

**Written Testimony
of Evan Wolfson**

**Founder and President,
Freedom to Marry**

Before the Committee on the Judiciary
United States Senate

For the Hearing

“S. 598, The Respect for Marriage Act: Assessing the Impact of
DOMA on American Families”

July 20, 2011

Mr. Chairman and Members of the Committee:

I am Evan Wolfson, Founder and President of Freedom to Marry, the national campaign to win marriage. I am also author of *Why Marriage Matters: America, Equality, and Gay People's Fight to Marry* (Simon & Schuster 2004).

On behalf of Freedom to Marry, I am pleased to be here with you today to testify in support of S.598, the Respect for Marriage Act, which would repeal the so-called "Defense of Marriage Act" ("DOMA") and return the federal government to its traditional and appropriate role of respecting marriages performed in the states. I thank Chairman Leahy for holding this hearing and Senator Feinstein for her leadership in introducing this important legislation in the Senate.

Fifteen years ago this summer, I was in a courtroom in Hawaii along with my non-gay co-counsel, Dan Foley (now a highly respected appellate judge), representing three loving and committed couples who, despite being together for many years, some of them for decades, had been denied marriage licenses by the state. In the clear, cool light of Judge Kevin Chang's courtroom, we presented evidence, called and cross-examined witnesses, and made logical and legal arguments, as did the state's attorneys. At the end of that historic trial – the world's first ever on marriage for same-sex couples – the court concluded, based on that record, that there is no good reason for the government to deny the freedom to marry to committed couples simply because of their sex or sexual orientation.

Unfortunately, Congress compiled no such record in 1996, and did not wait to consider evidence or undertake serious analysis, before rushing to add a new layer of marriage discrimination against couples already barred from marrying. In floor debate, Members repeatedly voiced disapproval of homosexuality, calling it "immoral," "depraved," "unnatural," "based on perversion" and "an attack on God's principles." By contrast, there was no examination of how undermining lawful marriages furthered any legitimate goal for federal programs, families, businesses, or others interacting with the couple.

From the get-go, DOMA flunked the basic test of equal protection, as Justice Jackson put it: "that the principles of law which officials would impose upon a minority must be imposed generally."¹ Rather, DOMA willfully singles one class of lawfully married couples for radically different treatment from all other similarly married couples, for any and all federal programs and policies, regardless of purpose or circumstance. DOMA carves out a "gay exception" to the way the federal government historically and currently treats all other married couples.

DOMA divides those married at the state level into first-class marriages for those the federal government prefers and second-class marriages for those the federal government doesn't like. But in America, we don't have second-class citizens, and we shouldn't have second-class marriages either.

And from the start, DOMA subverted the freedom to marry itself, stigmatizing and setting asunder couples committed in life who have entered into the legal commitment of marriage, treating them as legal strangers for all federal programs and policies – no matter what the

¹ *Railway Exp. Agency v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring)

purpose or circumstance. DOMA was and is an anti-marriage law that should never have been enacted, whose justifications have proven false as states have removed their restrictions on same-sex couples marrying, whose popular support has swiftly dwindled as understanding has grown, and whose time for repeal is now at hand.

For more than 200 years, the federal government relied on states to determine whether a person is married or not. The Supreme Court has repeatedly affirmed the states' primacy in this area. Throughout our country's history, states' marriage laws have varied—regarding the age when someone could marry, whether or not first cousins could marry, whether common law marriage is recognized, and so on. Yet, until DOMA, there was no intervention by the federal government. The federal government traditionally accepted state marriage determinations for purposes of triggering federal marriage protections and responsibilities. But in this case, before same-sex couples could marry anywhere in the world, Congress approved DOMA.

The record is clear that Congress did so for one and only one reason—to express disapproval of gay and lesbian people and the idea that gay people, too, share in the values of love, commitment, family, connectedness: the values that underline the freedom to marry.

Much has changed since the “Defense of Marriage Act” was adopted in 1996.

Nearly eight years after DOMA's passage, Massachusetts in 2004 ended the exclusion of same-sex couples from marriage. Through litigation and legislation, other states – Connecticut, Iowa, Vermont, New Hampshire – and our Nation's capital, the District of Columbia, all, too, have now ended the denial of marriage licenses. And as of this coming Sunday, when New York ends the exclusion, the number of Americans living in a state where gay couples share in the freedom to marry will more than double, to over 35 million. The Chairman and ranking Republican Member of this Committee represent two of those states. Nearly half of the members of this Committee, 8 out of 18, represent states that have enacted state-level recognition for same-sex couples and their families, whether marriage itself or a legal mechanism providing some measure of protections as a step toward marriage – all up from zero when DOMA was passed.

In 1996, many wild gloom-and-doom claims were made about the scary consequences of permitting same-sex couples to share in the freedom to marry. They could not be proven, but because same-sex couples were denied marriage, neither could they all be fully disproven. Today, however – with gay couples sharing in the freedom to marry in 12 countries on four continents – we know for a fact that the dire predictions and supposed risks were simply false.

Opponents of the freedom to marry predicted that “traditional marriage” would be harmed if gay couples could marry. The claim was perplexing even then, and now it is clear that even the most vociferous opponents have been unable to show that any individual or marriage has been harmed as a result of gay and lesbian couples sharing in the freedom to marry. During last year's federal trial challenging California's Proposition 8, the lead defense attorney was asked by the judge how ending marriage discrimination would harm anyone else. The attorney's answer, literally, was “I don't know, your honor; I don't know.”

In Massachusetts, where same-sex couples have been marrying for the longest, the divorce rate is the lowest in the country, by a significant margin. While allowing gay couples to marry may not be the cause of the low divorce rate, by that illustrative measure, marriage is doing better in

Massachusetts than in any other state in the country. Nor is this an anomaly; we see the same pattern that the states that are inclusive of same-sex couples and their families show better family outcomes across a wide range of measures, as cited most recently by the American Medical Association and other leading public health authorities.

Some DOMA proponents argued that allowing gay couples to marry would harm children because, they repeat, children need a mother and a father. There are a number of reasons why that purported justification is faulty as well as inadequate, including that same-sex couples are raising children irrespective of whether or not they can marry – and children have the parents they have. The more relevant question is why punish the children of same-sex couples by denying them and their families the protections and security that would come to them were their parents equally able to marry.

When DOMA was passed, all existing studies of how children fared with same-sex parents refuted the opponents' scary claims, but the number of studies was limited. Since then, however, there has been extensive research, a mountain of evidence, and it all has consistently demonstrated that lesbian and gay parents are as capable as heterosexual parents, and that their children are as psychologically healthy and well-adjusted as children raised by heterosexual parents. There is, in fact, more consensus on gay parenting and the successful outcomes for children than there is in virtually any other area of social science; literally every single reputable public health and child welfare authority in the country weighing the science, evidence, and clinical as well as personal experience has agreed with our nation's kids' doctors, the American Academy of Pediatrics and, most recently, the American Medical Association, that the best interests of the children and public health in general warrant support of the freedom to marry.² All these authorities refute the kinds of unsubstantiated claims we've heard today to justify DOMA; all have taken clear and explicit stands in support of the freedom to marry.

In the 15 years since DOMA passed, as Americans have gotten to know same-sex couples living in their communities, public support for the freedom to marry has increased dramatically. In a 1996 Gallup poll, only 27% of the American people were in favor. Today, according to Gallup and five other recent surveys, support has doubled to 53%, a clear national majority for marriage. Younger Americans across the board are overwhelmingly in support; according to Gallup, 70 percent of those aged 18 to 34 favor allowing same-sex couples to marry. 63% of Catholics are for the freedom to marry, according to an ABC News/Washington Post poll this year. And opposition is falling among all parts of the public, with accelerating momentum and bipartisan voices, as reflected in last month's historic vote in New York. As Vice President Biden said last December, "there's an inevitability for a national consensus" on ending marriage discrimination.

Even the author of DOMA, Republican Congressman Bob Barr (R-GA), concluded in 2009 that it should be repealed, stating that "DOMA is neither meeting the principles of federalism it was supposed to, nor is its impact limited to federal law." Like many Americans, Congressman Barr has heard the real stories of real families, and looked at the real evidence; he now supports the freedom to marry, as does the Democratic President who signed DOMA into law, Bill Clinton.

² These organizations include the American Academy of Child and Adolescent Psychiatry, the American Psychiatric Association, the American Psychological Association, the American Psychoanalytic Association, the National Association of Social Workers, the Child Welfare League of America, and the North American Council on Adoptable Children, among others.

Nor has the “Defense of Marriage Act” withstood the test of constitutionality. In *Gill v. Office of Personnel Management* brought by New England’s Gay & Lesbian Advocates & Defenders (GLAD) on behalf of eight same-sex couples and three surviving spouses, Judge Joseph L. Tauro, appointed to the bench by President Nixon, ruled that none of the rationales for DOMA—neither those put forward by Congress at the time of enactment nor those argued by the Justice Department in its defense in *Gill*, met even the rational-basis test for a law, the least stringent standard of review.

Reviewing the record and the absence of justifications in evidence or argument, Judge Tauro found that it serves no legitimate policy interest for the federal government to force states to carve the class of married people into two:

In the wake of DOMA, it is only sexual orientation that differentiates a married couple entitled to federal marriage-based benefits from one not so entitled. And this court can conceive of no way in which such a difference might be relevant to the provision of the benefits at issue. By premising eligibility for these benefits on marital status in the first instance, the federal government signals to this court that the relevant distinction to be drawn is between married individuals and unmarried individuals. To further divide the class of married individuals into those with spouses of the same sex and those with spouses of the opposite sex is to create a distinction without meaning. And where, as here, “there is no reason to believe that the disadvantaged class is different, in *relevant* respects” from a similarly situated class, this court may conclude that it is only irrational prejudice that motivates the challenged classification. As irrational prejudice plainly *never* constitutes a legitimate government interest, this court must hold that Section 3 of DOMA as applied to Plaintiffs violates the equal protection principles embodied in the Fifth Amendment to the United States Constitution.

The court held that that animus towards gay people was and is the only explicable basis for the law, and that, as a result, DOMA is unconstitutional.

Following the ruling in *Gill*, the Department of Justice likewise concluded that, under heightened scrutiny, DOMA is unconstitutional and indefensible, and, as a result, the United States will no longer defend the discriminatory law in ongoing challenges. In a July 1, 2011 brief filed in federal district court, the Justice Department argued powerfully that DOMA is unconstitutional, because it “treats same-sex couples who are legally married under their states’ laws differently than similarly situated opposite-sex couples, denying them the status, recognition, and significant federal benefits otherwise available to married persons.”

Why is the repeal of DOMA so important for same-sex couples and their families? Because marriage matters. Gay and lesbian couples want the freedom to marry for the same mix of reasons as other couples – reasons that are emotional as well as economic, practical as well as personal, social as well as spiritual, and reasons that resonate in law as they do in love. Like non-gay people, gay people want to be able to protect themselves and their families, and marriage provides literally thousands of protections and supports at the federal and state level. Most profoundly, gay people seek to make a lifetime commitment to the person they love and to protect their families. They share similar values to those that other couples hold—like the importance of family and helping out their neighbors; they share similar worries—like making

ends meet or the possibility of losing a job; and they share similar hopes and dreams—like finding that special someone to grow old with, and standing in front of friends and family to make a lifetime commitment.

By treating married same-sex couples as legal strangers, DOMA degrades those couples, their loved ones, and marriage itself, depriving loving and committed American of the unique respect, support, and public and personal meanings that come with marriage. DOMA goes so far as to require same-sex couples to deny the existence of their own marriages through civil and criminal statutes that prohibit them from acknowledging they are married in dealings with the federal government, such as on federal forms. DOMA wreaks a wholesale undermining of their state-sanctioned family status, insults the states that have celebrated their legal union, and brands targeted Americans with the stamp of a second-class marriage that the federal government doesn't acknowledge. That is harsh, it is harmful, it is unfair, and it is un-American.

With respect to tangible protections, according to GAO and CBO studies conducted in 1997 and 2004, there are at least 1,138 federal laws in which marital status is a factor. The direct testimony presented today demonstrates that these federal incidents of marriage represent some of the critical legal safety-nets that couples count on when they marry, as they plan their lives and futures together, as they raise children and deal with hard times, and as they pay their taxes.

As I note in my book, *Why Marriage Matters*, the protections and responsibilities that come with marriage touch every part of life, from birth to death, with taxes in between. Attached is a detailed list of the protections the federal government affords married couples, prepared by our colleagues at GLAD. Among the most important are:

- Social Security spousal protections that ground a family's economic security while living in old age, and upon disability and death;
- The ability to be included in a health insurance family policy without being taxed on the value of that coverage;
- The ability to use the "Married Filing Jointly" status for federal income tax purposes that can save families money;
- Family medical leave from a job to care for a seriously ill spouse;
- Disability, dependency or death benefits for the spouses of veterans and public safety officers;
- Employment benefits for federal employees, including access to family health insurance benefits, as well as retirement and death benefits for surviving spouses;
- Estate/death protections that allow a spouse to leave assets to the other spouse – including the family home – without incurring any taxes; and
- The ability of a citizen to obtain a visa for a non-citizen spouse and sponsor that spouse for purposes of citizenship.

One specific area I want to highlight today is how DOMA destabilizes families and harms the children of married same-sex couples. Consider just one family:

Mary Ritchie and Kathy Bush, of Framingham, Massachusetts, have been married for seven years. While Mary works as a state police lieutenant, Kathy is a stay-at-home mom with their two children, 12-year-old Ryan and 10-year-old William. Mary and Kathy and their family are

reminded how vulnerable their family is every time a member of law enforcement dies in the line of duty— and, appallingly, they are even more vulnerable because of DOMA.

Because they cannot file their federal taxes jointly as a married couple, they've paid \$19,066 more in taxes since they've been married, money that could go to household expenses, be put away for their boys' college funds, or to save for a rainy day.

Social Security also protects young families by providing support in the case of a tragedy. For example, if a heterosexual parent of a child under 16 passes away, the surviving spouse would receive a "children's benefit" for each child as well as a "parent benefit" until the kids are 16. In the case of Mary and Kathy, however, should Kathy pass away, the family would receive the children's benefit but not the parent benefit. The children as well as the surviving spouse are directly injured by the federal government's refusal to respect this lawful marriage.

In Kathy's words, "We work hard, pay taxes, volunteer, and do our part for our community. But the federal government still tells us we're less of a family than other families in our neighborhood—families Mary risks her life every day to protect."

In an effort to combat these discriminatory policies, certain corporations, states and municipalities have begun to offset the extra taxes and burdens to which same-sex couples are subject. At least 17 companies, including Boston Consulting Group, Google, and Facebook, compensate same-sex couples to offset the tax that they must pay on employer-provided health insurance policies that cover their same-sex spouse. The city of Cambridge, Massachusetts has done the same. The state of Massachusetts has enacted a law in which the state will compensate a same-sex couple if one spouse enters a nursing home and the couple is forced to spend down their savings, ensuring the other spouse does not need to give up their home in order to receive Medicaid benefits. But this patchwork of support, though commendable, barely scratches the surface in trying to make up for the federal government's discriminatory withholding of the extensive protections available to all other married couples and their families.

Companies, cities, and courts, of course, are not the only ones who can act. Congress can, and should, undo the damage caused by the "Defense of Marriage Act" and federal marriage discrimination. The remedy at hand is the straightforward and restorative Respect for Marriage Act.

The Respect for Marriage Act repeals "DOMA" in its entirety. It doesn't tell states what marriages they must celebrate or how to treat marriages, but provides that the federal responsibilities and protections accorded married couples will remain stable and predictable no matter where a couple lives, works, or travels, and no matter whether that couple is gay or non-gay. The Respect for Marriage Act doesn't require any person, religious organization, locality, or state to celebrate or license any marriage, gay or non-gay. The First Amendment protects the right of churches and religious bodies to determine the qualifications for religious marriage, and the Respect for Marriage Act cannot and will not upset that longstanding protection.

Mr. Chairman, in just four days, same-sex couples will begin marrying in New York, the result of both Democratic-led and Republican-led legislative chambers approving, and the governor

signing into law, a simple bill ending the exclusion of same-sex couples from marriage. Beginning this Sunday, Americans will watch on television as these couples, some of whom have been together forty, fifty – in the case of one couple who contacted Freedom to Marry, Richard Dorr and John Mace, sixty-one – years, express their love and have their commitment celebrated by family and friends and confirmed by the state.

As these joyous couples join in marriage, they will at the same time become the newest Americans who experience first-hand the sting of discrimination by the federal government. They will endure the intangible yet very real pain of once again being deemed a second-class citizen by Congress, and suffer the tangible harm of being excluded from the safety-net of protections and responsibilities that their heterosexual married family members and friends cherish.

Congress can remove this sting, eliminate this pain, end this harm – by enacting the Respect for Marriage Act, repealing the so-called “Defense of Marriage Act,” and standing up for American values of the pursuit of happiness, personal responsibility, and treating others as you would want to be treated.

Freedom to Marry urges this Committee, and the Senate, to pass the Respect for Marriage Act.

Thank you.