

IN THE
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, in Her Capacity as Executor of
the Estate of Thea Clara Spyer, *et al.*,

Respondents.

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

**BRIEF *AMICI CURIAE* OF SERVICES AND ADVOCACY FOR
GAY, LESBIAN, BISEXUAL AND TRANSGENDER ELDERS
(SAGE), THE NATIONAL SENIOR CITIZENS LAW CENTER, THE
AMERICAN SOCIETY ON AGING, THE NATIONAL HISPANIC
COUNCIL ON AGING, THE SOUTHEAST ASIA RESOURCE
ACTION CENTER, AND THE NATIONAL ORGANIZATION OF
SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES
IN SUPPORT OF RESPONDENTS (MERITS BRIEF)**

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QUESTION PRESENTED

Whether Section 3 of the Defense of Marriage Act 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 by defining marriage as "only a legal union between one man and one woman" and spouse as "a person of the opposite sex."

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Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders (“SAGE”), the National Senior Citizens Law Center (“NSCLC”), the American Society on Aging (“ASA”), the National Hispanic Council on Aging (“NHCOA”), the Southeast Asia Resource Action Center (“SEARAC”), and the National Organization of Social Security Claimants’ Representatives (“NOSSCR”) respectfully submit this brief as *amici curiae* in support of the affirmance of the Court of Appeals for the Second Circuit’s ruling that Section 3 of the Defense of Marriage Act (“DOMA”), 1 U.S.C. § 7, is unconstitutional.

INTEREST OF *AMICI CURIAE*¹

SAGE is a national organization that offers supportive services and consumer resources to lesbian, gay, bisexual and transgender (“LGBT”) older adults and their caregivers, advocates for public policy changes that address the needs of LGBT older people, and provides training for aging providers and LGBT organizations. In partnership with constituents and allies, SAGE works to achieve a high quality of life for LGBT older adults, supports and advocates for their rights, fosters a greater understanding of aging in all communities, and promotes positive images of LGBT life in later years. SAGE is a non-profit organization; it does not offer stock and has no parent organization.

1. Pursuant to Supreme Court Rule 37.6, *amici curiae* certify that no party’s counsel has authored any portion of this brief and that no party or their counsel has contributed any money toward the preparation or filing of this brief. Other than SAGE, NSCLC, ASA, NHCOA, SEARAC and NOSSCR, no person has contributed any money that was intended to fund the preparation or submission of this brief.

As the country's largest and oldest organization dedicated to improving the lives of LGBT older adults, SAGE has a vested interest in challenging the constitutionality of DOMA because it prevents legally married same-sex couples from accessing federal safety net programs and benefits that are intended to assist Americans as they age. As an organization representing LGBT elders from offices in New York City, Chicago, and Washington D.C., and working in connection with 23 local SAGE affiliate organizations in 16 different states and the District of Columbia, SAGE is well-positioned to provide the Court with unique insight on how DOMA detrimentally impacts the health and economic well-being of LGBT elders, one of the country's most underserved populations.

The National Senior Citizens Law Center is an organization dedicated to protecting the rights of low-income older adults. NSCLC is a non-profit organization; it does not offer stock and has no parent organization. For the past 40 years, NSCLC has sought to ensure the health and economic security of older adults with limited income and resources. Through advocacy, litigation, and the education and counseling of local advocates, NSCLC works to promote the independence and well-being of low-income elderly and persons with disabilities, especially disadvantaged minorities, including the elderly LGBT community. Because of its commitment to ensuring the economic security of older adults by protecting their access to the federal benefits programs that allow low-income older adults to live with dignity and independence, NSCLC has a vested interest in challenging the constitutionality of DOMA because it deprives legally married same-sex older adults of the benefits that help them to live free from the worry and pain that the threat of poverty can bring.

The American Society on Aging is an association of diverse individuals in aging and aging-related fields who promote the well-being of aging people and their families. ASA's membership is multidisciplinary and includes professionals who are concerned with the physical, emotional, social, economic and spiritual aspects of aging. ASA offers nationally recognized professional education programs, publications, and information on responding to the ever-growing needs of the aging population. ASA is a non-profit organization; it does not offer stock and has no parent organization. Because ASA's members wish to enhance the quality of life of all older adults and work to ensure that racial and other disparities are reduced, and because DOMA diminishes the quality of life for legally married LGBT elders and reinforces economic and other disparities, ASA has an interest in challenging the constitutionality of DOMA.

The National Hispanic Council on Aging is a national organization working to improve the lives of Hispanic older adults, their families and their caregivers. For more than 30 years, NHCOA has sought to ensure the health and economic security of older Hispanic adults by promoting and advocating for research, policy, and practical programming in the areas of economic security, health, and housing. NHCOA is a non-profit organization; it does not offer stock and has no parent organization. In addition to developing a Hispanic Aging Network of community-based organizations across the continental United States, the District of Columbia, and Puerto Rico that reaches millions of Latinos each year, NHCOA is one of the six founding members of the Diverse Elders Coalition – a coalition of diverse aging organizations that advocates for policies and programs to improve aging in our communities. Given this commitment to improving

the lives of older adults, NHCOPA has an interest in challenging the constitutionality of DOMA because of its discriminatory effects on legally married same-sex couples and spouses.

The Southeast Asian Resource Action Center is a national organization that advances the interests of Cambodian, Laotian, and Vietnamese Americans by empowering communities through advocacy, leadership development, and capacity building to create a socially just and equitable society. SEARAC is a non-profit organization; it does not offer stock and has no parent organization. For over fifteen years, SEARAC has been a leader in policy advocacy and community development initiatives on behalf of elder Southeast Asian American refugees who have resettled in the United States, as well as other vulnerable and isolated older adult populations. As one of the six founding members of the Diverse Elders Coalition – a coalition of diverse aging organizations that advocates for policies and programs to improve aging in our communities – SEARAC has an interest in challenging the constitutionality of DOMA because its discriminatory effects perpetuate economic and other disparities for legally married same-sex adults.

The National Organization of Social Security Claimants' Representatives is a voluntary membership association comprised of approximately 4,000 professionals, mostly attorneys, who represent individuals applying for Social Security and Supplemental Security Income ("SSI") benefits. NOSSCR members include employees of legal services organizations, educational institutions, and other non-profits; employees of for-profit law firms and other businesses; and individuals in private practice.

NOSSCR is a non-profit organization; it does not offer stock and has no parent organization. NOSSCR is committed to ensuring that Americans who have paid into the Social Security trust funds, as required by law, receive the benefits to which they and their families have contributed, in a non-discriminatory manner.

This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.3(a). Copies of the requisite consent letters have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

There are an estimated 1,138 federal laws and regulations that look to Section 3 of DOMA for the definition of "spouse" or "marriage."² These laws and regulations confer multiple rights, benefits and protections on married heterosexual couples. But because DOMA restricts the definition of marriage to "only a legal union between one man and one woman" and spouse to "a person of the opposite sex,"³ legally married gay and lesbian couples are denied every single one of them. This denial of marital benefits and protections has a substantial impact on married same-sex elders and their surviving spouses.

2. U.S. Gov't Accountability Office, GAO-04-353R, *Defense of Marriage Act: Update to Prior Report 1* (2004), available at <http://www.gao.gov/new.items/d04353r.pdf>. See also *Married But Not Equal* (In the Life Media 2012), <http://www.youtube.com/watch?v=a5KbrMbcCA0> (last visited Feb. 21, 2013).

3. 1 U.S.C. § 7.

The threat of financial insecurity is an unfortunate reality for the majority of aging Americans. Loss of income following retirement and an increased need for medical and long-term care can leave elder Americans vulnerable. Federal income programs, housing subsidies, access to affordable, quality health care and long-term services all play a critical role in helping aging Americans address financial insecurity and avoid poverty. While many of these programs are available to individuals, there are valuable benefits that are only available on the basis of a legally recognized marital relationship – such as Social Security spousal and survivor benefits and the marital deduction under federal estate tax laws. But because of DOMA, more than 130,000 legally married same-sex couples⁴ are denied these benefits for no valid or apparent reason other than the gender of their spouse.

The elder services and advocacy organizations SAGE, NSCLC, ASA, NHCOA, SEARAC and NOSSCR, submit this brief for the purpose of illustrating to the Court the tangible and disparate impact that DOMA has on the lives and financial well-being of LGBT elders as compared with their similarly situated heterosexual peers. This brief discusses certain federal benefits and protections afforded to heterosexual spouses – Social Security benefits, protected leave under the Family and Medical Leave Act, retiree health and survivorship benefits, qualified deferred tax retirement plans, and the marital

4. U.S. Census Bureau, *Census Bureau Releases Estimates of Same-Sex Married Couples* (Sept. 27, 2011), http://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn181.html (“According to revised estimates from the 2010 Census, there were 131,729 same-sex married couple households . . . in the United States.”)

deduction under the federal estate tax – to show how the denial of these benefits to married same-sex elders heightens the threat of financial insecurity in the growing LGBT elderly population. As these examples plainly show, DOMA impairs the financial security of married same-sex elders. Because there is no justification for this inequitable treatment, the Court of Appeals’ holding that Section 3 of DOMA is unconstitutional should be affirmed.

ARGUMENT

I. The Advancement of Age Presents Challenges for All Americans, Whether LGBT, Straight, Married or Single – Including the Threat of Financial Insecurity.

All individuals face considerable challenges as they age. Often there is the frustration of coping with an aging body, the growing dependency on others, increased frailty and the threat of chronic illness, departing the workforce, and the loss of networks and social opportunities as family members and friends who have also reached old age pass on. In addition to these physical and emotional challenges, aging brings with it the threat of financial insecurity, and for many older Americans, even the possibility of poverty.⁵

5. See, e.g., Administration on Aging, U.S. Dep’t of Health and Human Servs., *A Profile of Older Americans: 2011*, at 1, http://www.aoa.gov/aoaroot/aging_statistics/Profile/2011/docs/2011profile.pdf (“Almost 3.5 million elderly persons (9.0%) were below the poverty level in 2010. . . . The [Supplemental Poverty Measure released by the U.S. Census Bureau] shows a poverty level for older persons of 15.9%, an increase of over 75% over the official rate of 9.0% mainly due to medical out-of-pocket expenses.”).

Most older Americans have minimal retirement savings. Fifty-nine percent of poor adults depend on Social Security for all or nearly all of their household income.⁶ Even with important programs like Social Security, the median annual income for Americans 65 and over is below \$45,000 for married couples and less than half that amount for non-married elders.⁷ In addition, because of rising health care and prescription drug costs, older Americans spend a far higher percentage of their income on health care and prescription drugs than the general population. A recent study, which considered health care expenses as well as more traditional daily living expenses, found that 21.2% of older New Yorkers live in poverty.⁸ In the District of Columbia, the number is even higher, with 31.5% of residents over 65 living in poverty.⁹

LGBT elders are confronted with the same challenges that all individuals face when they age. As the LGBT Baby Boomers – the first generation of LGBT individuals to have

6. Ellen O'Brien, Ke Bin Wu, and David Baer, AARP Public Policy Institute, *Older Americans in Poverty: A Snapshot 2* (Apr. 2010), available at <http://assets.aarp.org/rgcenter/ppi/econ-sec/2010-03-poverty.pdf>.

7. Soc. Sec. Admin., *Income of the Aged Chartbook, 2010*, at 5 (2012), available at http://www.ssa.gov/policy/docs/chartbooks/income_aged/2010/iac10.pdf. Data is for households headed by a person age 65 or older.

8. NYC Center for Econ. Opportunity, *The CEO Poverty Measure, 2005 – 2010*, at ix (Apr. 2012), available at http://www.nyc.gov/html/ceo/downloads/pdf/CEO_Poverty_Measure_April_16.pdf.

9. *Older Americans in Poverty: A Snapshot*, *supra* note 6, at 63 tbl. 3.

lived openly gay or transgender lives in large numbers – reach retirement age and more studies on this emerging population are conducted, we are learning more about the challenges faced by LGBT elders. These studies show that LGBT older adults make up a significant – and growing – share of not only the overall LGBT population, but also a significant share of the larger 65 and over population as well. Indeed, experts estimate that between 1.75 and 4 million Americans ages 60 and over are lesbian, gay, bisexual or transgender.¹⁰ Over the coming decades, the percentage of Americans age 65 and older is expected to grow from about 12% to approximately 20% of the total population. LGBT elders are conservatively estimated to comprise at least 4% of that senior population.¹¹ By 2030, it is estimated that there will be close to 6 million LGBT elders living in the United States.¹²

10. Administration on Aging, U.S. Dep't of Health and Human Servs., *Diversity: Lesbian, Gay, Bisexual and Transgender (LGBT)*, http://www.aoa.gov/AoA_programs/Tools_Resources/diversity.aspx#LGBT (last visited Feb. 21, 2012).

11. Jim Zians, *LGBT San Diego's Trailblazing Generation: Housing & Related Needs of LGBT Seniors* 4 (2011), available at <http://www.thecentersd.org/pdf/programs/senior-needs-report.pdf>.

12. Nancy J. Knauer, *LGBT Elder Law: Toward Equity in Aging*, 32 HARV. J. L. & GENDER 1, 8 (2009). See also Karen I. Fredriksen-Goldsen, et al., *The Aging and Health Report: Disparities and Resilience among Lesbian, Gay, Bisexual, and Transgender Older Adults* 9 (2011), available at <http://caringandaging.org/wordpress/wp-content/uploads/2011/05/Full-Report-FINAL-11-16-11.pdf> (noting that the number of LGBT older adults will increase proportionally with the general population, more than doubling by 2030).

II. LGBT Elders Face Unique Challenges That Are Not Shared By Their Heterosexual Peers – Including a Greater Risk of Financial Insecurity.

In addition to the common challenges of aging, many LGBT elders confront challenges stemming from lingering stigma and prejudice that can impede full and equal access to important health and community services, programs and opportunities. These challenges make “successful aging”¹³ more difficult for LGBT elders than for their heterosexual counterparts, who often take for granted the acceptance and support of their family and peers, as well as the benefits, services and protections they receive from the federal government. This puts LGBT elders at an increased risk of social isolation, loneliness and depression, all of which can exacerbate existing health conditions. In addition, LGBT elders are more likely to need to rely on informal families of choice for social connections, daily support and long-term care, rather than on blood relatives, who may be estranged, or spouses or children, which LGBT elders are less likely to

13. Access to appropriate housing, quality health care, and supportive services are some of the key components of successful aging. Other objectives include maximizing physical and emotional well-being, maintaining autonomy and independence for as long as possible and remaining socially involved in the community. Funders for Lesbian and Gay Issues, *Aging in Equity: LGBT Elders in America* 3 (2004), available at <http://www.lgbtfunders.org/files/AgingInEquity.pdf>. See also LGBT Movement Advancement Project (MAP) & Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders (SAGE), *Improving the Lives of LGBT Older Adults* 1 (March 2010), available at <http://sageusa.org/files/Improving%20the%20Lives%20of%20LGBT%20Older%20Adults%20-%20full%20report.pdf>.

have. Finally, many laws and safety net programs that are intended to support and protect older Americans fail to provide equal protection for LGBT elders.¹⁴

Adding to these unique challenges, LGBT elders are generally less financially secure than American elders as a whole.¹⁵ Indeed, contrary to a common stereotype, most LGBT elders are not affluent individuals or couples living comfortable urban lives. For many LGBT elders, a lifetime of employment discrimination translates into earning disparities, reduced lifelong earnings, smaller Social Security payments, and fewer opportunities to build pensions. As a result, older LGBT couples face higher poverty rates than married heterosexual couples,¹⁶ and older lesbian couples are twice as likely to be poor as heterosexual couples.¹⁷ In New York State, a recent needs assessment for the LGBT population found that 11.9% of

14. For more in-depth discussions of the challenges facing the aging LGBT population, see generally, *Improving the Lives of LGBT Older Adults*, *supra* note 13, and *The Aging and Health Report*, *supra* note 12. See also Shaun Knittel, *National Study Finds Health Care Needs Lacking Among LGBT Elderly*, EDGE Boston, Nov. 21, 2011, <http://www.edgeboston.com/index.php?ch=news&sc=family&sc3=&id=126983> (describing the unique needs of the aging LGBT population, including the fear of discrimination, the lack of children upon which they can depend for caregiving, and destabilizing social support and fear of financial insecurity).

15. *Improving the Lives of LGBT Older Adults*, *supra* note 13, at ii.

16. *Id.* at 11 (Figure 7).

17. *Id.* at 11 (citing Naomi G. Goldberg, *The Impact of Inequality for Same-Sex Partners in Employer-Sponsored Retirement Plans* (2009)).

the survey respondents reported being in poverty, with either no income or household income of less than \$10,000 per year.¹⁸

Unfortunately, “a lack of financial security is the fearful reality for a large percentage of LGBT older adults.”¹⁹ This lack of financial security among LGBT elders dramatically impacts not only their standard of living, but also their mental and physical health. Indeed, almost all of the challenges of old age are felt more acutely by those in lower income groups, when compared to their peers at the higher end of the income scale.²⁰

III. Legally Married Same-Sex Elders are Denied Equal Access to Important Federal Benefits Otherwise Available to Married Couples That Are Intended to Mitigate the Threat of Financial Insecurity.

Many LGBT elders, like a large number of other older Americans, rely on federally provided benefits, programs and protections to help ease some of the financial challenges that often accompany aging. Federal income programs, housing subsidies, access to affordable health care and long-term care all play a critical role in helping American elders avoid poverty. However, many

18. Somjen Frazer, *LGBT Health and Human Services Needs in New York State* 5 (2009), available at <http://www.prideagenda.org/Portals/0/pdfs/LGBT%20Health%20and%20Human%20Services%20Needs%20in%20New%20York%20State.pdf>.

19. Tom Nelson, *Foreword to Improving the Lives of LGBT Older Adults*, *supra* note 13.

20. *Improving the Lives of LGBT Older Adults*, *supra* note 13, at 11 (Figure 8).

of the federal laws and programs designed to protect older Americans provide greater protections and benefits to married couples. The combination of this marriage-centered approach and the lack of marriage equality hurts LGBT elders, many of whom will never get an opportunity to marry.

Nine states and the District of Columbia recognize marriage for same-sex couples,²¹ but DOMA prevents legally married spouses of the same-sex from accessing benefits and protections that are afforded to their heterosexual counterparts. As a result, DOMA makes it more difficult for married same-sex elders to achieve financial security for themselves and their legal spouses, relative to the heterosexual population. Because of DOMA, legally married same-sex elders are, among other things, denied certain Social Security benefits, denied the spousal care protections afforded by the Family and Medical Leave Act, required to pay income tax on health insurance provided to a same-sex spouse, likely to pay higher premiums for Medicare Part B coverage, unable

21. Nine states, Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, and Washington, and the District of Columbia currently issue marriage licenses to same-sex couples. National Conference of State Legislatures, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws* (Nov. 2012), <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx>. For a limited time, California issued marriage licenses to same-sex couples and the approximately 18,000 marriages that took place during that time are recognized by the state as valid marriages. See *Strauss v. Horton*, 207 P.3d 48, 74, 119, 122 (Cal. 2009) (discussing the history of same-sex marriage law in California and holding that Proposition 8 was a valid constitutional amendment but does not apply retroactively).

to make tax-deductible contributions to a spouse's IRA, required to begin drawing down inherited tax-qualified retirement plans within one year of inheritance, ineligible for certain survivor annuity benefits, and deprived of the federal estate tax's marital deduction.

1. Social Security

Social Security is the most important financial safety net program for older and disabled Americans. Nearly 90% of all elder households receive Social Security.²² A family's eligibility and benefit amounts are based on contributions to Social Security in the form of mandatory Federal Insurance Contributions Act ("FICA") payroll taxes from the individual, the individual's spouse, divorced spouse, or in some cases the individual's parent.²³ But as explained below, even when same-sex married couples have paid into Social Security trust funds at the same rate as opposite-sex couples, they do not derive equal benefits.

DOMA's definition of "spouse" bars same-sex spouses' eligibility for spousal benefits administered by the Social Security Administration, including various Old Age, Survivors, and Disability Insurance Benefits, plus a one-time death benefit. Because DOMA mandates that the federal government treat legally married same-sex couples as legal strangers, a same-sex spouse is often denied financial benefits – including the spousal disability benefit, the survivor disability benefit, the

22. *A Profile of Older Americans: 2011*, *supra* note 5, at 1.

23. *See* 42 U.S.C. § 402. A parent can also receive benefits from his or her insured child under certain limited circumstances. *See id.* at § 402(g)(1)(D).

spousal retirement benefit, the survivor retirement benefit, and the lump sum death benefit, as well as all benefits in all categories to divorced spouses – that are afforded to legally married opposite-sex spouses. As a result, “gay male couples receive [on average] 18% less in Social Security benefits than straight couples, and lesbian couples receive 31% less (because women statistically earn less money).”²⁴

a. Disability Benefits

Social Security provides special benefits to married couples if one spouse should become disabled. For example, if a worker becomes disabled, the worker’s spouse is often entitled to receive “auxiliary benefits up to the rate of 50% of the disabled worker’s own benefits,” subject to the family maximum.²⁵ Because of DOMA’s definition of spouse, the Social Security Administration denies this auxiliary benefit to same-sex spouses when the working spouse becomes disabled.

If a dependent spouse becomes disabled, the “survivor disability benefit” can provide assistance after the working spouse’s death. When a surviving spouse has reached the

24. Paul Canning, *How LGBT Inequality Means Economic Inequality*, care2.com (May 1, 2012, 12:30 PM), <http://www.care2.com/causes/how-lgbt-inequality-means-economic-inequality.html>.

25. 42 U.S.C. § 402(b)(1)(D), (c)(1)(D). To qualify for such auxiliary benefits, a spouse must be 62 years of age or have a child entitled to child’s insurance benefits in her care. *Id.* at § 402(b)(1)(B), (c)(1)(B). Similarly, a divorced spouse can qualify for auxiliary benefits under the same conditions as the spouse above as long as the marriage to the insured lasted for at least ten years. *Id.* at § 402(b)(1)(C), (b)(1)(G); *id.* at § 402(c)(1)(C), (c)(1)(G).

age of 50 and has a disability that began within seven years after the insured's death, the disabled survivor can qualify for auxiliary benefits on the deceased spouse's earnings record.²⁶ A disabled same-sex surviving spouse who otherwise qualifies for the auxiliary survivor disability benefit would nonetheless be denied the auxiliary benefit because of DOMA's definition of spouse. This denial of benefits may lead the disabled surviving same-sex spouse to suffer financial harm or forgo needed treatment or care.

b. Retirement Benefits

The "spousal retirement benefit" allows a heterosexual spouse to receive the greater of an amount equal to 50% of the benefit that his or her past or current spouse has earned or the benefit due from his or her own earnings.²⁷ Spouses are entitled to the spousal retirement benefit when they meet the minimum age requirements.²⁸ For example, a wife who has never worked outside of the home may nonetheless claim a \$500 monthly spousal benefit if

26. 42 U.S.C. § 402(e)(1)(B), (e)(4); *id.* at § 402(f)(1)(B), (f)(4). The surviving spouse must also meet the marriage requirement of nine months in order to qualify for survivor's benefits (subject to limited exceptions). *Id.* at § 416(c)(1)(E). A surviving divorced spouse can also receive "survivor's disability benefits." *Id.* at § 402(e)(1)(A), (f)(1)(A). To qualify for benefits as a surviving divorced spouse, the marriage must have been valid under state law and have lasted for at least ten years. *Id.* at § 416(d)(2).

27. 42 U.S.C. § 402(b)(1)(D), (c)(1)(D).

28. 42 U.S.C. § 402(b)(1)(B), (c)(1)(B). A divorced spouse can normally receive the retirement benefits so long as the marriage lasted for at least ten years. *Id.* at § 402(b)(1)(C), (G); *id.* at § 402(c)(1)(C), (G).

her husband is eligible for a \$1,000 monthly benefit; yet a same-sex spouse homemaker would not be entitled to any benefit, even if her spouse is eligible for a \$1,000 monthly benefit. For high income wage earners, the denial of this benefit to a legally married same-sex spouse can amount to \$15,078 per year in lost income, where one spouse begins claiming benefits at age 66 and receives the maximum monthly Social Security payout of \$2,513.²⁹

This inability to claim the spousal benefit impacts numerous same-sex spouses, including Jo Ann Whitehead and Mina Kay Meyer. Jo Ann has been in a committed relationship with her wife, Bette Jo Green, since 1980. In 2004, Bette Jo and Jo Ann were married in Massachusetts. Although both women receive primary insurance benefits from Social Security based on their individual work histories, Bette Jo's income from working for 35 years as a labor and delivery nurse substantially exceeded Jo Ann's, who worked part-time as a gardening educator. As a result, Jo Ann's monthly Social Security benefit is less than 50% of Bette Jo's monthly benefit. Under the spousal benefit program, Jo Ann should therefore be entitled to a monthly benefit amount equal to 50% of the benefit that her spouse, Bette Jo, has earned. But because of DOMA, Jo Ann has been denied the spousal benefit and the additional monthly income that she would be entitled to if Bette Jo

29. Soc. Sec. Admin., *Fact Sheet: 2012 Social Security Changes* (2012), <http://www.ssa.gov/pressoffice/factsheets/colafacts2012.pdf>. For each year that a retiree delays claiming benefits, his or her monthly benefit amount is increased by up to 8% until age 70. Soc. Sec. Admin., *Retirement Planner: Delayed Retirement Credits*, <http://www.ssa.gov/retire2/delayret.htm> (last modified Oct. 18, 2012).

were a man.³⁰ The denial of the spousal benefit means that as a couple, Jo Ann and Bette Jo receive a lower combined monthly benefit amount than a similarly situated heterosexual couple, and, if Bette Jo were to predecease her spouse, Jo Ann would be left even more vulnerable.

Similarly, Mina Kay Meyer has been denied the spousal retirement benefit because she is not married to a man. Mina has known her wife Sharon Raphael since they were pre-schoolers growing up as neighbors and playmates in Ohio. Now in their seventies, Mina and Sharon have lived together as a couple for over 40 years and were married in California in 2008 during the period in which the state was issuing marriage licenses to same-sex couples.³¹ Although they both receive individual Social Security retirement benefits, Mina's monthly benefit of \$544.90 is less than half of Sharon's \$2,312.30 monthly benefit. Under the spousal benefit program, Mina should therefore be entitled to a monthly benefit amount equal to 50% of Sharon's monthly benefit – or \$1,156.15 per month. But because of DOMA, Mina's application for the spousal retirement benefit was denied.³² As a result, Mina receives \$611.25 less per month than a similarly situated heterosexual spouse. This amounts to a loss of \$7,335.00

30. See generally *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010).

31. For a limited time in 2008, California issued marriage licenses to same-sex couples. The approximately 18,000 marriages that took place during that time are recognized by the state as valid marriages. See *Strauss v. Horton*, 207 P.3d 48, 74, 119, 122 (Cal. 2009).

32. Matter of Mina Kay Meyer, Office of Disability Adjudication and Review, Soc. Sec. Admin. (filed Feb. 1, 2013).

per year that, if not for DOMA, Mina would otherwise be entitled.

The “survivor retirement benefit” allows a surviving opposite-sex spouse to receive up to 100% of a deceased spouse’s benefit amount.³³ The surviving opposite-sex spouse can receive a portion of this benefit as early as age 60.³⁴ For example, the wife who has never worked outside the home could receive up to a \$2,503 monthly benefit following her husband’s death; yet a gay widower like Herb Burtis would be entitled only to his own benefit amount following the death of his higher earning husband, John.

Herbert “Herb” Burtis and John Ferris met in college in 1948 and were married in Massachusetts in 2004, after what they called their “55-year engagement.” Herb and John both worked as musicians and music teachers, but over the course of their lives together, John earned more money than Herb. In 1992, John was diagnosed with Parkinson’s disease. For the next 16 years, while John suffered and deteriorated from the disease, Herb cared for John and served as his principal advocate and caregiver. After John’s death in 2008, Herb applied for the survivor benefit because John’s monthly benefit amount was higher than Herb’s; but because of DOMA, the Social Security Administration denied Herb’s application, depriving him of the additional monthly income to which he would be entitled had John been a woman.³⁵

33. 42 U.S.C. § 402(e)(1)(A), (f)(1)(A).

34. 42 U.S.C. § 402(e)(1)(B), (f)(1)(B). A surviving divorced spouse can receive the same benefits if the marriage lasted for at least ten years. *Id.* at § 402(e)(1)(A), (f)(1)(A); *id.* at § 416(d)(2).

35. *Gill*, 699 F. Supp. 2d at 397.

This lack of survivor benefits can cost a legally married same-sex widow or widower up to \$30,156 per year in lost income, assuming benefits are claimed beginning at age 66 at the maximum monthly Social Security payout of \$2,513 per month. The disparity can be the difference between whether or not a same-sex widow lives in poverty.³⁶

Over time, the effects of the discriminatory denial of Social Security benefits compounds, potentially condemning the same-sex couple or the same-sex surviving spouse to poverty, while providing financial security for an opposite-sex couple, surviving spouse, or divorced spouse.³⁷ Jo Ann, Mina, and Herb's experiences are representative of same-sex couples and surviving spouses across the country, who, as a result of DOMA's discriminatory definition of marriage, are unable to access valuable Social Security benefits otherwise available to heterosexual couples, widows and widowers.

36. See Soc. Sec. Admin., *Income of the Population 55 or Older, 2010*, at 39 (2012), available at http://www.ssa.gov/policy/docs/statcomps/income_pop55/2010/incpop10.pdf (noting that the median income for households of single individuals over age 65, including widows and widowers, is \$17,478).

37. Data show the grim effects of this unequal treatment – lesbian couples receive an average of 31.5% less in Social Security, and gay couples receive 17.8% less, when compared to heterosexual couples. *Improving the Lives of LGBT Older Adults*, *supra* note 13, at 13 (Figure 10); Naomi G. Goldberg, *The Impact of Inequality for Same-Sex Partners in Employer-Sponsored Retirement Plans*, Executive Summary (2009), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Goldberg-Retirement-Plans-Report-Oct-2009.pdf>.

c. Death Benefits

Finally, Social Security pays a one-time “death benefit” to the surviving heterosexual spouse, which often helps cover funeral and other burial related expenses.³⁸ But because of DOMA, legally married same-sex spouses are not entitled to collect even this modest benefit: Herb Burtis’s application for the one-time death benefit following his husband John’s death was denied.

2. Family and Medical Leave Act

The Family and Medical Leave Act (“FMLA”) entitles eligible employees to take up to 12 weeks of unpaid leave for certain family and medical reasons without fear of the employee losing his or her job.³⁹ Among other things, FMLA leave permits an employee to care for the employee’s spouse, child, or parent who has a serious health condition. However DOMA denies this protection to employees who need to care for an ailing same-sex spouse. An employee who is not guaranteed the protections of FMLA leave to provide care to his or her same-sex spouse may not be able to afford appropriate medical care and may be at risk of losing his or her job if the employee decides to care for the spouse. Alternatively, the ailing spouse may have to forgo appropriate medical care in

38. 42 U.S.C. § 402(i).

39. 29 U.S.C. § 2612(a)(1) (“Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following: . . . (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition . . .”).

order to protect the working spouse's employment. This is not a choice that heterosexual couples have to face if they need to care for an ailing spouse.

But this was the situation that Raquel Ardin and Lynda DeForge faced when Raquel required regular medical treatments because of a neck injury sustained while serving in the Navy. Raquel and Lynda met in 1977 when they were both serving in the Navy and were married 32 years later in 2009 in Vermont. Both had long careers with the U.S. Postal Service, but eventually Raquel had to take disability retirement because of her neck condition. Lynda applied for FMLA leave so that she could care for Raquel while she was receiving medical treatment. But because of DOMA, the Postal Service was unable to recognize Raquel as Lynda's spouse and her FMLA leave request was denied.⁴⁰ Lynda was required to use her vacation time to care for Raquel during her medical treatments and also following Raquel's two surgeries; time that Lynda would otherwise have taken as unpaid FMLA leave, had Raquel been a man or DOMA not deprived her of the FMLA protections and benefits afforded to heterosexual spouses.

3. Retiree Health and Survivorship Benefits

Retired married heterosexual couples receive tangible health and survivorship benefits that are unavailable to legally married same-sex couples because of DOMA. For example, where a retiree benefit plan provides that health or survivorship benefits are payable to an

⁴⁰. See generally *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294 (D. Conn. 2012).

insured's "spouse," DOMA prevents same-sex spouses from accessing these valuable benefits that are otherwise available to similarly situated heterosexual spouses. Similarly, legally married same-sex couples can be required to pay higher Medicare Part B premiums than similarly situated heterosexual couples.

a. Retiree Health Benefits

Spouses of retired federal employees are automatically eligible for health care coverage under the retired employee's Federal Employee Health Benefit ("FEHB") Program.⁴¹ The same is true for spouses of state employees who receive pensions through state retirement systems. However, because FEHB and many state pension plans invoke DOMA's definition of marriage, same-sex spouses of federal and state employees, like Dean Hara, Jim Fitzgerald and Janet Geller, are excluded from the same health care benefits that are afforded to the heterosexual spouses of other retired federal and state employees. The lack of health insurance for the same-sex spouse of a retired federal or state employee can impose a substantial household cost if the couple must purchase alternative health care coverage for the same-sex spouse.

Dean Hara, the surviving spouse of former Massachusetts Congressman Gerry Studds, has been denied FEHB coverage and other protections available to a surviving spouse of a federal employee.⁴² Numerous other

41. 5 C.F.R. § 890.302.

42. See, e.g., Philip Shishkin, *The Battle Over Benefits for Same-Sex Spouses*, THE WALL ST. J., May 21, 2009; *No Death Benefits for Studds's Spouse*, THE WASH. POST, Oct. 18, 2006.

couples, including Martin “Al” Koski and Jim Fitzgerald, are also impacted by the denial of FEHB coverage and related benefits to same-sex spouses. Al Koski, a retired Social Security Administration employee, has been in a committed relationship with Jim Fitzgerald, an aide at an addiction treatment center, since 1975. The couple was married in Massachusetts in 2007. Following their marriage, Al requested that Jim be added to his FEHB plan, as other federal employees do as a matter of course for their spouses. But because of DOMA, Al’s application to add Jim to his FEHB plan was denied.⁴³ As a result, Al and Jim are forced to spend hundreds of dollars each month on insurance premiums, co-pays, and prescription medications for Jim, who has chronic and severe asthma. Between 2007, when the couple was married, and 2011, they have spent over \$12,500 more in health care costs than a similarly situated heterosexual couple because Jim was not recognized as a spouse for the purposes of Al’s FEHB plan.

DOMA has had a similar impact on Janet Geller and Joanne Marquis, both retired school teachers. Janet and Joanne have been together for 32 years and were married in 2010 in New Hampshire. Throughout their 30- and 43-year careers teaching at the high school, college, and middle school levels, both women paid in to the New Hampshire Retirement System (“NHRS”) and now both receive a pension through NHRS. However, because of Joanne’s additional years of service, her benefits include a medical cost supplement that helps her pay for Medicare Part B supplemental insurance. Although Janet has not earned this additional benefit as an individual, as Joanne’s

43. *Gill*, 699 F. Supp. 2d at 397.

spouse she would be otherwise entitled to receive it.⁴⁴ But because the trust that funds the NHRS is qualified under federal tax laws, which incorporate DOMA, Janet has been denied the additional medical cost supplement, costing the couple \$375.56 per month.

Additionally, federal tax law currently allows a private employer to provide health insurance to the heterosexual spouse of an employee or retired employee as a tax-free benefit.⁴⁵ If an employer offers the same benefit to legally married same-sex couples, DOMA operates to require the value of the same-sex spouse's health insurance to be treated as taxable income.⁴⁶ Thus, because of DOMA, the employee's same-sex spouse must pay income taxes on the value of this benefit while the heterosexual spouse does not. This costs same-sex couples on average \$1,069 more per year than their married heterosexual counterparts

44. *Pedersen*, 881 F. Supp. 2d at 303-04.

45. 26 U.S.C. § 106 ("Except as otherwise provided in this section, gross income of an employee does not include employer-provided coverage under an accident or health plan."); 26 C.F.R. § 1.106-1 ("The gross income of an employee does not include contributions which his employer makes to an accident or health plan for compensation (through insurance or otherwise) to the employee for personal injuries or sickness incurred by him, his spouse, or his dependents, as defined in section 152."); *but see* I.R.S. Priv. Ltr. Rul. 98-50-011 (Sept. 10, 1998) (because of DOMA, "[a]n employee's same-sex domestic partner does not qualify as the 'spouse' of the employee for purposes of the Code.>").

46. Regulation of employee benefits falls under the federal Employee Retirement Income Security Act, which incorporates DOMA's definition of marriage, and consequently views legally married same-sex couples as legal strangers.

with the same coverage.⁴⁷ This high cost prevents many elderly same-sex spouses from accepting health insurance from their spouses' employers because the couples simply cannot afford to pay higher income taxes.

b. Medicare Part B

For those who are eligible and enrolled, Medicare Part B generally covers the cost of medically necessary doctors' services, outpatient care, home health services, durable medical equipment, preventative services, and other services not covered under Medicare Part A.⁴⁸ Unlike Part A, which is free for those over age 65 who paid Medicare taxes while working,⁴⁹ Part B coverage requires the payment of a premium every month. Because of DOMA, however, Part B premiums can be higher for legally married same-sex couples than for similarly situated heterosexual couples.

An individual's Part B premium is based on the individual's yearly income from 2 years prior as reported

47. M. V. Lee Badget, *Unequal Taxes on Equal Benefits: The Taxation of Domestic Partner Benefits* 7 (Dec. 2007), available at <http://escholarship.org/uc/item/25c0n9rx.pdf>.

48. 42 U.S.C. § 1395k. Medicare Part B is available to individuals who are age 65 and older, disabled and receiving Social Security disability or Railroad Retirement benefits for at least 24 months, or have end stage renal disease. See 42 U.S.C. § 1395o; *id.* at §§ 426, 426(1).

49. Centers for Medicare & Medicaid Services, U.S. Dep't of Health and Human Servs., *Medicare & You* 24 (2013), available at <http://www.medicare.gov/Pubs/pdf/10050.pdf>.

on the individual's tax return. In 2013, Part B premiums are as follows:⁵⁰

2011 Yearly Income		Part B Premium in 2013
Individual Tax Return	Joint Tax Return	
\$85,000 or less	\$170,000 or less	\$104.90
above \$85,000 up to \$107,000	above \$170,000 up to \$214,000	\$146.90
above \$107,000 up to \$160,000	above \$214,000 up to \$320,000	\$209.80
above \$160,000 up to \$214,000	above \$320,000 up to \$428,000	\$272.70
above \$214,000	above \$428,000	\$335.70

Because DOMA “prevents same-sex married couples from filing joint federal tax returns,”⁵¹ they are unable to combine their incomes and therefore must pay Part B premiums under the individual scale. Thus, if an individual made \$110,000 in 2011, and his same-sex spouse made \$50,000, the individual's Part B premium would be based on his individual tax return, resulting in a premium payment of \$209.80 per month in 2013. If this same individual's spouse were of the opposite sex, however, the couple could file a joint tax return showing joint income of \$160,000 in 2011. The individual's Part B premium would then only be \$104.90 per month in 2013, which is half

50. *Id.* at 25.

51. *Massachusetts v. U.S. Dep't Health & Human Servs.*, 682 F.3d 1, 6 (1st Cir. 2012).

the amount that the similarly situated individual with a same-sex spouse is required to pay. Over the course of 2013, if both individuals continue to pay Part B premiums, the same-sex couple will pay \$1,258.80 more for Part B coverage than the similarly situated heterosexual couple.

c. Retiree Survivorship Benefits

Benefits payable under a deceased spouse's defined benefit or pension plan can provide a significant source of income for a surviving spouse. The Employment Retirement Income Security Act ("ERISA")⁵² regulates employer-sponsored retirement funds, including pension and defined benefit plans. These plans are typically offered by large public employers or employers with unionized workforces and guarantee workers a certain payment for life, after an individual works a certain number of years. Pension plans provide an important source of retirement income, with over 40% of older American households receiving income from pension plans.⁵³

Under federal law, a married worker's pension is automatically designated as a Qualified Joint and Survivor Annuity, which makes the pension payable over the lifetimes of both the worker and his or her spouse.⁵⁴ Employers are also required to offer Qualified Pre-Retirement Survivor Annuities, which entitle the surviving

52. 29 U.S.C. § 1055.

53. Soc. Sec. Admin., *Fast Facts & Figures About Social Security, 2012*, at 6, available at http://www.ssa.gov/policy/docs/chartbooks/fast_facts/2012/fast_facts12.pdf.

54. 26 U.S.C. § 401(a)(11).

spouse of an employee who dies before retirement to all accrued retirement funds over the remainder of the surviving spouse's life. However, because ERISA looks to DOMA for the definition of "spouse," same-sex spouses are not entitled to receive the annuity as a matter of right.⁵⁵ Although employers may choose to offer this benefit to same-sex spouses of their employees, many employers do not.⁵⁶ The inability of a surviving same-sex spouse to access these important benefits denies surviving same-sex spouses valuable retirement income which is guaranteed under federal law to similarly situated heterosexual surviving spouses.

4. Tax Qualified Retirement Plans

Tax qualified individual retirement accounts ("IRA") are one of the most common forms of retirement savings in the United States. Married couples receive distinct benefits with respect to both contribution to and withdrawal from IRAs that, because of DOMA, are unavailable to legally married same-sex couples.

a. Contributions to a Spouse's IRA

Unmarried individuals may contribute to an IRA up to an annual deductible limit as long as the individual has

55. Pension and defined benefit plans often limit the class of permitted beneficiaries to certain enumerated family members and many do not include a same-sex spouse in the class of beneficiaries.

56. Human Rights Campaign, *Corporate Equality Index 2013*, at 28, available at http://www.hrc.org/files/assets/resources/CorporateEqualityIndex_2013.pdf.

earned income in a given year. A married couple filing a joint tax return, however, can take advantage of “spousal IRA” contributions, which allow married couples to make contributions on behalf of each spouse up to his or her annual deductible limit, even if one spouse has not earned any income in the tax year.⁵⁷ But because DOMA prevents legally married same-sex couples from filing a joint income tax return, non-working same-sex spouses like Kathy Bush are not able to make tax-deductible contributions to their IRAs.

Married in 2004 in Massachusetts, Kathy Bush has been in a committed relationship with Mary Ritchie for nearly 23 years. For as long as they have been a couple, Mary has been a member of the Massachusetts State Police. After the birth of the couple’s first son, Kathy stopped working outside of the home in order to care for the couple’s son, and later other children, full-time. The couple wants to use Mary’s income to make contributions to Kathy’s IRA, to ensure that she has adequate retirement savings. But Kathy cannot make her own contributions because she has no taxable income, and because DOMA prevents Mary and Kathy from filing a joint income tax return, the couple cannot use Mary’s income to make tax-deductible contributions to Kathy’s IRA.⁵⁸ A similarly situated non-working heterosexual spouse would be able to use the working spouse’s income to make tax-deductible IRA contributions and, unlike Kathy, would not be denied this opportunity to set aside tax-deferred retirement savings.

57. 26 U.S.C. § 219(c).

58. *See generally Gill*, 699 F. Supp. 2d 374.

b. Withdrawals from a Deceased Spouse's IRA

DOMA also impacts the ability of a surviving spouse to inherit their deceased spouse's IRA investments. Current law places no restrictions on whom the owner of the qualified retirement plan may designate as a beneficiary; however beneficiaries are treated differently depending on their relationship to the plan's owner. A surviving heterosexual spouse can inherit his or her deceased spouse's retirement plan and leave the inherited amount to grow tax-free until the surviving spouse reaches age 70.5. A surviving spouse of the same-sex, however, is not permitted to do this. Because of DOMA, the same-sex surviving spouse is treated as a "non-spouse" and must start drawing down a minimum amount of funds each year beginning the year after the original account holder dies.

Over time, this disparate treatment can have a significant impact on the retirement savings and income of the surviving same-sex spouse. For example, if a heterosexual widow inherits a \$50,000 IRA at age 49.5 and invests this amount for a 5% return, she could withdraw \$10,864 per year in after-tax income for 15 years once she turned 70.5. A similarly situated lesbian widow would be forced to start drawing down funds each year beginning the year after her spouse dies and could only withdraw \$9,582 in after-tax income once she turned 70.5, which is a difference of \$1,282 per year. If the inheritance age is reduced to 39.5, the heterosexual widow could withdraw \$17,696 per year in after-tax income, compared to only \$14,491 for the lesbian widow – a difference of \$3,205 per year.⁵⁹

⁵⁹ See *Improving the Lives of LGBT Older Adults*, *supra* note 13, at 19 & n.97.

Like numerous others, Andrew Sorbo has been deprived of interest income because DOMA forced him to begin withdrawing money from his husband Colin Atterbury's IRA shortly after Colin died of pancreatic cancer. Andrew, a teacher and school principal, and Colin, a professor of medicine and employee of the Veteran's Administration, were married in Connecticut in 2009, having been in a committed relationship since 1979. Four months after they were married, Colin succumbed to pancreatic cancer. Among other things, Andrew inherited Colin's IRA. Had Andrew been a woman, he would have been able to transfer the IRA to his name and allow the principal to continue to grow tax-free; but because of DOMA, Andrew was viewed as a "non-spouse" and was required to begin withdrawing money from Colin's IRA almost immediately following Colin's death.⁶⁰ This imposed a significant long-term financial strain on Andrew, which would not have been experienced by a similarly situated surviving heterosexual spouse who would have been able to defer the income tax-free.⁶¹

5. Estate Taxes

While only a small fraction of all estates are affected by the estate tax, the inability of legally married same-sex couples to take advantage of the marital deduction impacts higher-net-worth same-sex couples whose estates

60. *Hearing on S.598, The Respect for Marriage Act: Assessing the Impact of DOMA on American Families Before the S. Comm. on the Judiciary*, 111th Cong. (2011) (statement of Andrew Sorbo).

61. Andrew's financial hardships were compounded because DOMA prevented Colin's pension from the Veteran's Administration to be transferred to Andrew, as his same-sex spouse, after his death. *Id.*

are subject to federal estate tax. While a surviving heterosexual spouse is allowed to inherit all of the deceased spouse's assets without incurring any estate tax liability, a same-sex spouse must pay taxes on any inheritance over the federal exemption limit,⁶² which is what Respondent Edie Windsor was required to do when she inherited the estate of her late wife, Thea Spyer, in 2009.

Edie and Thea met in 1963 and soon thereafter began a committed relationship that would last for over 40 years. Both women had successful careers, Edie as a computer systems consultant for IBM and Thea as a respected clinical psychologist. But later in life, as a result of multiple sclerosis and a heart condition, Thea's health began to deteriorate. In 2007, the couple was married in Canada.⁶³ Two years later, Thea passed away. Under Thea's will, her entire estate passed to Edie. Prevented by DOMA from taking advantage of the unlimited marital deduction, Edie was required to pay over \$363,000 in federal taxes on Thea's estate, an amount that no similarly situated heterosexual surviving spouse would have been required to pay.

62. Currently the federal estate tax rate is 35%. 26 U.S.C. § 2001(c). However, the estate tax rate changes frequently. When the federal estate tax was levied against the late Ms. Spyer's estate, the tax rate was 45%, which required Ms. Windsor to pay \$363,053 in estate taxes. Brief for Plaintiff-Appellee Edith Windsor at 7, *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (Nos. 12-2335, 12-2435).

63. Edie and Thea were residents of New York, which although did not offer marriage licenses to same-sex couples in 2007, did recognize same-sex marriages from other jurisdictions at the time of Thea's death. *Windsor v. United States*, 699 F.3d 169, 177-78 (2d Cir. 2012).

A recent study estimated that in 2011, same-sex couples affected by the federal estate tax would lose an average of \$1.1 million per couple due to the inequity caused by DOMA.⁶⁴ This is an unjust loss of a protection afforded to opposite-sex surviving spouses.

IV. The Denial of Marital Benefits and Protections Heightens the Threat of Financial Insecurity for Legally Married Same-Sex Elders.

The inequitable treatment precipitated by DOMA exacerbates LGBT elders' predisposition to financial insecurity. Although elderly same-sex couples and elderly heterosexual couples have equally paid into, and are in equal need of, the programs and benefits that are designed to assist older couples in their retirement years, DOMA stands as a roadblock to the elderly same-sex couples' equal access to these benefits based on nothing more than their spouses' gender. As the examples above make plain, the disparate impact of DOMA on legally married same-sex elders is tangible and pronounced. In direct contrast to Petitioner's irrational justification, time has shown that because of DOMA, married same-sex couples have experienced "significant problems of disuniformity and unfairness in the distribution of [marital] benefits."⁶⁵

64. Michael D. Steinberger, *Federal Estate Tax Disadvantages for Same-Sex Couples* 10 (Nov. 2009), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Steinberger-Federal-Estate-Tax-Nov-2009.pdf>.

65. Brief for Defendant-Appellant Bipartisan Legal Advisory Group of the United States House of Representatives at 14, *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (Nos. 12-2335, 12-2435).

CONCLUSION

Because of DOMA's undeniable and unjustifiable unequal treatment of legally married couples, *amici curiae* SAGE, NSCLC, ASA, NHCOA, SEARAC and NOSCCR respectfully submit that this Court should affirm the decision of the Court of Appeals for the Second Circuit that Section 3 of DOMA is unconstitutional.

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Respectfully submitted,

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