No. 12-307

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR
AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

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

BRIEF ON THE MERITS FOR *AMICUS CURIAE* THE PARTNERSHIP FOR NEW YORK CITY IN SUPPORT OF RESPONDENT WINDSOR AND AFFIRMANCE OF THE SECOND CIRCUIT

MARC WOLINSKY
Counsel of Record
JONATHAN M. MOSES
KEVIN S. SCHWARTZ
LUKE M. APPLING
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, NY 10019
(212) 403-1000
MWolinsky@WLRK.com

Counsel for the Partnership for New York City

March 1, 2013

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Section 3 of the Defense of Marriage Act (DOMA) defines the term "marriage" for all purposes under federal law, including the provision of federal benefits, as "only a legal union between one man and one woman as husband and wife." 1 U.S.C. 7. It similarly defines the term "spouse" as "a person of the opposite sex who is a husband or a wife." *Id*. The question presented is:

Whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

Constitution

Statutes

TABLE OF AUTHORITIES—Continued

Page(s)

Other Authorities

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

IN THE

Supreme Court of the United States

No. 12-307

UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR
AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

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

BRIEF ON THE MERITS FOR *AMICUS CURIAE* THE PARTNERSHIP FOR NEW YORK CITY IN SUPPORT OF RESPONDENT WINDSOR AND AFFIRMANCE OF THE SECOND CIRCUIT

INTEREST OF *AMICUS CURIAE*[1]

The Partnership for New York City ("the Partnership") is a nonprofit membership organization comprised of 200 chief executive officers from many of the

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* or its counsel, made any monetary contribution to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk.

City's leading businesses. These businesses operate in a wide range of industries, including finance, consulting, healthcare, fashion, media, law, real estate, and entertainment.

The Partnership's mission is to engage the business community in efforts to advance the economy of New York City and maintain the City's position as the center of world commerce, finance, culture and innovation. The Partnership for New York City leverages its network of partners to formulate and advocate for policies aimed at advancing this mission and, in that capacity, advocated strongly for the passage of New York's Marriage Equality Act. The Partnership for New York City is thus well-positioned to inform the Court of the substantial, detrimental effects that Section 3 of the Defense of Marriage Act (DOMA) has on the New York business community's efforts to maintain the highest levels of competitiveness.[2]

The Partnership for New York City submits this *amicus* brief with the consent of all parties in support of respondent Windsor and in support of affirmance of the Second Circuit.

SUMMARY OF ARGUMENT

This case presents the important question of whether the federal government may intrude into the province of the States in order to deny the full bene-

[2] We understand that a group of business, professional and municipal employers as well as professional, trade and civic organizations representing employers is also submitting an *amicus* brief in support of respondent Windsor and in support of affirmance of the Second Circuit. The views expressed herein are consistent with those of the *amicus* brief submitted for the employers group.

fits of marriage to loving same-sex couples who are legally married under state law. The Partnership for New York City exercised a pivotal advocacy role supporting the enactment of marriage equality in New York State. The Partnership did so because marriage equality is important to maintaining the State's and New York City's competitiveness. DOMA improperly stands in the way of the full accomplishment of these objectives. It denies same-sex couples who are legally married in New York the benefits and protections afforded to opposite-sex marriages. And it does so without advancing any legitimate purpose. The Partnership for New York City therefore urges the Court to affirm the Second Circuit's decision.

There are two considerations that, from the perspective of the Partnership, bear particular emphasis in the Court's consideration of the important issues raised on this appeal.

First, DOMA's creation of a federal definition of marriage must be carefully reviewed because it is fundamentally inconsistent with basic principles of federalism. Since our nation was founded, the institution of marriage has been regulated by the States, not by Congress. Businesses have organized their affairs in reliance on this fundamental allocation of power and responsibility. And they have participated in the democratic process at the state level to promote marriage laws that make the communities in which they do business better places to work and live. As a pointed illustration of this, the Partnership for New York City was instrumental in building support for legislation in New York that entitles same-sex marriages to full legal rights and benefits, legislation that was enacted last year on a bipartisan basis.

New York City's business leaders urged the passage of marriage equality because they wanted to be located in a State where the legal environment matched their business values and interests, including their interest in recruiting a workforce that is diverse and from a labor pool that contains the greatest available business talent. Nevertheless, on a daily basis, DOMA's imposition of a federal definition of marriage flouts the results of this state-based democratic process and the deeply-rooted reservation to the States of the power to regulate the institution of marriage.

Second, the review of DOMA that the law requires demonstrates not only that it fails to advance its own purported ends in violation of the Fifth Amendment's guarantee of equal protection, but also that it imposes substantial burdens on the business community. New York employers must recognize employees' same-sex marriages for all state-law purposes. At the same time, they are prohibited from doing so for every way in which marital status implicates federal law. This dual regime undermines the very uniformity DOMA purports to advance, one of the statute's supposedly prime justifications. The burdens imposed by DOMA include not only significant administrative cost, but also the invidious harm inflicted by a mandate that effectively requires employers to act as agents of the federally-mandated discrimination against their gay and lesbian employees.

* * *

Congress purportedly adopted DOMA to promote uniformity and "traditional" marriage. Yet New York's business leaders can attest that DOMA does neither. Since DOMA's passage in 1996, same-sex

marriages have become widely accepted. The notion that the extension of the benefits and protections afforded by marriage to loving and committed same-sex couples has undermined the institution of marriage is without substance. The extension of voting rights to women in individual States prior to the adoption of the Nineteenth Amendment did not weaken democracy, it strengthened it. The same is true for marriage. Indeed, rather than strengthen the institution of marriage, DOMA's discrimination against same-sex couples who have committed themselves to each other works to harm families. And by promoting dis-uniformity in the workplace, it harms New York business.

Same-sex marriages (and, for that matter, opposite-sex marriages) will proceed regardless of DOMA; so, too, will the business imperative — and commitment — to equal recognition of marriage in the workforce. All that is left in DOMA is a law that clings to a baseless distinction among married couples, one at odds with the results of New York State's democratic process, irreconcilable with the statute's purported ends, and a threat to the global competitiveness of the New York business community.

BACKGROUND

Section 3 of DOMA creates a federal definition of marriage as "a legal union between one man and one woman as husband and wife."[3] The effects of this definition, adopted by Congress with little debate and as an acknowledged preemptive measure before States could act upon their historical role in defining marriage, are sweeping. They ripple through the

[3] 1 U.S.C. § 7.

more than 1,100 federal statutes in which marital status is a factor in determining legal protections, rights, and benefits, many of which are administered by the members of the Partnership for New York City.[4]

The case before this Court lays bare just one potent example in the area of disparate tax treatment: DOMA's refusal to recognize that a married couple who lived together in a devoted and caring relationship for almost 50 years was entitled to the marital exemption provided under the federal estate tax laws. That exemption is designed to protect a surviving spouse from the potentially devastating consequences that the estate tax can have on couples who made true on their vow to care for each other for richer or poorer and in sickness and in health by pooling their financial resources.

But the marital exemption is just one area affected by DOMA's definition of marriage. Numerous other provisions of federal law turn on marital status.[5] By way of example only:

- *Non-Taxation of Spousal Health Benefits*: The Internal Revenue Code excludes from an employee's income the value of employer-

---

[4] *See* Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* (June 21, 2004), http://bit.ly/CBOImpact. These statutory provisions run the gamut and literally can affect an individual in all aspects of his or her life, far beyond the decision to have children and raise them in a two-parent family, another of Congress's purported justifications for the law. The CBO estimates that, on net, same-sex marriage would actually improve the federal government's bottom line by approximately $1 billion per year. *Id*.

[5] *Id*.

provided spousal health benefits.[6] Under DOMA, same-sex spouses are not eligible for this exclusion; the fair market value of these benefits must be calculated and imputed as income to the employee.[7]

- *Flexible Spending Accounts (FSA)*: The Internal Revenue Code allows employees to use pre-tax income to pay for medical care for themselves as well as their spouses and dependents.[8] Under DOMA, same-sex spouses are ineligible to participate in this program.
- *Health Insurance Portability and Accountability Act (HIPAA)*: HIPAA provides employees the right to enroll additional individuals in their health plans outside the open enrollment period if there is a "qualifying event" such as a marriage.[9] Due to DOMA, same-sex marriage is not considered a qualifying event and an employer need not allow a same-sex spouse to be added to the policy.
- *Visa Rights*: When individuals are granted visas, their spouses are ordinarily provided with an equivalent immigration status.[10] DOMA, however, prevents the extension of such status to same-sex spouses.

---

[6] *See* 26 U.S.C. §§ 105 & 106(a). Thus, both the employee and the employer must pay higher taxes.

[7] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 200524016 (Mar. 17, 2005).

[8] *See* 26 U.S.C. § 125(a).

[9] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified in scattered titles of the United States Code).

[10] *See* 8 U.S.C. § 1153(d).

- *Continuing Health Coverage*: Under COBRA (the Consolidated Omnibus Budget Reconciliation Act), most employers are required to provide terminated employees the option to continue their health insurance coverage for themselves, as well as spouses and dependents, for a defined period and at their own expense.[11] But because DOMA prohibits same-sex spouses from classification as spouses for any purpose under federal law, these employees are excluded from the same continued coverage protections that other married couples receive in the workforce.
- *Family Medical Leave Act (FMLA)*: Most employers are required under the FMLA to provide up to 12 weeks of unpaid leave during any 12-month period to care for an ill or injured parent, child, or spouse, or for the birth or adoption of a child. Under DOMA, however, an employer bears no obligation to provide this unpaid leave for employees who need to care for their same-sex spouses.
- *Employee Retirement Income Security Act (ERISA)*: Due to DOMA, companies that self-insure are under no ERISA obligation to provide insurance benefits to same-sex spouses on the same basis as opposite-sex spouses.[12]

Many of the rights and benefits affected by DOMA are implemented and provided by employers. It is

---

[11] *See* Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. No. 99-272, 100 Stat. 82 (codified in scattered titles of the United States Code).

[12] *See* Human Rights Campaign, *Federal Laws Impacting Domestic Partner Benefits*, http://bit.ly/humanrightscampaign.

the employer that must withhold additional taxes from the paycheck of an employee with same-sex spousal health benefits. It is the employer that must determine the marital status of employees who claim, or might even wish to claim, spousal protections or benefits. It is the employer that must identify which employees are entitled to particular health and retirement benefits under federal law. In short, due to the many ways in which federal law and DOMA's definition of marriage implicate employee benefits, businesses are necessarily thrust into the role as agents of the law and must maintain an administrative machinery to do so.

Since the adoption of DOMA, same-sex marriages have become increasingly recognized.[13] In order to compete effectively for the diverse talent that they believe will promote their businesses, many employers in New York State — at their own cost — have extended to employees in same-sex relationships the benefits and protections that federal law provides to opposite-sex spouses. New York's Marriage Equality Act, adopted with wide business-community support, recognizes that development by providing that a marriage is valid and entitled to full legal rights and protections "regardless of whether the parties to the marriage are of the same or different sex."[14] In other words, under New York law it is illegal to treat married couples differently based on whether they are in same- or opposite-sex marriages. DOMA stands as

---

[13] Julie Appleby, PBS Newshour, *The Rundown: Many Businesses Offer Health Benefits to Same-Sex Couples Ahead of Laws* (May 14, 2012), http://bit.ly/PBSRundown.

[14] Marriage Equality Act, 2011 N.Y. Sess. Laws. Ch. 95 (A. 8354) (McKinney 2011) (codified as N.Y. Dom. Rel. L., Art. 3, § 10-A).

an obstacle to that goal, a goal that the New York legislature endorsed when it acted in an area traditionally left to the States.

ARGUMENT

I. DOMA ILLEGITIMATELY UNDERMINES STATES' HISTORIC ROLE IN DEFINING MARRIAGE.

"[E]ven in the ordinary equal protection case . . . [courts] insist on knowing the relation between the classification adopted and the object to be attained . . . [and] requir[e] that the classification bear a rational relationship to an independent and legitimate legislative end." *Romer* v. *Evans*, 517 U.S. 620, 632-33 (1996). Consistent with the constitutional guarantee to every citizen of equal protection of the laws, "the Supreme Court [has] scrutinized with special care federal statutes intruding on matters customarily within state control." *Massachusetts* v. *U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 13 (1st Cir. 2012) (citing *United States* v. *Morrison*, 529 U.S. 598 (2000) and *United States* v. *Lopez*, 514 U.S. 549 (1995)).

And specifically with respect to the issue presented here, this Court has recognized repeatedly that "'[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.'" *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 581 (1979) (*quoting In re Burrus*, 136 U.S. 586, 593-594 (1890)). *See also Morrison*, 529 U.S. at 599 (disapproving of federal regulation of "family law and other areas of state regulation" such as "marriage, divorce, and childrearing"); *Sosna* v. *Iowa*, 419 U.S. 393,

404 (1975) ("[D]omestic relations [is] an area that has long been regarded as a virtually exclusive province of the States. Cases decided by this Court over a period of more than a century bear witness to this historical fact."); *Haddock* v. *Haddock*, 201 U.S. 562, 575 (1906) ("[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce. . . . [T]he Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce."), *overruled on other grounds by Williams* v. *North Carolina*, 317 U.S. 287 (1942). Because marriage is the province of the States, BLAG's attempt to take up the mantle of federalism is founded on a false premise — *i.e.*, that "the federal government has the same latitude as the states to adopt its own definition of marriage"[15] — which is belied by this Court's precedents.

The Second Circuit therefore correctly recognized that "DOMA is an unprecedented breach of long-standing deference to federalism." *Windsor* v. *United States*, 699 F.3d 169, 186 (2d Cir. 2012). Similarly, Judge Boudin, writing for the First Circuit, observed that "DOMA intrudes extensively into a realm that has from the start of the nation been primarily confided to state regulation — domestic relations and the definition and incidents of lawful marriage — which is a leading instance of the states' exercise of their broad police-power authority over morality and culture." *Massachusetts* v. *U.S. Dep't of Health & Human Servs.*, 682 F.3d at 12.

---

[15] Brief on the Merits for Respondent The Bipartisan Legal Advisory Group of the United States House of Representatives at 19.

These courts of appeals correctly have questioned the justifications offered for DOMA Section 3 and the legitimacy of its end. The First Circuit held that DOMA was not entitled to the "extreme deference accorded to ordinary economic legislation" and, instead, requires "a closer examination" of its justifications. *Id*. at 10-12, 13. The Second Circuit likewise recognized that in this area where state regulation has traditionally governed, the federal government's intrusion is not justified. *Windsor*, 699 F.3d at 186 ("Because DOMA is an unprecedented breach of longstanding deference to federalism that singles out same-sex marriage as the only inconsistency (among many) in state law that requires a federal rule to achieve uniformity, the rationale premised on uniformity is not an exceedingly persuasive justification for DOMA.").

From the perspective of the Partnership for New York City, this conclusion — that Section 3 of DOMA intrudes into a domain that has traditionally been subject to state regulation, and is therefore deserving of special scrutiny or is illegitimate — is particularly appropriate. By undermining state-based decision-making in an area traditionally left to the States, DOMA subverts the interests of businesses to determine, in response to state policy, where to locate. While New York has enacted marriage equality,[16] other States have chosen differently — and, to be sure, businesses may choose to locate in or to avoid such economic and legal landscapes. The existence of this range of legal regimes is a reflection of the

[16] Marriage Equality Act, 2011 N.Y. Sess. Laws. Ch. 95 (A. 8354) (McKinney 2011).

historic reservation to the States of the power to define marriage.[17]

This Court has emphasized that a key benefit of our nation's federalist structure is that it allows the very kind of decision-making for which the Partnership advocated in New York. Federalism "assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991). The Partnership for New York City's recent experience in supporting same-sex marriage legislation in New York pointedly demonstrates why respect for the virtues of federalism that this Court has highlighted, especially in this context, is so important.

The passage of the New York Marriage Equality Act was the result, in significant part, of the engagement of business leaders around New York State with the State's democratic processes. New York business leaders, through the Partnership for New York City, published an open letter expressing support for New York marriage equality legislation.[18] The letter explained that "[a]s other states, cities and countries across the world extend marriage rights regardless of sexual orientation, it will become

---

[17] Of course, the Fourteenth Amendment imposes limits on a State's latitude under federalism. *See, e.g.*, *Romer*, 517 U.S. at 632; *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967).

[18] *An Open Letter from Business Leaders on the Importance of Marriage Equality* (April 28, 2011), http://bit.ly/BusinessLetter.

increasingly difficult to recruit the best talent if New York cannot offer the same benefits and protections."[19] The Partnership continued to press its position in a subsequent letter published in *The New York Times*.[20] The Partnership's advocacy was singled out for recognition as influential in broadening the coalition of marriage equality advocates across political party lines.[21] And the support of the business community was critical to the New York State Legislature's passage of the Marriage Equality Act with bipartisan support.[22]

New York's business leaders advocated for the Marriage Equality Act because it would advance their interest in recruiting a workforce that is diverse and drawn from a labor pool with the greatest available talent. For many New York businesses, full equality is now essential to attracting and retaining employees. Location in a State that provides full recognition to same-sex couples sends a powerful signal that employers are committed to an inclusive work environment that does not draw distinctions among its employees based on anything other than merit.

---

[19] *Id*.

[20] Kathryn S. Wylde, President and CEO of Partnership for New York City, Letter to the Editor, N.Y. TIMES, May 25, 2011, at A26.

[21] *See, e.g*., Nicholas Confessore, *Business Leaders, in Letter, Will Urge Albany to Legalize Gay Marriage*, N.Y. TIMES, Apr. 29, 2011, at A23.

[22] Marriage Equality Act, 2011 N.Y. Sess. Laws. Ch. 95 (A. 8354) (McKinney 2011); Nicholas Confessore and Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 25, 2011, at A1.

As demographer Gary Gates explains, equal treatment of same-sex couples "signals a kind of openness to people who are different. It sends a signal to people, straight or gay, that this is a place where they can potentially thrive. That's especially critical for companies that rely on people who have to be creative, entrepreneurial and innovative."[23] John Berry, the Director of the Office of Personnel Management, has recently noted that providing full benefits for same-sex partners "has become a litmus test for this generation. I know because I've been out talking to college students at our recruitment and job fairs."[24]

The Partnership for New York City long has recognized that the choice of businesses to locate in New York is inextricably linked to the City's history as a magnet for talent. Competition to provide high-value services, and to attract the talented employees capable of providing them, has spilled well beyond state borders to reach international scope. As the Partnership's letter declared in support of marriage equality, "[t]o remain competitive" in this landscape "New York must continue to contend with other world cities to attract top talent."[25]

DOMA undermines the decision by New York to foster an environment that is open and welcoming to everyone, regardless of whom they love. And it does

---

[23] *See* James B. Stewart, *Gay Marriage Bans May Come at a Price*, N.Y. TIMES, May 11, 2012, at B1.

[24] Ed O'Keefe, *Federal Diary: Domestic-Partner Benefits as a Recruiting and Retention Tool*, WASH. POST, Oct. 16, 2009, http://bit.ly/FederalDiary.

[25] *An Open Letter from Business Leaders on the Importance of Marriage Equality* (April 28, 2011).

so in a way that, in this context involving marriage laws traditionally regulated by the States, subverts principles of federalism. It should therefore be subjected to a closer examination under the Equal Protection Clause.

II. DOMA FAILS TO ADVANCE ITS OWN PURPORTED ENDS, AND INSTEAD IMPOSES SIGNIFICANT BURDENS ON THE NEW YORK BUSINESS COMMUNITY.

A central justification offered for DOMA is that Congress had an "interest in uniformity" and therefore "decided to adopt a uniform rule."[26] Applying any level of review, it becomes clear that DOMA actually *undermines* uniformity by introducing a dual regime for marriage. Instead of advancing its purported objective, DOMA imposes significant burdens on New York businesses and employees and enlists employers as agents in its discrimination. The constitutional requirement of a "link between classification and objective" is therefore lacking. *Romer*, 517 U.S. at 632.[27] *Massachusetts* v. *U.S. Dep't of Health & Human Servs.*, 682 F.3d at 15 ("[T]he rationales offered do not

---

[26] Brief on the Merits for Respondent The Bipartisan Legal Advisory Group of the United States House of Representatives at 35.

[27] The experience of the Partnership also demonstrates that the other supposed justifications are without basis: New York's passage of marriage equality legislation and the expectations of today's labor force of equal treatment for same-sex marriages demonstrate that DOMA's definition of marriage, adopted preemptively before States had spoken on the subject, has not promoted a supposed "traditional" view of marriage, and many of the federal laws affected by the definition cannot possibly be said to have anything to do with either child-rearing or public expenditures.

provide adequate support for section 3 of DOMA."); *Windsor*, 699 F.3d at 186 (holding that the uniformity rationale does not justify DOMA).

A. DOMA replaced a uniform regime, under which States set the definition of marriage, with an inconsistent dual regime.

Prior to DOMA, the States and the federal government were in sync. A person who was deemed to be legally married in one State was deemed to be legally married for federal purposes. DOMA upended that longstanding regime. In its place, DOMA has created a dual scheme in which same-sex spouses are considered married for state-law purposes but single for federal-law purposes. Changing that consistency as States recognize same-sex marriage creates disuniformity.

The differential tax treatment of spousal health benefits is one key example of this dual regime. Under New York law, the value of a spouse's health coverage is not treated as taxable income of an employee.[28] Yet DOMA bars same-sex spouses from eligibility for a similar exclusion at the federal level. As an illustration of the complexity in this differential tax treatment, in 2010 Yale University — located in Connecticut, another State in the Second Circuit that recognizes same-sex marriage — failed to properly withhold federal income taxes covering the imputed income of same-sex spouses' health cover-

[28] *See* N.Y. Dep't of Taxation and Finance, *Withholding Tax Information Regarding Same-Sex Married Employees*, http://bit.ly/withholdingtaxinfo.

age.[29] The university was then required to find a way to deduct the taxes from employees' paychecks the following year.[30] Thus, the result of DOMA is that whereas employers long had implemented myriad federal and state benefit programs consistently, employers must now keep two sets of books: one for federal-law purposes and one for state.

This is but one example. The members of the Partnership for New York City, based on their experience in navigating the dual regime of federal and state law, are particularly able to inform the Court about the lack of uniformity caused by DOMA's Section 3. For New York employers operating under both state law and DOMA, the number and complexity of provisions affected by DOMA make employers' efforts to provide the equal benefits required by New York law a daunting task. Because DOMA affects the operation of more than 1,100 different federal statutes,[31] employers are continually confronted with new and unforeseen ways in which DOMA requires them to treat their employers differently under federal and state law.[32]

As a result, the dual regime effectively compelled by DOMA thrusts upon New York businesses an inconsistent employment landscape that undermines

---

[29] *See* Tara Siegel Bernard, *Yale Payroll Error Gives Gay Employees a New Year Surprise*, N.Y. TIMES Bucks Blog, Jan. 11, 2011, http://bit.ly/YalePayrollError.

[30] *Id*.

[31] *See* Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* (June 21, 2004), http://bit.ly/CBOImpact.

[32] Marriage Equality Act, 2011 N.Y. Sess. Laws. Ch. 95 (A. 8354) (McKinney 2011).

uniformity by imposing a dual regime on employers. DOMA therefore fails to advance its own uniformity objective.

B. DOMA imposes immense costs and burdens on New York employers and employees.

Even as DOMA undermines its stated objectives, the burden of operating under its dual regime is costly for the New York business community and its employees. The administrative costs alone are significant. Businesses must often revamp their entire benefits packages and reprogram or write new code for payroll and benefits software. They typically must hire or consult lawyers and ERISA-compliance experts. Human resources personnel must then be trained in the separate legal standards and in their application to classify the company's employees.

The dual regime also increases the payroll taxes New York employers must pay. The federal government's treatment of same-sex spousal benefits as taxable income increases employers' payroll tax burden because payroll taxes are calculated based on employee earnings. Employers who provide health benefits to their employees' same-sex spouses must pay a payroll tax of 7.65% of these benefits' fair market value.[33] It is estimated that U.S. employers pay $57 million per year in additional payroll taxes due to the inconsistent treatment of same-sex spousal benefits.[34] Yet New York law requires employers to

---

[33] *See* 26 U.S.C. § 3111.

[34] M.V. Lee Badgett, *Unequal Taxes on Equal Benefits: The Taxation of Domestic Partner Benefits*, Williams Inst. (Dec. 2007), http://bit.ly/AmericanProgressDP.

provide these benefits to same- and opposite-sex spouses alike if they provide family health benefits through insurers. Not only must employers pay this additional payroll tax, but they also must incur the administrative complication and uncertainty of calculating the fair market value of the benefits provided.

DOMA is particularly burdensome for small businesses. Smaller businesses with fewer resources are less able to bear the additional payroll taxes incurred by providing healthcare benefits to same-sex spouses. Smaller businesses also have fewer employees over whom to spread the administrative costs of providing these benefits while simultaneously complying with DOMA.

Nonetheless, New York employers are providing benefits to same-sex couples in light of New York law and the competition they face in attracting and retaining the best employees. New York's Marriage Equality Act now entitles same-sex marriages to full rights and benefits.[35] But even before this law took effect, New York employers were required to treat parties to same-sex marriages as spouses for insurance law purposes, including all provisions governing health insurance.[36]

---

[35] Marriage Equality Act, 2011 N.Y. Sess. Laws. Ch. 95 (A. 8354) (McKinney 2011).

[36] Since 2008, the State of New York Insurance Department has made clear that parties to same-sex marriages must be treated as spouses for purposes of New York insurance law, including all provisions governing health insurance. *See* N.Y. Office of Gen. Counsel, Op. No. 08-11-05, http://bit.ly/DFSNYGovInsurance.

Beyond these legal requirements, the demands of competition in the New York labor market effectively require that some employers provide equal benefits despite DOMA. The number of employers offering health benefits to the domestic partners of their employees has increased more than 12-fold since 1995,[37] such that 52% of all U.S. employers offered such benefits last year.[38] In many leading industries, benefits covering same-sex spouses are becoming par for the course.[39] Once a leading firm offers health benefits to same-sex partners, competing firms have quickly followed suit. This has been particularly notable in industries in which New York has a strong presence and that compete intensely for top talent, including financial services, law, technology, accounting and consulting.[40]

To pick one example of many, all of the "Big Four" accounting firms decided, in close proximity, to equalize the after-tax benefits received by their

---

[37] Human Rights Campaign, *Tax Parity for Health Plan Beneficiaries Act*, http://bit.ly/HRCTaxParity.

[38] Julie Appleby, PBS Newshour, *The Rundown: Many Businesses Offer Health Benefits to Same-Sex Couples Ahead of Laws*, http://bit.ly/PBSRundown.

[39] *Id*. (citing survey indicating that 96% of pharmaceutical companies extended benefits to same-sex partners of employees).

[40] *See* Katherine Reynolds Lewis, *Employers Boost Tax Benefits for Same-Sex Couples*, CNN Money (Mar. 26, 2012), http://bit.ly/CNNMoneyBenefits; Tara Siegel Bernard, *For Gay Employees, An Equalizer*, N.Y. TIMES, May 21, 2011, at B1, (identifying these industries as those with the most apparent competition to offer benefits to the same-sex spouses of employees).

employees in same-sex relationships.[41] New York employers in numerous other industries also provide "true-ups" to compensate their employees for the additional federal taxes the employees must pay on their same-sex benefits.[42] The cost of these true-ups is estimated to average between $2,000 and $2,500 per employee.[43]

Despite these costs, between 2010 and 2011 the number of large companies offering true-ups nearly tripled.[44] This is "raising the bar" for employee benefits packages. And the number of participating employers will continue to increase as they feel pressure to keep pace with competing firms.[45] The costs that DOMA imposes on businesses will therefore continue to increase as true-ups become the norm.

The provision of equal benefits and the use of true-ups make clear that DOMA is not advancing its pur-

---

[41] *See* Michael Cohn, *KPMG Adds Tax Benefit for Same-Sex Domestic Partners*, Accounting Today, Feb. 13, 2012, http://bit.ly/KPMGAddsTaxBenefits (noting that KPMG's extension of these benefits occurred only a month after Ernst & Young's).

[42] For a list of these businesses, see Tara Siegel Bernard, *A Progress Report on Gay Employee Health Benefits*, N.Y. TIMES Bucks Blog, Jan. 11, 2011, http://bit.ly/BenefitsProgressReport; and GLAD, *How DOMA Hurts Americans*, http://bit.ly/GLADDOMAHurts.

[43] Tara Siegel Bernard, *For Gay Employees, An Equalizer*, N.Y. TIMES, May 21, 2011 at B1.

[44] *See* Katherine Reynolds Lewis, *Employers Boost Tax Benefits for Same-Sex Couples*, CNN Money (Mar. 26, 2012).

[45] Tara Siegel Bernard, *For Gay Employees, An Equalizer*, N.Y. TIMES, May 21, 2011, at B1 (noting that as companies like Google offer these benefits, "everyone has to jump a little higher to be average").

ported objective of ensuring consistent eligibility for workplace benefits. In reality, New York businesses are increasingly compelled to provide equal benefits and after-tax compensation regardless of DOMA. From the employers' perspective, DOMA's effect is to increase the employer's costs of providing these benefits and protections. A statute with such burdensome classifications that fails to advance its own ends cannot pass constitutional muster, particularly when it infringes on an area traditionally left for the States.

C. DOMA compels the New York business community to act as an agent of discrimination.

Beyond administrative costs and added expenses, DOMA harms employers more fundamentally by transforming them into agents of discrimination. DOMA forces employers to treat employees with same-sex spouses differently by withholding additional taxes from their paychecks when they receive spousal health benefits. Similarly, when an employee's same-sex spouse seeks a distribution from the employer's ERISA pension plan, the employer must make a determination as to what the spouse is entitled in light of DOMA.

Even when an employer seeks to provide equal treatment despite DOMA, the employer's efforts often serve to remind employees of the legal discrimination they face. In order to offset DOMA's effects, an employer may need to investigate who needs additional benefits or offsetting compensation and how much is required. This process makes clear to employees with same-sex spouses the value of the benefits and protections from which DOMA excludes them.

DOMA thus is a reminder to legally married same-sex couples that in the eyes of the federal government, their loving relationships do not deserve the same dignity and respect afforded to the marriages of their colleagues, friends, family members and neighbors. And because of the role that they play in administering DOMA's discriminatory treatment, employers are often forced to deliver that message. For New York employers whose human capital is their most valuable resource, the harm DOMA inflicts on employer-employee relations may be the most costly of all.

CONCLUSION

"'It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" *Chandler* v. *Florida*, 449 U.S. 560, 579 (1981) (quoting *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). No State has embraced this value more wholeheartedly than New York, which has a great tradition of leading the nation in promoting equality. That commitment to justice is one of the things that makes New York a magnet for talented and creative people and, in turn, makes New York City the leading business center in America, indeed the world.

The Partnership for New York City advocated for marriage equality in New York because it advanced all of these goals. DOMA stands as an impediment to the full achievement of these goals. And it does so in a way that undercuts one of the great strengths of our federalist system by imposing a federally-mandated regime on an area that has traditionally

been left to the States. The Partnership therefore urges the Court to affirm the decision of the Second Circuit holding Section 3 of DOMA unconstitutional.

Respectfully submitted,

MARC WOLINSKY
Counsel of Record
JONATHAN M. MOSES
KEVIN S. SCHWARTZ
LUKE M. APPLING
WACHTELL, LIPTON, ROSEN
& KATZ
51 West 52nd Street
New York, NY 10019
(212) 403-1000
MWolinsky@WLRK.com

Counsel for the Partnership for New York City

March 1, 2013