Horizontal Inequity and Harms Tax Compliance

Under DOMA, couples who are validly married under local law are treated differently under the federal tax laws. That is illustrated by the significant financial difference between the two possible outcomes of the present case. If the estate of

Ms. Spyer (Ms. Windsor's deceased spouse) is deprived of the same marital deduction which is available to the estates of decedents who were married to a person of the opposite sex, Ms. Spyer's estate will be deprived of a significant sum of money.

Where a state has chosen to recognize a marriage, different tax treatment under the federal tax laws based on different "types" of marriages which are nevertheless valid under state law creates significant horizontal inequities. Based on the personal observations of counsel for *amicus*, who has over 30 years of experience in dealing with taxpayers who have fallen out of tax compliance, these horizontal inequities will, over time, do damage to the voluntary compliance system which is the very foundation of our system of taxation.

The IRS regularly depends upon taxpayers to voluntarily comply with tax laws. The IRS is only able to audit a tiny fraction of filed tax returns to verify that taxpayers are complying with the tax laws. Perceived unfairness in the administration of the tax laws, *i.e.*, treating similarly situated taxpayers differently, will over time damage voluntary tax compliance, to the detriment of all.

The adverse effects on the voluntary compliance system of treating a marriage that is valid under local law as being non-existent for federal tax purposes merely because both spouses are atheists, are Muslims, are autistic, are left-handed or are of mixed ethnic backgrounds are not difficult to imagine. Where a state recognizes that a marriage is valid, and the IRS treats some

marriages as valid and other marriages as not valid for purposes of the tax laws for discriminatory reasons, resentment by those who believe that this discrimination is unfair and improper will result in a decrease in tax compliance.

C. Under DOMA Same Sex Couples Who Are Validly Married Under State Law Are Deprived of Benefits Under the Tax Laws

Because the word "spouse" appears in so many different sections of the Internal Revenue Code, it is impossible to list here all of the tax "benefits" that are lost by same sex spouses as the result of DOMA. Some of these benefits are obvious, such as the availability of the marital deduction for estate tax purposes, which is at issue in this case.

Other benefits, some of which may be less obvious, include the following. When a person dies and leaves their IRA to their "spouse," that "spouse" can receive more favorable tax treatment of the funds in the IRA than if the IRA was left to someone other than a "spouse." See the discussion on the IRS website at http://www.irs.gov/Retirement-Plans/Plan-Participant,-Employee/Retirement-Topics---Beneficiary (last viewed Feb. 28, 2013).

Another example is the availability of relief under section 66 in community property states. In community property states, one-half of all post-marital earnings of both spouses are deemed to be earned by each spouse. *See Poe v. Seaborn*, 282 U.S. 101 (1930), *United States v. Mitchell, supra*. If the spouses file separate returns, each must include as

income their one-half share of community income, even if all of the income in question was physically earned by one spouse.

Sometimes, where spouses in a community property file separate income tax returns, one spouse ("Spouse A") will fail to disclose all of their income to the other spouse ("Spouse B"), resulting in an understatement of tax by Spouse B. Legally, one-half of that undisclosed income must be reported on the tax return of Spouse B. *Poe v. Seaborn, supra.*

Section 66(c) allows Spouse B to avoid paying taxes on their one-half share of community income that was earned by Spouse A if Spouse B did not know about the unreported income and meets certain other requirements. If DOMA were to apply to the Internal Revenue Code, same sex spouses in community property states would be ineligible for relief under section 66(c). These same sex spouses would end up having to pay income tax on income that they never received or controlled.

These are but two of many examples of how same sex married couples would be penalized if DOMA were to apply to the administration of the federal tax laws.

D. Under DOMA The IRS Is Deprived of the Ability to Deal with Abuses of the Tax Laws

Treating couples who are validly married under local law as not being married for purposes of the federal income tax laws will also deprive the IRS of the ability to deal with abuses of the tax laws in certain circumstances. For example, section 267 of the Code provides special rules for dealing with transactions between "related" taxpayers. These rules are designed to prevent related taxpayers from engaging in certain conduct and claiming certain tax benefits in situations that Congress deemed it inappropriate to claim these tax benefits.

These rules apply to "family" members. Section 267(c)(4) defines a family to include a "spouse." Treating a person who is validly married under state law as if they are not a "spouse" for purposes of section 267 can result in same sex married couples being able to engage in transactions and claim losses that would be prohibited if the marriage was treated as valid for federal income tax purposes.

For example, if the sale of stock by a person to his or her spouse results in a loss, section 267 prevents the person selling the stock from claiming this loss on their tax return. This rule prevents spouses from selling assets to each other to obtain the benefit tax losses. Under DOMA, same sex couples who are married can sell assets to each other and claim losses from such sales on their tax returns.

Similarly, section 4975 of the Code imposes an excise tax on certain types of "prohibited transactions" involving pension plans. Certain persons, including the "spouses" of those persons, are penalized if they engage in certain types of conduct. If DOMA were to apply to the administration of the federal tax laws, same sex spouses would not be prohibited from engaging in these types of prohibited transactions.

Thus, for example, if a fiduciary of pension plan sells assets of the pension plan to himself or herself, or to his or her spouse, such a sale is a "prohibited transaction" which is taxed under section 4975. Under DOMA, a pension plan fiduciary who is married to a spouse of the same sex could sell pension plan assets to his or her spouse without penalty.

E. Under DOMA, Where State Law Recognizes Same Sex Marriages and Bestows the Same Privileges and Obligations Under The Tax Laws on All Couples Who Are Married Under State Law, Same Sex Married Couples in these States Are Subject to Inconsistent Treatment By Federal and State Taxing Agencies

Under DOMA, if a state has an income tax system which is similar to the federal income tax system (but which treats a same sex married couple as "spouses" for state income laws), then same sex couples who are validly married under state law must deal with two sets of rules which will often be

wildly inconsistent. For example, the Internal Revenue Code requires the inclusion in gross income of any alimony received by a spouse under a divorce or separation instrument. 26 U.S.C. §71(b)(1)(A). How will alimony received under a valid divorce decree under State law be taxed at the federal level if the Federal government did not recognize the marriage in the first place? However it is taxed at the federal level, it will almost certainly be different than how it is taxed at the state level, since section 71 applies only to "spouses" and former "spouses."

Similarly, Section 417 of the Code deals with elections to waive a qualified joint and survivor annuity or a pre-retirement survivor annuity in retirement plans where the spouse must consent to the waiver. With conflicting rules at the federal and state level, it will be difficult to deal with such situations.

Faced with such conflicting rules for their citizens, states will have to make a choice between adopting the definition of marriage that they see fit and dealing with the consequences of not having it recognized by the Federal government, or adopting the Federal Definition of marriage under DOMA.

CONCLUSION

For the reasons set forth above, CFAT urges this Court to invalidate Section 3 of DOMA creating a "Federal" definition of Marriage and to hold that the definition of marriage will be determined under state law for purposes of federal tax administration. Such a result will avoid numerous difficult problems in administering the federal tax laws.

Respectfully submitted,

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