California Bankruptcy Journal™

VOLUME 32

NUMBER 1

2012

California Bankruptcy Journal™

VOLUME 32 NUMBER 1

The *California Bankruptcy Journal* (ISSN 1047-0743) is published by the California Bankruptcy Journal Corporation, which is wholly owned by the California Bankruptcy Forum. The opinions of the authors are not attributable to the *Journal*, its editors, advisors, or related entities.

Correspondence should be addressed to either Eric P. Israel, Danning, Gill, Diamond & Kollitz, LLP, 2029 Century Park East, Third Floor, California 90067-2904; E-mail: eisrael@dgdk.com, or Jeffrey I. Golden, Weiland, Golden, Smiley, Wang Ekvall & Strok, LLP, 650 Town Center Drive, Suite 950, Costa Mesa, California 92626, jgolden@wgllp.com. Guidelines for Manuscripts appear at the back of this issue.

Subscriptions are $75 per four issues. Single copy price is $20. Members of any local Bankruptcy Forum affiliated with the California Bankruptcy Forum receive their subscriptions as part of their dues and therefore do not need to subscribe. Please make checks payable to the *California Bankruptcy Journal*, and mail to the *Journal's* administrator, JBS & Associates at: CBJ, JBS & Associates, 954 La Mirada Street, Laguna Beach, California 92651. To ensure receipt of the *Journal*, all changes of address must be directed to Jeanne Sleeper at the same address. The *Journal* is not responsible for determining changes of address. Advertising information and rates may be obtained from JBS & Associates at (949) 497-3673, ext. 300, or JBSAssociates@earthlink.net.

MARRIAGE EQUALITY IN BANKRUPTCY COURT: JOINT PETITIONS FOR SAME-SEX COUPLES

By Robert J. Pfister[1]

On June 13, 2011, twenty Judges of the United States Bankruptcy Court for the Central District of California signed an opinion captioned *In re Balas & Morales*,[2] holding that the federal Defense of Marriage Act[3] ("DOMA") cannot constitutionally be applied to require the dismissal of a joint bankruptcy petition filed by a same-sex couple lawfully married under the laws of the state in which the couple resides. Although the U.S. Trustee initially appealed the *Balas & Morales* ruling, that appeal was withdrawn and the Department of Justice announced that it will no longer challenge joint bankruptcy petitions filed by validly married same-sex couples. Accordingly, absent a successful challenge by a party in interest or a definitive ruling finding DOMA constitutional in other (non-bankruptcy) litigation, married same-couples may jointly file for bankruptcy.

The sections that follow describe the background of the *Balas & Morales* decision, including the debtors themselves (Gene Balas and Carlos Morales ("Debtors")) and the statute that purports to deny same-sex couples the same federal rights available to opposite-sex couples (DOMA). Next is an examination of the *Balas & Morales* bankruptcy case, including its procedural posture, the framing of the constitutional issues, and the court's reasoning and analysis. Finally, a concluding section considers the government's response to *Balas & Morales* and its implications for the future.

I. Background

A. The Debtors

Gene Balas and Carlos Morales were married on August 30, 2008, during the brief window of opportunity between (i) the June 16, 2008, effective date of the California Supreme Court's ruling that the right to marry was "available both

---

[1] Mr. Pfister is a partner at Klee, Tuchin, Bogdanoff & Stern LLP. Together with David M. Stern (of the same firm), and with the assistance of Peter M. Lively (the Debtors' general bankruptcy counsel), Mr. Pfister served as special counsel to Gene Douglas Balas and Carlos A. Morales, the joint debtors in the case described below.

[2] *In re* Balas & Morales, 449 B.R. 567 (Bankr. C.D. Cal. 2011).

[3] Defense of Marriage Act ("DOMA"), Pub. L. No. 104-199, 110 Stat. 2419 (Sep. 21, 1996).

to opposite-sex and same-sex couples,"[4] and (ii) the November 5, 2008, effective date of Proposition 8, which amended the state constitution to once again restrict marriage to opposite-sex couples.[5] As subsequently confirmed by the California Supreme Court, marriages performed during that 143-day window remain fully valid as a matter of California law.[6]

Mr. Balas has an MBA from Columbia University and worked on Wall Street until he and Mr. Morales moved to Los Angeles in 2006, to be closer to the latter's aging mother. Mr. Morales, who was born and raised in Los Angeles, graduated from U.C. Santa Barbara and is a presentation specialist at an investment advisory firm. Like many married couples, Mr. Balas and Mr. Morales pool their assets and liabilities, and have depended on each other for support during times of job loss and illness. At times Mr. Balas has been the primary or sole breadwinner for the family; other times Mr. Morales has fulfilled that role. Regardless of who earned what, the couple treats their assets as joint property and their debts as joint obligations.

In March 2009, Mr. Balas lost his job when his company laid off nearly a fifth of its workforce. The subsequent loss of income (Mr. Balas's replacement job as a freelance writer pays significantly less than his former career in finance), together with a series of unexpected medical expenses, ultimately led the couple to seek relief under chapter 13 of the Bankruptcy Code.[7] However, because of a

---

[4] *In re* Marriage Cases, 43 Cal. 4th 757, 857, 183 P.3d 384, 453 (2008).

[5] CAL. CONST. art. I, § 7.5 ("Only marriage between a man and a woman is valid or recognized in California."). Proposition 8 was approved by 52.3 percent of the electorate at the November 4, 2008, general election, and became effective the following day. Perry v. Brown, ___ F.3d __, 2012 WL 372713, at *5 (9th Cir. Feb. 7, 2012).

[6] Strauss v. Horton, 46 Cal. 4th 364, 207 P.3d 48 (2009) (declining to give Proposition 8 retroactive effect, and expressly holding that the approximately 18,000 same-sex couples who wed before its passage remain validly married).

[7] Chapter 13 "facilitate[s] the adjustments of all types of debts . . . through extension and composition plans funded out of future income, under the protection of the court." 8 A. RESNICK, COLLIER ON BANKRUPTCY ¶ 1300.02 (16th ed. rev'd 2010). *See also* Perry v. Commerce Loan Co., 383 U.S. 392, 395 (1966) (describing the predecessor of chapter 13: "[T]he wage-earner extension-of-time [chapter of the Bankruptcy Act] was intended to give to the wage earner a reasonable opportunity to arrange installment payments to be made out of his future earnings. Congress clearly intended to encourage wage earners to pay their debts in full, rather than to go into straight bankruptcy . . . ."). Consumer bankruptcy protection under any chapter of the Code offers "honest but unfortunate debtor[s]" like Mr. Balas and Mr. Morales the opportunity to "reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" Grogan v. Garner, 498 U.S. 279, 286-87 (1991) (quoting Local Loan Co. v. Hunt, 292 U.S. 234,

1996 law misleadingly called the "Defense of Marriage Act," Mr. Balas and Mr. Morales were told that for bankruptcy purposes, they had to ignore the practical and legal reality of their marriage and instead pretend to be nothing more than strangers (or perhaps roommates): they were barred from filing a joint bankruptcy petition.

Joint petitions are authorized by section 302 of the Bankruptcy Code for "an individual . . . and such individual's spouse."[8] As the Historical and Statutory Notes to that section explain, spouses are often "jointly liable on their debts, and jointly hold most of their property" such that a joint bankruptcy filing "will facilitate consolidation of their estates, to the benefit of both the debtors and their creditors, because the cost of administration will be reduced, and there will be only one filing fee." Further, in the Central District of California, a local rule provides that all joint petitions "will be deemed substantively consolidated unless the court orders otherwise."[9]

Having to file as two unmarried individuals – rather than as a married couple – carries several disadvantages. As a threshold matter, there is the sizeable practical expense of having to pay a bankruptcy attorney to handle two separate cases,[10] and also two separate filing fees. Beyond the added expense, however, Mr. Balas and Mr. Morales also faced the prospect of having to artificially separate their intertwined assets, liabilities, income, and expenses in order to prepare the required financial schedules,[11] determine their eligibility for bankruptcy relief,[12] and formulate a chapter 13 plan.[13] Finally, the couple would

---

244 (1934)).

8 11 U.S.C. § 302(a).

9 BANKR. C.D. CAL. R. 1015-1(a).

10 Attorneys' fees for consumer bankruptcy filings may vary, but a reasonable indication of the cost for filing an individual chapter 13 case in the Central District of California at the time Mr. Balas and Mr. Morales filed can be found in the Court's Guidelines for Allowance of Attorneys' Fees in Chapter 13 Cases (BANKR. C.D. CAL. R. APP. IV), which contemplate payment of $4,000 for each relatively simple chapter 13 case. Costs could be significantly higher if the attorney had to bring a motion to substantively consolidate the two separate cases.

11 A debtor's disclosure obligations are prescribed by 11 U.S.C. § 521(a)(1) and FED. R. BANKR. P. 1007(b), but are most evident in Official Forms 6 and 7, the voluminous schedules and statements required for each bankruptcy petition. In a joint case, a single set of schedules and statements is required; in two individual cases, two sets of schedules and statements are required. Certain portions of the schedules and statements require joint debtors to specify which spouse owns or owes what, but other portions seek only aggregate data.

12 Following the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23 (2005), individual debtors with primarily consumer

be forced to lie, as both would be required to sign under penalty of perjury a bankruptcy petition that falsely stated they were single, not married.[14]

B. The Defense of Marriage Act

DOMA, the law requiring Mr. Balas and Mr. Morales to counter-factually file bankruptcy as single individuals rather than as a married couple, was passed in 1996 – nearly eight years before a single same-sex couple was validly married in the United States.[15] According to its sponsors, DOMA was prompted by a decision of the Supreme Court of Hawai'i three years before that supposedly

---

debts (a category that includes Mr. Balas and Mr. Morales) are subject to a detailed means test that, *inter alia*, limits the availability of chapter 7 relief and determines the required length of any chapter 13 plan. As with the statements and schedules described in note 11, *supra*, the forms required for means test calculations (Official Forms 22A, 22B and 22C) differentiate between married individuals and single individuals, and the calculations may yield different results depending on whether the form is completed by a married couple as joint debtors, or by two individuals whose marriage is ignored for purposes of federal law. *See also* FED. R. BANKR. P. Official Form 22 Advisory Committee Notes (2010 Amendments) (explaining that the form's references to "household" and "household size" have been replaced with references to "number of persons" and "family size" to conform with "the number of dependents that the debtor claims for federal income tax purposes" – which likely will not include same-sex partners).

13 Classification and priority of claims in chapter 13 are subject to detailed requirements in 11 U.S.C. §§ 1322 & 1325, and splitting a married couple's petition into two separate cases with two separate plans will likely lead to different results – for the debtors and their creditors – than providing for the debts in a joint plan. To take just one example, Mr. Balas and Mr. Morales owed different amounts to the IRS, so separate individual plans would have had different amounts of total unsecured priority claims, *see* 11 U.S.C. § 507(a)(8), which would have resulted in a different distribution to unsecured creditors, *see* 11 U.S.C. § 1322(a)(2) (chapter 13 plan must "provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507").

14 *See also* Tiffany R. Harper, *Gelding the Lily: How the Bankruptcy Code's Promotion of Marriage Leaves it Impotent*, 28 EMORY BANKR. DEV. J. 31, 34-39 (2011) (identifying and discussing other benefits provided to spouses under the Bankruptcy Code, including the ability to shield real estate held in a tenancy by the entirety from creditors, and the ability to claim a spouse as a dependent and exempt their expenses without proving actual dependency) (citing, *inter alia*, A. Mechele Dickerson, *Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status*, 67 FORDHAM L. REV. 69 (1998)); 7 NORTON BANKR. L. & PRAC. 3D § 141:2 (2012) (noting other benefits of joint filings, including that "[b]oth spouses are eligible to file a joint petition for Chapter 13 relief notwithstanding that one spouse is unemployed and could not satisfy the 'regular income' requirement for eligibility in a separate case") (citing *In re* McLeroy, 106 B.R. 147 (Bankr. W.D. Tenn. 1989); *In re* Estalella, 101 B.R. 391 (Bankr. S.D. Fla. 1989)).

15 Massachusetts became the first state to legalize marriage equality, with the November 2003 decision in Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 798 N.E.2d 941 (2003). The first valid same-sex marriages were performed six months later, in May 2004.

raised the specter of same-sex marriage becoming legal in one state.[16] Allegedly in response to this perceived threat – and with a legislative history that is replete with cringe-worthy sound bites[17] – a bill was rushed through Congress and signed by President Clinton shortly after midnight on a Friday evening, outside the regular news cycle.

The statute has two operative provisions: Section 2 permits interstate non-recognition of same-sex marriages,[18] and Section 3 defines the terms "marriage" and "spouse" for purposes of federal law to exclude same-sex marriages and spouses.[19] Section 3's federalization of what has traditionally been a domestic relations matter reserved for the states is a particularly poor fit in the bankruptcy context, where there is a long tradition of looking to state law unless a distinctly federal interest "requires a different result."[20]

For the first 14 years of DOMA's existence, the United States defended the statute's constitutionality, and courts generally upheld the law in the various contexts in which it was challenged.[21] The tide began to turn in 2010. In July of

---

16 Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993). *Baehr* was decided in May 1993. DOMA was enacted on Sept. 21, 1996. A more proximate explanation for the statute is the 1996 general election, which DOMA preceded by approximately six weeks.

17 *See, e.g.*, 142 CONG. REC. S10109 (daily ed. Sep. 10, 1996) (statement of Sen. Byrd) (asserting that same-sex couples are incapable of "emotional bonding" and therefore cannot constitute "'families' as society universally interprets that term").

18 Section 2 is codified as 28 U.S.C. § 1738C ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.").

19 Section 3 is codified as 1 U.S.C. § 7 ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

20 Butner v. United States, 440 U.S. 48, 53 (1979). This tradition dates back nearly 200 years to Sturges v. Crowninshield, 17 U.S. 122 (1819), and is stronger than any analogue in taxation or immigration, the two other areas where federal law most frequently encounters state domestic relations law. *See, e.g.*, United States v. Craft, 535 U.S. 274, 288-89 (2002); Adams v. Howerton, 673 F.2d 1036, 1038 (9th Cir. 1982).

21 *E.g.*, Wilson v. Ake, 354 F. Supp. 2d 1298 (M.D. Fla. 2005) (upholding Section 2 of DOMA against a challenge by a Florida couple who wanted their Massachusetts marriage recognized in their home state); *In re* Kandu, 315 B.R. 123 (Bankr. W.D. Wash. 2004) (upholding Section 3 of DOMA against a challenge by a Washington couple who wanted to jointly file for bankruptcy on

that year, Judge Joseph Tauro (a Nixon appointee) of the U.S. District Court for the District of Massachusetts issued a pathmarking decision finding Section 3 of DOMA unconstitutional insofar as it provided that some valid Massachusetts marriages "count" for purposes of federal law, while other valid Massachusetts marriages (those between same-sex spouses) do not.[22] Judge Tauro concluded that this distinction was neither rational nor legitimate:

> By premising eligibility for [federal] 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.[23]

The Executive Branch apparently took Judge Tauro's opinion in *Gill* to heart. On February 23, 2011, the Attorney General notified the Speaker of the House that he and the President had concluded that "Section 3 of [DOMA], as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment,"[24] and would no longer be defended from constitutional challenges by the Justice Department. Notwithstanding this conclusion, however, the Attorney General specified that the

---

the basis of their Canadian marriage, which was not recognized in their home state).

[22] Gill v. Office of Personnel Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010).

[23] *Id.* at 396-97 (emphasis in original; quotation marks and footnote omitted)). In a companion case decided the same day as *Gill*, Judge Tauro held DOMA unconstitutional on a further, additional ground: "[I]t is clearly within the authority of the Commonwealth to recognize same-sex marriages among its residents, and to afford those individuals in same-sex marriages any benefits, rights, and privileges to which they are entitled by virtue of their marital status. The federal government, by enacting and enforcing DOMA, plainly encroaches upon the firmly entrenched province of the state, and, in doing so, offends the Tenth Amendment. For that reason, the [Section 3 of DOMA] is invalid." Mass. v. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 253 (D. Mass. 2010).

[24] Letter from Hon. Eric H. Holder, Jr. to Hon. John A. Boehner, dated Feb. 23, 2011, *available at* 2011 WL 641582 ("Holder Letter"), at *1.

United States would continue to "enforce" DOMA, just not "defend" its constitutionality.[25]

II. *In re Balas & Morales*

A. Commencement of the Case

On February 24, 2011, one day after the Attorney General's announcement that the United States would no longer defend Section 3 of DOMA, the joint chapter 13 case styled *In re Gene Douglas Balas and Carlos A. Morales* was filed in the U.S. Bankruptcy Court for the Central District of California. Bankruptcy petitions do not ask for the gender of debtors (because gender is not pertinent to anything in the Bankruptcy Code or Bankruptcy Rules),[26] so other than the fact that the Debtors both had men's names, their petition was indistinguishable from the other 2,713 chapter 13 petitions filed in the Central District of California that month.[27]

A meeting of creditors was held March 28, 2011, at which Mr. Balas and Mr. Morales were required to personally "appear and submit to examination under oath" with a representative of the U.S. Trustee presiding.[28] At this meeting, a representative of the U.S. Trustee's office noted on the record that the "[d]ebtors appear to be two males," and stated the U.S. Trustee's intention to move for the dismissal of Mr. Balas and Mr. Morales's joint case on that ground, pursuant to DOMA.[29]

---

[25] *Id.* at *5.

[26] Marital status, by contrast, is germane and the Court's local rules require jointly filing debtors to be prepared to produce their marriage license. BANKR. C.D. CAL. R. 1002-1(g). Of course, Mr. Balas and Mr. Morales's marriage license (which they provided to the Court) is no different than any other California marriage license.

[27] Filing statistics for the Central District of California are available on the Bankruptcy Court's website. The District is the most populous and diverse in the country, and has well over 30,000 chapter 13 filings annually.

[28] 11 U.S.C. §§ 341(a) & 343 (directing the U.S. Trustee to "convene and preside at a meeting of creditors" shortly after the commencement of a bankruptcy case, with the debtors appearing and being examined under oath); *see also* FED. R. BANKR. P. 2003.

[29] Declaration of Hatty Yip (Yip Decl.) (Bankr. C.D. Cal., Apr. 15, 2011) [appended to ECF No. 26 No. 2:11-bk-17831] ("I am the Trial Attorney assigned to [*In re Balas & Morales*]. . . . On March 28, 2011, I personally attended the Debtors' § 341(a) meeting of creditors in its entirety. Debtors appear to be two males. I stated on the record at the § 341(a) meeting that . . . the United States Trustee objects to plan confirmation on the grounds that the Debtors are not eligible to file a joint petition.").

B. The U.S. Trustee's Motion to Dismiss

On April 15, 2011, the U.S. Trustee filed a written objection and motion to dismiss. The sole basis of each was that Mr. Balas and Mr. Morales are both men, and therefore cannot be "spouses" under federal law. Section 302 of the Bankruptcy Code allows any "individual . . . and such individual's spouse" to file a joint petition, with no mention of gender.[30] Although the gender-neutral language of the Code has not been amended since it was enacted in 1978, DOMA's redefinition of the term "spouse" effectively amended the statute in 1996 to limit the availability of joint bankruptcy cases to only "an individual . . . and a person of the opposite sex who is a husband or a wife."[31] Thus, even though Mr. Balas and Mr. Morales qualified as joint debtors under the Bankruptcy Code as originally written, they were barred from jointly filing under DOMA, which amended every reference in every federal law to the terms "marriage" and "spouse" to mean only certain kinds of marriages and certain kinds of spouses.

In keeping with the Attorney General's stated position of no longer defending DOMA's constitutionality, the U.S. Trustee's confirmation objection and motion to dismiss *In re Balas & Morales* did not offer any defense of, or even discuss, the constitutionality of DOMA.[32] But in keeping with the Attorney General's stated position that the Executive Branch would nevertheless continue to enforce DOMA, the U.S. Trustee – an arm of the Justice Department[33] – asked the bankruptcy court to "sustain [an] Objection and deny confirmation of the Debtors' plan" (in the confirmation objection) and "dismiss [the] case" (in the motion to dismiss), solely on the ground that the "Debtors appear to be two males."[34]

---

30 11 U.S.C. § 302(a).

31 *See* 1 U.S.C. § 7 ("In determining the meaning of any Act of Congress, . . . the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

32 To the contrary, the motion to dismiss cited cases such as *In re* Jephunneh Lawrence & Assocs. Chartered, 63 B.R. 318 (Bankr. D.D.C. 1986), where the court dismissed a petition jointly filed by a corporation and its sole shareholder).

33 *See* 28 U.S.C. §§ 581(a) & 586(c) (providing for appointment of U.S. Trustees by the Attorney General, and specifying that U.S. Trustees thereafter perform their duties "under the general supervision of the Attorney General").

34 Yip Decl. at ¶ 2. Attempting to distinguish between enforcement and defense is particularly tenuous in the bankruptcy context, where the United States Trustee is tasked with duties that span both administration of federal law and advocacy in support of federal law. *Cf. In re* Gideon, Inc., 158 B.R. 528, 530 (Bankr. S.D. Fla. 1993) ("When the [U.S. Trustee] makes a motion or objection which comes on for hearing before the Court, the [U.S. Trustee] is simply another party litigant. However, the [U.S. Trustee] may also act as an administrative arm of bankruptcy according to

C. The Debtors' Opposition to the U.S. Trustee's Motion to Dismiss

The Debtors opposed the U.S. Trustee's confirmation objection and motion to dismiss on three grounds.[35]

1. Gender Discrimination

DOMA's gender-specific gloss on an otherwise gender-neutral Bankruptcy Code is classic sex discrimination. Mr. Balas and Mr. Morales qualified to be joint debtors under the plain language of the Bankruptcy Code as originally enacted. But under DOMA, the Debtors were barred from seeking joint relief solely because one of them was not "a person of the opposite sex"[36]—that is, one of the Debtors is the "wrong" gender. Such an automatic and arbitrary disadvantage based solely on gender has been recognized as unconstitutional at least since the Supreme Court's decision in *Reed v. Reed.*[37]

In *Reed*, estranged spouses Sally Reed and Cecil Reed each sought to be appointed administrator of the estate of their deceased child.[38] Although both parents were equally qualified to serve, the Idaho probate court appointed Cecil Reed on the sole basis that, under Idaho probate law, "'of several persons claiming

---

statutory enactment, such as appointing or removing trustees, requiring reports, scheduling meetings of creditors, etc. In these instances, the [U.S. Trustee] no longer acts as a party litigant but as an official authority whose action may be reviewed by another official authority, the Court.").

[35] Under current doctrine, all three grounds technically rest on the Fifth Amendment's due process clause (which binds the federal government) rather than the Fourteenth Amendment's equal protection clause (which applies by its terms only to the states). *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954). The Supreme Court has interpreted the Fifth Amendment's due process clause to include an equal protection component that mirrors the protections of the Fourteenth Amendment. *Id.*; Davis v. Passman, 442 U.S. 228, 234 (1979). This "reverse incorporation" (with the Fourteenth Amendment giving content to the earlier-adopted Fifth Amendment) seems less satisfactory as a matter of both doctrine and logic than simply grounding a citizen's right to equal protection vis-à-vis the federal government in the much-neglected citizenship clause of the Fourteenth Amendment. *See* U.S. CONST. amend. 14, § 1, cl. 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are *citizens of the United States* and of the state wherein they reside." (emphasis added)). The citizenship clause does not contemplate second-class citizenship, and equal status as a citizen of the United States carries with it the right of equal protection of federal laws. *See* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801 (2010).

[36] 1 U.S.C. § 7.

[37] Reed v. Reed, 404 U.S. 71 (1971).

[38] *Id.* at 71-72.

and equally entitled to administer, males must be preferred to females.'"[39] The Supreme Court unanimously struck down this law as a violation of the equal protection clause: "[T]he arbitrary preference established in favor of males by . . . the Idaho Code cannot stand in the face of the Fourteenth Amendment's command that no State deny the equal protection of the laws to any person within its jurisdiction."[40] The same principle applies when automatic and arbitrary sex-based discrimination is against men rather than women.[41]

Importantly, the Supreme Court has recognized that gender discrimination is just as invidious when applied against families as a whole (here, Mr. Balas and Mr. Morales as a married couple) as when applied against individuals. In *Califano v. Westcott*,[42] a federal program that provided benefits to "families whose dependent children have been deprived of parental support because of the unemployment of the father, but [not] when the mother becomes unemployed."[43] The government defended the law on the basis that its application to families (rather than individuals) necessarily meant that it did not amount to gender discrimination:

> The Secretary readily concedes that [the statute] entails a gender distinction. He submits, however, that the Act does not award AFDC benefits to a father where it denies them to a mother. Rather, the grant or denial of aid based on the father's unemployment necessarily affects, to an equal degree, one man, one woman, and one or more children. As the Secretary puts it, even if the statute is "gender-based," it is not "gender-biased."[44]

That argument – which is essentially the same as what has been offered in defense of DOMA – was squarely rejected by the Supreme Court:

---

39 *Id.* at 73 (quoting the Idaho statute).

40 *Id.* at 74.

41 Orr v. Orr, 440 U.S. 268, 278-79 (1979) (invalidating an Alabama law under which husbands, but not wives, could be required to pay alimony upon divorce: "In authorizing the imposition of alimony obligations on husbands, but not on wives, the Alabama statutory scheme provides that different treatment be accorded on the basis of sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause. The fact that the classification expressly discriminates against men, rather than women, does not protect it from scrutiny.").

42 Califano v. Westcott, 443 U.S. 76 (1979).

43 *Id.* at 78.

44 *Id.* at 83-84.

> We are not persuaded by this analysis. For mothers who are the primary providers for their families, and who are unemployed, [the law] is obviously gender biased, for it deprives them and their families of benefits solely on the basis of their sex. The Secretary's argument, at bottom, turns on the fact that the impact of the gender qualification is felt by family units rather than individuals. But this court has not hesitated to strike down gender classifications that result in benefits being granted or denied to family units on the basis of the sex of the qualifying parent. [Citations.] Here, as in those cases, the statute discriminates against one particular category of family – that in which the female spouse is a wage earner.[45]

In other words, the fact that DOMA's gender qualification is felt by the Debtors as a family unit (that is, as two married men) does not make DOMA any less subject to equal protection scrutiny. Like the statute in *Califano v. Westcott*, DOMA "discriminates against one particular category of family" (same-gender couples), and as applied to either Mr. Balas or Mr. Morales, the law "is obviously gender-biased [because] it deprives [that particular individual] of benefits solely on the basis of [his] sex."[46]

---

[45] *Id.* at 84.

[46] *Id.* Statutes that discriminate on the basis of gender rarely survive constitutional scrutiny, and are only likely to do so when rooted in a concrete biological difference between men and women that is particularly germane to an important governmental interest. One of the rare recent examples where such a statute has been upheld (albeit in a five-to-four decision, over a powerful dissent) is Nguyen v. INS, 533 U.S. 53 (2001). There, the Supreme Court rejected a constitutional challenge to an immigration statute that imposes more stringent proof requirements when a child claims citizenship through a father instead of a mother. The Court reasoned that "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood." *Id.* at 63. "In the case of the mother, the relation is verifiable from the birth itself. The mother's status is documented in most instances by the birth certificate or hospital records and the witnesses who attest to her having given birth. In the case of the father, the uncontestable fact is that he need not be present at the birth. If he is present, furthermore, that circumstance is not incontrovertible proof of fatherhood." *Id.* at 62. *But see id.* at 97 (O'Connor, J., dissenting) ("No one should mistake the majority's analysis for a careful application of this Court's equal protection jurisprudence concerning sex-based classifications. Today's decision instead represents a deviation from a line of cases in which we have vigilantly applied heightened scrutiny to such classifications to determine whether a constitutional violation has occurred. I trust that the depth and vitality of these precedents will ensure that today's error remains an aberration.").

2. Heightened Scrutiny

Next, the Debtors argued that DOMA's discrimination against gays and lesbians in refusing federal recognition of their marriages constitutes invidious discrimination against a "discrete and insular minorit[y],"[47] and must therefore be subject to a heightened level of scrutiny. "Heightened scrutiny" is a shorthand way of saying that some characteristics that differentiate people (such as race, gender, non-marital parentage, and the like) have a particularly checkered past in this country, and are so often inappropriate that their use should raise red flags.[48] Thus, when the government distinguishes between and among citizens on the basis of a characteristic subject to heightened scrutiny – by, for example, segregating prisoners by race,[49] presuming women to be dependent on their husbands but not *vice versa*,[50] or structuring inheritance laws to favor children born during marriage at the expense of those born out of wedlock[51] – courts engage in a searching examination of the purported basis of the distinction drawn and often (but not always[52]) find the distinction invalid.

The viability of this challenge to DOMA hinges on whether discrimination against gays and lesbians is subject to heightened scrutiny. The Executive Branch

---

[47] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[48] *E.g.*, Johnson v. California, 543 U.S. 499, 505-06 (2005) ("Racial classifications raise special fears that they are motivated by an invidious purpose. Thus, we have admonished time and again that, absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. We therefore apply strict scrutiny to all racial classifications to 'smoke out' illegitimate uses of race by assuring that government is pursuing a goal important enough to warrant use of a highly suspect tool.") (internal quotation marks and alterations omitted).

[49] *Id.* at 515 (applying strict scrutiny to race-based segregation of prisons). *Compare id., with* Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding state university's consideration of race as one factor when attempting to attain a diverse student body).

[50] Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion). *Compare id., with* Schlesinger v. Ballard, 419 U.S. 498 (1975) (upholding military regulation that favored female officers where Congress "quite rationally [might] have believed that women line officers had less opportunity for promotion than did their male counterparts, and that a longer period of tenure for women officers would, therefore, be consistent with the goal to provide women officers with fair and equitable career advancement programs") (internal quotation marks omitted).

[51] Trimble v. Gordon, 430 U.S. 762 (1977). *Compare id., with* Lalli v. Lalli, 439 U.S. 259, 268 (1978) (plurality opinion) (upholding law that required additional proof of paternity from non-marital children on account of the state interest in "just and orderly disposition of property at death").

[52] *E.g.*, *Grutter*, 539 U.S. 306, *Schlesinger*, 419 U.S. 498, and *Lalli*, 439 U.S. 259.

has concluded that such scrutiny should apply to classifications based on sexual orientation,[53] reasoning that each of the four factors traditionally examined when deciding whether heightened scrutiny applies to particular classifications (a history of discrimination, immutability, minority status politically, and the absence of a connection between the classification in question and legitimate policy objectives or ability to contribute to society) "counsels in favor of being suspicious of classifications based on sexual orientation."[54] The Debtors relied heavily on the Executive Branch's determination in this regard, given the relative dearth of case law squarely applying heightened scrutiny to classifications based on sexual orientation.[55] Notably, there is no real question that if heightened scrutiny applies, DOMA cannot pass muster – as even the statute's defenders concede.[56]

---

[53] Holder Letter, *supra* note 24, at 2 ("[T]he President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.").

[54] *Id.* (quoting and citing Bowen v. Gilliard, 483 U.S. 587, 602-03 (1987); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441-42 (1985)).

[55] *See also* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756-57 (2011) ("Litigants still argue that new classifications should receive heightened scrutiny. Yet these attempts have an increasingly antiquated air in federal constitutional litigation, as the last classification accorded heightened scrutiny by the Supreme Court was that based on nonmarital parentage in 1977. At least with respect to federal equal protection jurisprudence, this canon has closed.") (footnotes omitted). Although Professor Yoshino's analysis is insightful, there is a special, persuasive case for why discrimination based on sexual orientation is nonetheless a viable candidate for strict scrutiny: rarely, if ever, has a particular form of discrimination moved so rapidly from being common and accepted to being widely recognized as invidious. *Compare* Bowers v. Hardwick, 478 U.S. 186, 194 (1986) (describing claim by gays and lesbians to a right to privacy as "at best, facetious"), *with* Lawrence v. Texas, 539 U.S. 558, 579 (2003) (observing that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress"). As a result, discrimination on the basis of sexual orientation is perhaps the last prejudice that is widely recognized as improper, yet has not been squarely presented to the Supreme Court as a candidate for heightened scrutiny. (By contrast, age discrimination and disability discrimination have long ago been ruled to fall outside the purview of heightened scrutiny. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976) (per curiam) (age); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (disability)).

[56] Specifically, the private attorneys retained by the Speaker to defend DOMA's constitutionality (after the Executive Branch declined to do so) have briefed the constitutional issues in several pending cases, and have never argued that DOMA can withstand heightened scrutiny. Rather, their argument is that heightened scrutiny does not apply to classifications based on sexual orientation.

3. Rational Basis

Finally, the Debtors argued that even if DOMA is subject to only the least exacting form of judicial examination – so-called "rational basis" review – the statute nevertheless fails because limiting joint bankruptcy filings to opposite-sex couples only is not rationally related to any legitimate governmental interest, but is instead motivated solely by animus. This is ultimately the basis upon which Judge Tauro found DOMA unconstitutional in the *Gill* case,[57] and upon which two other federal judges have rested their conclusions, as well.[58]

The quintessential rational basis review case is likely *Dep't of Agric. v. Moreno*,[59] in which the court struck down a law that denied food stamps to households composed of unrelated people. Ordinarily laws that do not discriminate on the basis of a suspect classification are given only the lightest constitutional review, and will be upheld if they bear any rational relationship (however tenuous) to what the court can hypothesize as a legitimate governmental interest.[60] But in *Moreno*, the legislative history of the law in question revealed that the purpose of the provision was to deny relief to "hippie communes," apparently for the sole reason that Congress disliked "hippies."[61] In striking down the law under the usually lenient rational basis standard, the Supreme Court explained: "If the constitutional conception of 'equal protection of the laws'

---

57 *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d at 396-97.

58 *In re* Levenson, 560 F.3d 1145, 1151 (9th Cir. Jud. Council 2009); *In re* Levenson, 587 F.3d 925, 934 (9th Cir. Jud. Council 2009); Dragovich v. Dep't of the Treasury, 764 F. Supp. 2d 1178, 1190-91 (N.D. Cal. 2011). The two *Levenson* decisions were reached by Judge Reinhardt in his administrative capacity as a member of the Ninth Circuit Judicial Council. Chief Judge Kozinski reached similar conclusions in the same capacity, but ultimately framed his analysis as one of constitutional avoidance rather than a direct holding that DOMA is unconstitutional. *In re* Golinski, 587 F.3d 901 (9th Cir. Jud. Council 2009); *In re* Golinski, 587 F.3d 956 (9th Cir. Jud. Council 2009).

59 Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

60 Ferguson v. Skrupa, 372 U.S. 726, 732 (1963). *See generally* Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L.A. L. REV. 1143, 1151 (1992) (describing how the Supreme Court has regularly upheld "[e]ven irrational protectionist laws," such as those at issue in Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (barring optometrists from making eyeglasses – which served no purpose other than to increase business for opticians and ophthalmologists – on the dubious rationale that it might encourage people to have their vision checked more regularly), and New Orleans v. Dukes, 427 U.S. 297 (1976) (*per curiam*) (restricting pushcart food vending to those vendors who had operated for eight years, on the theory that it might "preserve the appearance and custom valued by the [French] Quarter's residents and attractive to tourists")).

61 *Moreno*, 413 U.S. at 534.

means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[62]

DOMA fails even the lowest level of constitutional scrutiny because it is supported by no rationale other than "a bare congressional desire to harm a politically unpopular group."[63] Most of the purported justifications for the law – encouraging "responsible procreation," "defending traditional heterosexual marriage," and "defending morality"– have no bearing on the question of how the federal government ought to treat same-sex couples who are *already* married (as opposed to the separate question of whether individual states should allow same-sex marriages). Such couples did not exist when DOMA was passed,[64] but tens of thousands of them exist today. Unless the theory is that DOMA will encourage these couples to divorce and thereafter enter into "traditional heterosexual marriages," it is difficult to see any justification beyond pure spite for treating them as second-class citizens.[65]

Finally, DOMA's cost justification is similarly lacking. The statute may save the government money, but no more so than arbitrarily denying federal recognition of marriages celebrated on the second Tuesday of any given month, or randomly denying recognition of the married status of every twentieth couple who files a joint tax return or every sixty-fourth pair who files a joint bankruptcy petition. Government money would conceivably be saved in each instance, but the method of achieving such savings would nonetheless be improper.[66]

---

[62] *Id.*

[63] *Id.*

[64] *See supra* note 15 and accompanying text.

[65] The "responsible procreation" argument is particularly puzzling. The concept is that "because opposite-sex couples are the only couples who can procreate children accidentally or irresponsibly," marital recognition should be offered as an "inducement" to "steer [them] into marriage." Perry v. Brown, ___ F.3d ___, 2012 WL 372713, at *38 (N.R. Smith, J., dissenting). This argument *might* make sense if there were only a limited number of marriage licenses and each one had to be rationed, with the state responsible for the weighty task of deciding which lucky couples should be permitted to marry. In the real world, however, the argument is "at best, facetious" (*Bowers*, 478 U.S. at 194).

[66] *Cf.* Colgate v. Harvey, 296 U.S. 404, 425-26 (1935) (hypothesizing the absurdity – and hence the unconstitutionality – of a statute that levied "a tax upon all income from loans except those made on Mondays"), *overruled on other grounds by* Madden v. Kentucky, 309 U.S. 83 (1940); Barsky v. Bd. of Regents, 347 U.S. 442, 470 (1954) (Frankfurter, J., dissenting) (governmental authority may never be premised "on arbitrary, whimsical or irrational considerations"; "A license cannot be revoked because a man is redheaded or because he was divorced, except for a calling, if

D. The House Bipartisan Legal Advisory Group's Refusal to Respond

No reply brief was filed in response to the Debtors' opposition to the U.S. Trustee's confirmation objection and motion to dismiss. At the scheduled May 17, 2011, hearing on the matter, however, the U.S. Trustee informed the court that the Bipartisan Legal Advisory Group (BLAG) of the U.S. House of Representatives had asked the U. S. Trustee via e-mail an hour before the hearing "to come here today to request a brief continuance, so that [BLAG] can determine whether to intervene in this case, in order [to present] its arguments on the constitutional issues the Debtors have raised."[67] Although this request did not comply with the bankruptcy court's local rules, which "call for a written motion to continu[e] filed at least three days before the hearing,"[68] the Debtors consented to a brief continuance to allow BLAG to appear and defend the statute, and the bankruptcy court entered an order granting BLAG until May 31, 2011, to respond (twice as long as requested).[69]

BLAG filed nothing: no merits brief, no motion for extension of time, and not even an explanation for why BLAG inconvenienced the bankruptcy court, the parties, and a courtroom full of observers with a nearly one-month delay for no apparent purpose. In a short reply brief (responding to BLAG's non-response), the Debtors pointed out that BLAG had intervened in every case challenging the constitutionality of DOMA in other contexts (including taxation, federal benefits, and immigration), but had failed to appear in a single bankruptcy case.[70]

---

such there be, for which redheadedness or an unbroken marriage may have some rational bearing.").

[67] Transcript of Hearing at 3:17-22, Balas & Morales, No. 2:11-bk-17831 (May 17, 2011).

[68] *Id.* at 4:3-5; *see* BANKR. C.D. CAL. R. 9013-1(m) (further providing that any motion for a continuance "must set forth in detail the reasons for the continuance . . . and be supported by the declaration of a competent witness attesting to the necessity for the continuance").

[69] *See* May 20, 2011 Order Continuing Hearing on the United States Trustee's Motion to Dismiss and Setting Deadline for Any Pleadings or Other Filings, Balas & Morales, ECF No. 43 ("Any agency or instrumentality of the United States Government that wishes to be heard on the merits of the Motion to Dismiss or the Opposition must file its merits brief on or before May 31, 2011.").

[70] Although it is speculation, the author's view is that BLAG was not familiar or comfortable with the unique procedural nature of bankruptcy cases, in which the Federal Rules of Civil Procedure (including, in particular, Rule 24 on intervention) do not apply. *Cf. In re* Deist Forest Prods., Inc., 850 F.2d 340, 341 (7th Cir. 1988) (describing bankruptcy's peculiar setting, in which "clouds of persons indirectly affected by the acts and entitlements of others may buzz about, delaying final resolution of cases").

E. The Court's Ruling

The continued hearing on the U.S. Trustee's confirmation objection and motion to dismiss was set for June 13, 2011. After hearing argument in a packed courtroom in downtown Los Angeles, Judge Thomas B. Donovan announced that he had reached a decision:

> I have to sit back and think for a moment because this is a busy place. The calendars have been lengthy from the time I heard about this case and learned that it was assigned to me and that I would be seeing you one day in court. I've read the briefs and all the submissions, especially of the debtors. The debtors' declarations are long and heartfelt and thorough in their discussion of the debtors' travails, like many people in this court face travail, and of the debtors' relationships with one another and what that means to them. . . .
>
> [The government's position] is far more succinct. It simply stands on the language of Section 3 of DOMA and says, sorry, the law does not allow two people of the same sex to have the privileges of married people under federal law . . . that people married who are opposite-sex marital partners have. That's the issue presented here today . . . .
>
> I come to the conclusion under the law that same-sex married people should not be treated differently from opposite-sex married people. Under the law, DOMA is simply wrong, and it is in violation of the Equal Protection Provision as recognized under the Fifth Amendment to the United States constitution.[71]

After concluding with Justice Douglas's famous closing words in his opinion for the court in *Griswold v. Conn.*,[72] Judge Donovan announced that he

---

[71] Transcript of Hearing at 22:1-23:9, Balas & Morales (June 13, 2011).

[72] Griswold v. Conn., 381 U.S. 479, 486 (1965) ("We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.").

was issuing an opinion joined by 19 other judges – that is, 20 of the 24 bankruptcy judges in the Central District of California – finding DOMA unconstitutional.[73] Judge Donovan then "wish[ed] Mr. Balas and Mr. Morales a happy and successful life together and a successful Chapter 13 reorganization."[74]

The court's written opinion carefully considers the Debtors' three arguments against DOMA's constitutionality and agrees with each one: (i) the statute constitutes unlawful gender discrimination[75]; (ii) heightened scrutiny is applicable to discrimination against gays and lesbians, and the statute cannot withstand such scrutiny[76]; and (iii) DOMA fails under even the lowest level of inquiry (rational basis review).[77] The court's guiding rationale is perhaps best summarized in the following two excerpts, which bookend the opinion:

> [T]he only issue in this Bankruptcy Case is whether some legally married couples are entitled to fewer rights than other legally married couples, based solely on a factor (the gender and/or sexual orientation of the parties in the union)

---

[73] Stated differently, the ruling was effectively issued by the Bankruptcy Court *en banc*. Such sittings by the full bench of a trial court are exceedingly rare, but one example is the district court's decision in the landmark case establishing the work product doctrine, Hickman v. Taylor, 329 U.S. 495 (1947). *See* Hickman v. Taylor, 4 F.R.D. 479 (E.D. Pa. 1945) (en banc), *rev'd*, 153 F.2d 212 (en banc), *aff'd*, 329 U.S. 495 (1947).

[74] Transcript of Hearing at 24:23-25:1, Balas & Morales (June 13, 2011).

[75] *In re* Balas & Morales, 449 B.R. 567, 577-78 (Bankr. C.D. Cal. 2011) ("[T]his court concludes that DOMA is gender-biased because it is explicitly designed to deprive the Debtors of the benefits of . . . federal law solely on the basis that these debtors are two people married to each other who happen to be men. [N]othing about the Debtors' gender affects their fitness for bankruptcy protection available to opposite-sex marital partners. Spouses should be treated equally, whether of the opposite-sex variety or the same-sex variety, under heightened scrutiny and the principles announced by the Supreme Court and other lower court rulings discussed above.").

[76] *Id.* at 574 (explicitly adopting the Attorney General's analysis of why discrimination based on sexual orientation is subject to heightened scrutiny, and concluding that "[t]he legislative record underlying DOMA is filled with precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against" (internal quotation marks omitted)).

[77] *Id.* at 579 ("Although individual members of Congress have every right to express their views and the views of their constituents with respect to their religious beliefs and principles and their personal standards of who may marry whom, this court cannot conclude that Congress is entitled to solemnize such views in the laws of this nation in disregard of the views, legal status and living arrangements of a significant segment of our citizenry that includes the Debtors in this case. . . . This court cannot conclude from the evidence or the record in this case that any valid governmental interest is advanced by DOMA as applied to the Debtors.").

> that finds no support in the Bankruptcy Code or Rules and should be a constitutional irrelevancy. In this court's judgment, no legally married couple should be entitled to fewer bankruptcy rights than any other legally married couple.
>
> * * *
>
> In the court's final analysis, the government's only basis for supporting DOMA comes down to an apparent belief that the moral views of the majority may properly be enacted as the law of the land in regard to state-sanctioned same-sex marriage in disregard of the personal status and living conditions of a significant segment of our pluralistic society. Such a view is not consistent with the evidence or the law as embodied in the Fifth Amendment with respect to the thoughts expressed in this decision. The court has no doubt about its conclusion: the Debtors have made their case persuasively that DOMA deprives them of the equal protection of the law to which they are entitled. The court is of the opinion that the Debtors have met their high burden of overcoming the presumption of the constitutionality of DOMA.[78]

F. The Government's Appeal

The U.S. Trustee appealed the bankruptcy court's ruling for the express purpose of allowing BLAG yet another opportunity to intervene and be heard on the constitutionality of DOMA. The U.S. Trustee elected to have the appeal sent to the district court (rather than the Bankruptcy Appellate Panel), as was its right. In response, however, the debtors asked the bankruptcy court to certify the appeal directly to the Ninth Circuit under section 158(d)(2) of the Judicial Code, which provides a discretionary mechanism by which an appeal from the bankruptcy court may bypass either the district court or the Bankruptcy Appellate Panel.[79] The debtors pointed out that only the Ninth Circuit could issue a decision that would bind courts throughout the Circuit,[80] and such a binding decision was

---

[78] *Id.* at 569, 579 (internal quotations and record citation omitted).

[79] 28 U.S.C. § 158(d)(2). *See also* FED. R. BANKR. P. 8001(f).

[80] *See* Life Ins. Co. v. Barakat (*In re* Barakat), 173 B.R. 672 (Bankr. C.D. Cal. 1994) (an "appellate ruling by a district judge is only binding on [the parties in] the case in which it is made

imperative because the U.S. Trustee was continuing to file motions to dismiss each and every joint bankruptcy case filed by married same-sex couples in the District.[81]

Before the bankruptcy court ruled on the debtors' certification request, however, BLAG informed the U.S. Trustee that it did not intend to intervene to defend DOMA's constitutionality on appeal. News reports revealed the stated reason for BLAG's reticence:

> A spokesman for [Speaker of the House John] Boehner, Brendan Buck, said the ruling would not be appealed.
>
> "Bankruptcy cases are unlikely to provide the path to the Supreme Court, where we imagine the question of constitutionality will ultimately be decided," Mr. Buck said. "Obviously, we believe the statute is constitutional in all its applications, including bankruptcy, but effectively defending it does not require the House to intervene in every case, especially when doing so would be prohibitively expensive."[82]

The debtors declined to stipulate to the dismissal of the U.S. Trustee's appeal. Absent indication of a larger shift in policy by which no further challenges would be brought under DOMA to joint bankruptcy cases filed by legally married same-sex couples, the Debtors intended to oppose the U.S. Trustee's motion to dismiss its appeal on the ground that definitive appellate guidance was necessary regardless of what position BLAG may or may not take.

The issue was mooted, however, when the Department of Justice announced a nationwide change in policy:

---

and not on the district as a whole," including "other district judges of that district [or] the bankruptcy judges of that district").

[81] In fact, the certification request included declarations from five chapter 7 panel trustees, reporting that all panel trustees had been instructed to identify any such cases and refer them to the U.S. Trustee. Also included were declarations from two practitioners (one in the Central District, one in the Northern District), who testified to the significant uncertainty facing debtors' counsel who were attempting to advise same-sex married couples.

[82] John Schwartz, *A California Bankruptcy Court Rejects U.S. Law Barring Same-Sex Marriage*, N.Y. TIMES (June 15, 2011) at A18. *But see* KENNETH N. KLEE, BANKRUPTCY AND THE SUPREME COURT (LexisNexis 2009) (examining hundreds of bankruptcy decisions issued by the U.S. Supreme Court from 1898 to 2008).

> Following consultation with the House Bipartisan Legal Advisory Group (BLAG), the U.S. Trustee asked to withdraw its appeal in its challenge to the attempted joint bankruptcy petition filed by Gene Douglas Balas and Carlos Morales, a married gay couple who live in California – a move a Department of Justice spokeswoman says represents the DOJ's new policy on all such bankruptcy filings.
>
> DOJ spokeswoman Tracy Schmaler wrote to Metro Weekly that the July 6 filing in the Balas and Morales case represents a new policy, writing, "The Department of Justice has informed bankruptcy courts that it will no longer seek dismissal of bankruptcy petitions filed jointly by same-sex debtors who are married under state law."
>
> * * *
>
> About the department-wide policy, Schmaler wrote to Metro Weekly that the decision was made after consulting with the BLAG [and] went on to note, "This decision is consistent with and follows the Administration's notification to Congress in February of this year that it would no longer defend the constitutionality of Section 3 of DOMA as applied to legally married same-sex couples but would seek to provide Congress an opportunity to enter litigation to argue in favor of DOMA's constitutionality. This decision to stop filing motions to dismiss bankruptcy petitions avoids generating costly and time-consuming constitutional litigation that neither the BLAG nor the Department plans to defend."[83]

In light of this nationwide change in policy, the Debtors informed the bankruptcy court that they had no objection to the dismissal of the U.S. Trustee's appeal. An order was entered shortly thereafter, and the constitutional phase of in *In re Balas & Morales* drew to a close. The bankruptcy case itself continues, with

[83] Chris Geidner, *U.S. Trustee Withdraws Appeal of Gay Couple's Bankruptcy Court DOMA Victory*, METRO WEEKLY (July 7, 2011). The Justice Department's change in policy was further confirmed by filings made in several other joint bankruptcy cases filed by same-sex couples, in which the government sought to withdraw previously filed motions to dismiss.

Mr. Balas and Mr. Morales jointly repaying their creditors pursuant to a joint plan of reorganization confirmed in their joint bankruptcy case.

III. Conclusion

In re Balas & Morales is an important decision on many levels. Most immediately for the debtors, the bankruptcy court's denial of the U.S. Trustee's motion to dismiss allowed a married couple to avail themselves of a remedy Congress provided for situations like theirs. Mr. Balas and Mr. Morales are the quintessential "honest but unfortunate debtor[s]" who needed an opportunity to "reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'"[84] They now have that opportunity, just like every other married couple.

More broadly, In re Balas & Morales prompted a nationwide change in policy at the Department of Justice that will ultimately benefit untold numbers of families in financial distress: No longer will the government seek dismissal of joint bankruptcy petitions filed by same-sex married couples anywhere in the country. This is more than the Debtors could have achieved even with a win at the Ninth Circuit, and the policy change will only become more significant as additional states allow same-sex couples to wed.

Finally, the bankruptcy context in which *In re Balas & Morales* arose lays bare the inequity and utter purposelessness of DOMA. Even more so than areas of law like taxation and immigration, "[b]ankruptcy is an intensely practical affair" that works best when clear, settled rules "animate and guide the law within the statutory framework set by the Bankruptcy Code."[85] In such a context, any "governmental [decision to treat] differently persons who are in all relevant respects alike" is quickly exposed.[86] Why should a same-sex couple's creditors be treated any differently than creditors who lent to an opposite-sex couple? Why should government employees be asked to police bankruptcy filings to look for a characteristic (two men's names, two women's names) that is utterly irrelevant to entitlement to bankruptcy relief? Why should families that are already in dire financial straits be forced to fight a culture war just to take advantage of relief

---

84 Grogan v. Garner, 498 U.S. 279, 286-87 (1991) (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934)).

85 *In re* Cooper Commons LLC, 512 F.3d 533, 534 (9th Cir. 2008).

86 Nordlinger v. Hahn, 505 U.S. 1, 10 (1992) (citing F.S. Royster Guano Co. v. Commonwealth of Va., 253 U.S. 412, 415 (1920) ("all persons similarly circumstanced shall be treated alike")).

available to everyone else? At bottom, DOMA's defiance of "the principle that government and each of its parts remain open on impartial terms to all who seek its assistance"[87] is abundantly clear in the dollars-and-cents context of consumer bankruptcy.

[87] Romer v. Evans, 517 U.S. 620, 633 (1996).

This page intentionally left blank.