

IN THE
Supreme Court of the United States

EDITH SCHLAIN WINDSOR, in her capacity as
Executor of the estate of THEA CLARA SPYER,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent,

and.

THE BIPARTISAN LEGAL ADVISORY GROUP OF
THE U.S. HOUSE OF REPRESENTATIVES
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE
JUDGMENT TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**BRIEF OF THE CITY OF NEW YORK,
ET AL., AS AMICI CURAE IN SUPPORT OF
PETITIONER**

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QUESTION PRESENTED

Whether Section 3 of the Defense of Marriage Act (DOMA), 104 Pub. L. 199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7) 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 State law?

TABLE OF CONTENTS

	<i>Page</i>
QUESTION PRESENTED	i
TABLE OF CONTENTS.....	ii
TABLE OF CITED AUTHORITIES	iii
INTEREST OF THE <i>AMICI CURIAE</i>	1
REASONS FOR GRANTING THE PETITION..	3
A. DOMA Forces The City To Be The Unwilling Agent Of Federally-Required Separate Treatment Of Lawfully-Married Employees.....	6
B. The Disparate Treatment Of Legally Married Couples Required By DOMA Undermines The City’s Non-Discrimination Laws	10
CONCLUSION	14

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Statutes and Other Authorities	
Supreme Court Rule 37.4	1
Supreme Court Rule 37.6	1
Fourteenth Amendment to the U.S. Constitution. .	10
26 United States Code § 105	7
26 United States Code § 106(a)	7
26 United States Code § 152	7
26 United States Code § 2056(a)	13
Defense of Marriage Act	<i>passim</i>
Family Leave Act of 1993.	8, 9
Federal Consolidated Omnibus Budget Reconciliation Act of 1985	9
New York City Administrative Code § 3-240.	12
New York City Administrative Code § 3-245.	12
New York City Administrative Code § 8-101.	11
New York City Administrative Code § 13-149.	10

Cited Authorities

	<i>Page</i>
New York City Administrative Code § 13-244.	10
New York Domestic Relations Law § 10-a(2).	1, 12
New York Estates, Powers and Trusts Law § 5-1.1-A.	10
Local Law No. 2 of 1986	11
Local Law No. 24 of 2002.	11
Local Law No. 24 of 2002, § 1	12
Local Law No. 27 of 1998	11
New York Executive Law § 296(a).	8
Treasury Regulation § 1.106-1.	7
2011 N.Y. Sess. Laws Ch. 95 (McKinney).	12
I.R.S. Info. Ltr. 2011-0066, 2011 WL 4626122 (Jul. 27, 2011)	7
I.R.S. Priv. Ltr. Rul. 200524016, 2005 PLR LEXIS 278 (Mar. 17, 2005)	7
I.R.S. Priv. Ltr. Rul. 200339001, 2003 PLR LEXIS 879 (Jun. 13, 2003).	7
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	<i>Page</i>
I.R.S. Priv. Ltr. Rul. 9717018, 1997 PLR LEXIS 85 (Jan. 22, 1997)	7
2004-121604, Teachers' Retirement System resolution (adopted December 16, 2004)	9
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City of New York Office of Labor Relations, Employee Benefits Program, New York State Marriage Equality Act, Frequently Asked Questions, Health Benefits for your Spouse, http://www.nyc.gov/html/olr/downloads/ pdf/healthb/marriage_equality_act.pdf	7
City of New York Office of Labor Relations, Health Benefits Program, Notice of Rights, When Your Health Benefits Terminate, http:// nyc.gov/html/olr/downloads/pdf/healthb/cobra. pdf	9
Fire Department Pension Fund resolution (adopted December 22, 2004)	9
Guidelines on the Family Medical Leave Act, Personnel Services Bulletin 440-8R (April 17, 2000), http://www.nyc.gov/html/dcas/html/ resources/440_8r.shtml	8

Cited Authorities

	<i>Page</i>
New York City Employees' Retirement System Cal. No. R-38 (adopted December 9, 2004)	9
New York City Police Pension Fund resolution (signed February 9, 2005)	9
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M.V. Lee Badgett, Unequal Taxation of Domestic Partner Benefits (2007), http://www. americanprogress.org/issues/2007/12/ domestic_partners.html	7, 8
Sean Dobbin, New York's Same-Sex Marriage Law Celebrates First Anniversary, <i>Democrat and Chron.</i> (June 24, 2012), http://www. democratandchronicle.com/article/20120624/ NEWS01/306240001?nclick_check=1	3, 5
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Cited Authorities

	<i>Page</i>
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INTEREST OF THE *AMICI CURIAE*

Amici are the City of New York, the Council of the City of New York, Michael R. Bloomberg, in his official capacity as Mayor of the City of New York, and Christine C. Quinn, in her official capacity as Speaker of the Council of the City of New York (hereinafter collectively referred to as “the City”).¹

Even prior to the legalization of marriage of same-sex couples in New York, the City of New York had a policy of extending to same-sex couples the same rights and benefits afforded to opposite-sex couples to the maximum extent allowed by law. The recent passage of New York State’s Marriage Equality Act has expanded even further the City’s ability to do this in important ways. Nonetheless, the Defense of Marriage Act still stands in the way of the City’s efforts because it excludes married same-sex couples from recognition for purposes of more than 1000 federal statutes and programs whose administration turns in part on individuals’ marital status.² The City of New York has a particular interest in the outcome of this

1. Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part; and no counsel or party, other than the City of New York, made a monetary contribution to fund the preparation or submission of the brief. Pursuant to Rule 37.4, *amici* have obtained the parties’ consent to the filing of this brief and such consents are submitted herewith.

2. See U.S. Gen. Accounting Office, Report No. GAO-04-353R, Defense of marriage Act: Update to Prior Report 1 (2004), <http://www.gao.gov/new.items/d04353r.pdf> (GAO Report) (identifying 1138 federal laws that are contingent on marital status or in which marital status is a factor).

case because DOMA deprives married same-sex couples living in New York City of equal recognition for their lawful marriages. This forces the City to be the unwilling agent of federally-required separate treatment of lawfully married City employees, thus undermining the City's marriage recognition and anti-discrimination policies. The City's interests are aligned with those of the petitioner in establishing that, by depriving legally married same-sex couples of many substantial benefits available to married opposite-sex couples, DOMA violates the United States Constitution's guarantee of equal protection of the laws.

The City's residents and employees come from all fifty states and from countries all around the world and are diverse in a myriad of ways, including race, color, creed, age, national origin, gender, sexual orientation, disability, marital status, and partnership status. The City embraces this diversity with strong anti-discrimination laws and policies promoting the equal treatment of its residents and employees. DOMA, however, forces the City to be the unwilling agent of federally-required separate treatment of lawfully-married employees and undermines the City's strong non-discrimination laws.

Census 2010 found that there were nearly 49,000 same-sex couples in New York state and 10,000 of them had legally married.³ Conservatively, it has been estimated that more than 8,000 same-sex couples have legally married

3. The Williams Institute, UCLA School of Law, New York Census Snapshot: 2010, <http://williamsinstitute.law.ucla.edu/census-snapshots/new-york/>.

in New York State in the past year.⁴ Approximately 55% of New York's same-sex couples live in New York City.⁵ In an effort to protect these same-sex couples from discrimination, the City of New York has enacted laws, issued policy directives, and has created workarounds in employee benefits. DOMA, however, fatally undermines the City's substantial efforts in this regard.

In light of the City's non-discrimination policies and laws and the City's public policy of support for initiatives that extend, in a manner consistent with law, the same benefits to same-sex couples that are afforded to opposite-sex couples, the City has a particular interest in the outcome of this case. The elimination of DOMA is important to the City because it allows the City to ensure that the same rights and benefits are available to all married couples in the City of New York.

REASONS FOR GRANTING THE PETITION

The petition for *certiorari* before judgment should be granted in order for this Court to determine the constitutionality of Section 3 of DOMA. Section 3 of

4. See Joseph Spector, A Year Later, New York Reflects on Same-Sex Marriage Law, USA Today, (June 24, 2012) <http://www.usatoday.com/news/nation/story/2012-06-24/new-york-same-sex-marriage/55783432/1>; Sean Dobbin, New York's Same-Sex Marriage Law Celebrates First Anniversary, Democrat and Chron. (June 24, 2012), http://www.democratandchronicle.com/article/20120624/NEWS01/306240001?nclick_check=1.

5. The Williams Institute, UCLA School of Law, New York Census Snapshot: 2010, <http://williamsinstitute.law.ucla.edu/census-snapshots/new-york/> at page 6.

DOMA denies to same-sex couples lawfully married under state law significant federal benefits that are available to opposite-sex couples lawfully married under state law. Because of DOMA, Edith Windsor, the petitioner in this case, was required to pay \$363,053.00 in taxes on the estate of her late spouse Thea Spyer that she otherwise would not have had to pay if her marriage was recognized under federal law. Such discriminatory treatment bears no rational relationship to any legitimate governmental objective. Accordingly, Section 3 of DOMA violates the guarantee of equal protection secured by the Fifth Amendment and should be struck down.

This question of the constitutionality of Section 3 of DOMA is an issue of exceptional public importance warranting *certiorari* before judgment. Section 3 applies to more than 1000 federal statutes and programs whose administration depends in part on marital status.⁶ The President has instructed Executive agencies to continue to comply with Section 3 of DOMA, “unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law’s constitutionality.”⁷ As a result, the federal government will continue to deny federal benefits to scores of affected individuals until this Court reaches a definitive resolution of the question presented.

New York is the largest state in the nation that currently authorizes civil marriage between same-

6. See Note 2, *supra*.

7. Letter from Eric H. Holder Jr., Attorney General, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

sex couples. In the first year of marriage equality in New York, it has been estimated that over 8,000 same-sex couples have married in New York State.⁸ Indeed, reports maintained by the New York State Department of Health indicate that between July 24, 2011 (when New York's marriage statute became effective) and July 23, 2012, 3,468 couples self identified as same-sex on their marriage license applications in New York State (excluding New York County). Reports maintained by New York City's Department of Information Technology and Telecommunications indicate that between July 24, 2011 and July 16, 2012, 7,184 couples self identified as same-sex on their marriage license applications in New York City. In New York City alone, the number of such marriages represents more than 9% of the total number of marriages performed (75,129). But even the Statewide total of 10,427 between same-sex couples likely underreports the actual number since New York does not require couples to report their gender on their application in order to obtain a marriage license and more than 10% do not so report.

As an increasing number of New York City residents enter into same-sex marriages, a timely and definitive ruling on the constitutionality of Section 3 of DOMA is of exceptional practical importance to these New York City residents in same-sex marriages who, like Edith Windsor, are being deprived of federal recognition of their legal marriages.

8. See Note 4, *supra*.

A. DOMA Forces The City To Be The Unwilling Agent Of Federally-Required Separate Treatment Of Lawfully-Married Employees.

DOMA imposes on the City of New York the burden of compliance and cost associated with a dual system of benefits for its married employees and forces it to become the face of its discrimination. The City of New York administers health plans, retirement plans, family leave, and COBRA for its employees. As an employer, the City must identify the gender of the spouses of its lawfully-married employees and then single out those employees with a same-sex spouse. DOMA enforces discriminatory tax treatment of spousal health care benefits. In many other benefit-related matters, the City must either incur the cost and administrative burden of “workarounds” (employer-created benefit structures attempting to compensate for the discriminatory effects of DOMA), or discriminate in its treatment of its married workforce.

Recognizing the benefits created by workplace equality for recruitment and retention, the City offers the same health benefits for employees’ same-sex spouses as they do for employees’ different-sex spouses.⁹ However, though the benefits received by different-sex spouses are tax exempt, the federal government taxes

9. See Circular Letter No. 27 (2008), stating that “[W]here an employer offers group health insurance to employees and their spouses, the same-sex spouse of a New York employee who enters into a marriage legally performed outside the State is entitled to health insurance coverage to the same extent as any opposite-sex spouse.” http://www.dfs.ny.gov/insurance/circltr/2008/cl08_27.htm.

the benefits received by same-sex spouses. Under the Internal Revenue Code, the fair market value of health care benefits for a qualified employee's spouse who is not otherwise a dependent of the qualified employee is not subject to federal income tax, but DOMA forces both the employer and employee to treat that value as taxable income when the qualified employee's spouse is a same-sex spouse.¹⁰ The City also imputes to such employees the employee's share of FICA taxes that the City pays on these benefits.¹¹ A 2007 national study found that an employee with a same-sex spouse pays \$1,069 more in taxes per year than an employee receiving the same health benefits for a different-sex spouse.¹² This results in these

10. *See e.g.*, 26 U.S.C. §§ 105, 106(a), 152; Treas. Reg. § 1.106-1 (excluding from gross income “contributions which his employer makes to an accident or health plan for compensation . . . to the employee for personal injuries or sickness incurred by him, [or] his spouse . . .”); I.R.S. Info. Ltr. 2011-0066, 2011 WL 4626122 (Jul. 27, 2011); I.R.S. Priv. Ltr. Rul. 200524016, 2005 PLR LEXIS 278 at *23-24 (Mar. 17, 2005); I.R.S. Priv. Ltr. Rul. 200339001, 2003 PLR LEXIS 879 at *9-11 (Jun. 13, 2003); I.R.S. Priv. Ltr. Rul. 9850011, 1998 PLR LEXIS 1650 at *10-12 (Sep. 10, 1998); I.R.S. Priv. Ltr. Rul. 9717018, 1997 PLR LEXIS 85 at *11-12 (Jan. 22, 1997).

11. *See* City of New York Office of Labor Relations, Employee Benefits Program, New York State Marriage Equality Act, Frequently Asked Questions, Health Benefits for your Spouse, http://www.nyc.gov/html/olr/downloads/pdf/healthb/marriage_equality_act.pdf (explaining that City pays Social Security and Medicare taxes on the value of a same-sex spouse's health benefits and employee's taxable wage amounts are increased accordingly).

12. M.V. Lee Badgett, Unequal Taxation of Domestic Partner Benefits (2007), http://www.americanprogress.org/issues/2007/12/domestic_partners.html.

employees paying 11% more in taxes than they would pay if they were married and the federal government recognized that marriage.¹³ This increased tax burden is particularly onerous for New York City residents who pay not only federal and state taxes, but City taxes as well.

Because of DOMA, the City, as an employer, must impute the value of spousal healthcare benefits to its employees' detriment if those employees are in same-sex marriages. The City must intrude on its married employees' privacy by investigating the gender of their spouses, and must then treat one employee less favorably, or at minimum differently, when each is as lawfully married as the other. The City must do this notwithstanding its own laws and policies that prohibit workplace discrimination on the basis of sexual orientation and demand equal treatment of all married individuals.¹⁴

In order to minimize the discriminatory impact of DOMA on its employees, the City has voluntarily extended certain employment benefits to same-sex spouses where possible. The City's Guidelines on the Family Leave Act of 1993 (FMLA) extend FMLA benefits to eligible employees who seek to take leave to care for a "spouse", which includes "a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides", if such person has a serious health condition.¹⁵ Similarly, the City extends the

13. *Id.* at 7.

14. *See* N.Y. Exec. Law § 296(a) (prohibiting workplace discrimination based on sexual orientation).

15. Guidelines on the Family Medical Leave Act, Personnel Services Bulletin 440-8R (April 17, 2000), http://www.nyc.gov/html/dcas/html/resources/440_8r.shtml.

protections offered by the Federal Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) to same-sex spouses, allowing them the opportunity to continue benefit fund coverage in certain instances when the coverage would otherwise terminate.¹⁶ Thus, even though the federal government does not recognize a same-sex spouse as a spouse for purposes of FMLA and COBRA, the City extends the protections offered under these federal programs to an eligible employee's different-sex spouse to an eligible employee's same-sex spouse as well.

In addition, in 2004, the City extended the benefits available to the "spouses" of members of the City's five pension systems to the same-sex spouses of members. The City's five pension systems adopted resolutions recognizing the same-sex marriages of members lawfully entered into in other jurisdictions "for the purpose of determining all the rights, responsibilities and benefits afforded to the 'spouse,' 'surviving spouse,' 'widow' or 'widower' of a member."¹⁷ Because some benefits in the New York City retirement plans, including accidental death benefits, are payable only to a surviving "spouse"

16. City of New York Office of Labor Relations, Health Benefits Program, Notice of Rights, When Your Health Benefits Terminate, <http://nyc.gov/html/olr/downloads/pdf/healthb/cobra.pdf> at pages 2-3.

17. New York City Employees' Retirement System Cal. No. R-38 (adopted December 9, 2004); New York City Police Pension Fund resolution (signed February 9, 2005); Board of Education Retirement System resolution (approved December 13, 2004); 2004-121604, Teachers' Retirement System resolution (adopted December 16, 2004); Fire Department Pension Fund resolution (adopted December 22, 2004).

or to a spouse, child or parent, but not to any other person and some rights may only be exercised by a “spouse” or “widow/widower,” including the right to take an elective share of the estate of a deceased member, same-sex spouses were previously excluded from such benefits.¹⁸

DOMA forces the City to administer dual systems of benefits and imposes on the City the burden of the workarounds necessary to protect married employees. DOMA requires the City to simultaneously treat employees with same-sex spouses as (1) single for the purposes of federal tax withholding and payroll taxes, and (2) married for all other purposes under state law. Even where there is no direct financial cost to the City, the City is forced to absorb the administrative burdens of creating these workarounds in an effort to offer equal employment benefits to all of its employees. In violation of the Fourteenth Amendment’s guarantee of equal protection of the laws, DOMA forces the City to be the unwilling agent of federally-required separate treatment of lawfully-married employees.

B. The Disparate Treatment Of Legally Married Couples Required By DOMA Undermines The City’s Non-Discrimination Laws.

The federal non-recognition of marriage for same-sex couples articulated in DOMA creates separate castes of married couples. The City of New York has enacted laws, issued policy directives, and has created workarounds in

18. See, e.g., New York City Administrative Code §§ 13-149 (NYCERS), 13-244 (Police Pension Fund) (accidental death benefits); New York Estates, Powers and Trusts Law § 5-1.1-A (right to take elective share of spouse’s estate).

employee benefits in an effort to mitigate or eliminate the effects of this caste system. DOMA, however, fatally undermines the City's substantial efforts in this regard.

The City's policy of recognizing the rights of same-sex partners who have entered into lawful marriages is part of the City's commitment to recognizing rights of same-sex partners and to its general policies of non-discrimination and equal treatment of its residents and employees. Pursuant to Local Law No. 2 of 1986 (the "Gay Rights Law"), the City Council amended the City's Human Rights Law, New York City Administrative Code § 8-101, et seq, to prohibit discrimination based on sexual orientation. Mayors Koch and Dinkins adopted orders conferring benefits on domestic partners, which were ratified by Mayors Giuliani and Bloomberg. In addition, the City has permitted its employees to obtain health coverage for their domestic partners since 1994.

In 1998, pursuant to Local Law No. 27 of 1998, the City codified a domestic partner registration program and amended the Charter and Administrative Code to provide equal treatment in a number of areas for domestic partners registered pursuant to the City's program. In 2002, the City enacted Local Law No. 24 to extend the rights and benefits provided to domestic partners registered in the City to parties to lawful same-sex marriages and civil unions, as well as to domestic partners registered in other jurisdictions. In the "Declaration of legislative intent and findings" accompanying Local Law No. 24 of 2002, the City Council explicitly recognized that same-sex couples have faced many obstacles to full legal recognition of their relationships and that the Federal Government, as well

as many other states, have passed Defense of Marriage Acts expressly prohibiting the recognition of same-sex marriages.¹⁹ In response, the Council amended the City's Administrative Code to ensure that same-sex couples who have lawfully married in other jurisdictions can, at least, enjoy all rights and benefits currently available to domestic partners registered in New York City.²⁰

The New York State Legislature legalized marriage between same-sex couples in New York by the passage of New York State's Marriage Equality Act, which was signed into law by Governor Andrew Cuomo on June 24, 2011.²¹ The Marriage Equality Act was intended to abolish all legal distinctions between same-sex and different-sex marriages.²² The Legislative Intent articulated in the Marriage Equality Act is fully consistent with the City's endorsement of equal treatment for same-sex couples:

Marriage is a fundamental human right. Same-sex couples should have the same access as others to the protections, responsibilities, rights, obligations, and benefits of civil marriage. Stable family relationships help build a strong

19. See Local Law No. 24 of 2002, Section 1.

20. New York City Administrative Code §§ 3-240, 3-245.

21. 2011 N.Y. Sess. Laws Ch. 95 (McKinney).

22. See New York Domestic Relations Law § 10-a(2) ("Marriage Equality Act") ("No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex.").

society. For the welfare of the community and in fairness to all New Yorkers, this act formally recognizes otherwise-valid marriages without regard to whether the parties are of the same or different sex. It is the intent of the legislature that the marriages of same-sex and different-sex couples be treated equally in all respects under the law.

The Defense of Marriage Act is the last remaining obstacle to achieving legal equality between the City's married couples. Solely because of DOMA, Edith Windsor was required to pay more than \$363,000 in federal estate tax on her legal spouse's estate. If Ms. Windsor's spouse had been a man, the marital exemption provided by federal law would have applied and she would not have owed any federal estate taxes at all.²³ As a result of DOMA, thousands of legally married same-sex couples in the New York City are being subjected to this type of disparate treatment because their legal marriages are not recognized under federal law.

The constitutionality of DOMA is a question of exceptional importance to the City of New York. Daily, it affects the lives of thousands of same-sex married couples in New York City. The City urges this Court to grant the petition for writ of *certiorari* before judgment to resolve the constitutionality of DOMA.

23. See 26 U.S.C. § 2056(a).

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* before judgment should be granted.

Respectfully submitted,

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