

## Same-Sex Married Debtors May File a Joint Petition for Bankruptcy

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### Introduction

Legally married couples may file a petition for bankruptcy jointly under section 302(a)<sup>1</sup> of the Bankruptcy Code (“the Code”). The choice to file jointly is limited to only include married spouses, excluding partners and people in civil unions. Across virtually all jurisdictions, courts have explicitly rejected joint filings under section 302(a) filed by unmarried debtors. For example, an adult child cannot file for bankruptcy jointly with a parent,<sup>2</sup> nor can a cohabiting unmarried couple file together.<sup>3</sup> While the Bankruptcy Code does not purport to define who may qualify as a married couple, the Defense of Marriage Act (“DOMA”) does, defining “spouse” as a person of the opposite sex who is a husband or a wife.<sup>4</sup> The individual states ultimately decide who is a spouse for purposes of state law; “[t]he determination of who may marry in the United States is uniquely a function of state law.”<sup>5</sup> However, DOMA is federal law, as is bankruptcy under the Code, and so DOMA’s definition of spouse applies in federal bankruptcy proceedings.

<sup>1</sup> 11 U.S.C. § 302(a) (2006).

<sup>2</sup> See *In re Jackson*, 28 B.R. 559 (Bankr. E.D. Pa. 1983).

<sup>3</sup> See *In re Malone*, 50 B.R. 2 (Bankr. E.D. Mich. 1985).

<sup>4</sup> 1 U.S.C. § 7.

<sup>5</sup> Aff. of Gary D. Buseck, H.R.Rep. No. 104–664 at 3 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906–07.

At issue is whether a same-sex couple, legally married under state law, may file a joint petition for bankruptcy despite DOMA.

In *In re Balas & Morales*,<sup>6</sup> the United States Bankruptcy Court for the Central District of California allowed a same-sex married couple to file a joint petition. In doing so, the court also held that DOMA's definition of "spouse" is unconstitutional as applied to same-sex married debtors under equal protection of the Fifth Amendment.<sup>7</sup> The court found there was no legitimate government purpose in upholding DOMA and rejected the United States Trustee's ("Trustee") motion to dismiss "for cause" pursuant to section 1307(c)<sup>8</sup> of the Code.<sup>9</sup> The court deemed sexual orientation a suspect class and used heightened scrutiny to strike down DOMA in this case, while also asserting that DOMA could not even pass rational basis review.<sup>10</sup> The debtors were allowed to continue their joint petition under chapter 13, as there was no other cause to dismiss asserted.

Part I of this memorandum will consider previous cases that dismissed same-sex debtors filing jointly (even when they were legally married under state law) and the benefits of filing jointly. Parts II and III discuss case law that establishes two ways for married same-sex debtors to file jointly for bankruptcy. Part II analyzes the Bankruptcy Court of the Central District of California's ruling in *In re Balas & Morales* and the first approach to allowing same-sex married debtors to file jointly, despite DOMA. Part III will discuss and compare the California ruling with the similar, recent New York case, *In re Somers*,<sup>11</sup> and consider the second approach for courts to allow same-sex debtors to file. In *In re Somers*, same-sex married debtors jointly filed

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<sup>6</sup> 449 B.R. 567 (Bankr. C.D. Cal. 2011).

<sup>7</sup> *Id.* at 571.

<sup>8</sup> 11 U.S.C § 1307.

<sup>9</sup> *In re Balas & Morales*, 449 B.R. at 571.

<sup>10</sup> *Id.* at 579.

<sup>11</sup> 448 B.R. 677 (Bankr. S.D.N.Y. 2011).

for chapter 7 protection, and the Southern District of New York rejected the Trustee’s motion to dismiss “for cause” based on DOMA.<sup>12</sup> Part IV analyzes the implications of *In re Balas & Morales* and DOMA and considers the effect of the executive branch’s determination to no longer defend cases based on DOMA’s definition of “spouse.” This memorandum concludes that these recent cases may leave some uncertainty regarding how same-sex married debtors will fare filing jointly in jurisdictions that uphold DOMA, but more importantly, that the door should now be open for all legally married debtors to file bankruptcy petitions jointly regardless of sexual orientation. Debtors can seek to avoid the consequences of DOMA by using one of the two methods from these cases. First, debtors may challenge the constitutionality of DOMA. Second, they may argue that being a same-sex couple is not a proper cause to dismiss under the Code’s dismissal sections.

## **I. Background: Pre-*In re Balas & Morales***

### **A. The Benefits of Allowing Joint Filings**

The implications are great for same-sex debtors in jurisdictions that have rejected DOMA and allow same-sex marriage. Filing jointly under section 302 can be beneficial for both debtors and creditors when compared to two debtors filing separately with joint debts. Section 302(a) was enacted to aid in the administration of a bankruptcy estate and to allow the payment of only one filing fee for two debtors. While debtors may be considered one in marriage, they are considered to have two separate estates even in a joint bankruptcy filing. However, married debtors are often jointly liable for their debts and jointly own property, expanding the pool of assets for creditors.<sup>13</sup>

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<sup>12</sup> *Id.* at 682.

<sup>13</sup> *Matter of Stuart*, 31 B.R. 18 (Bankr. D. Conn. 1983).

Besides the obvious benefits of allowing more married debtors to file jointly, the idea that section 302(a) eases a judge's administration over an estate is apparent in looking at the dismissal statutes of the Code: sections 1307<sup>14</sup> and 707.<sup>15</sup> Both sections enumerate certain causes for dismissal of a case, but it is clear from the language of the statutes that there is great discretion left with the bankruptcy judge to decide proper "cause" to dismiss. Furthermore, an "overwhelming majority" of courts have held that the party moving to dismiss or convert a case carries the burden of showing why a case should be dismissed "for cause."<sup>16</sup> According to *In re Balas & Morales*, that burden will now be significantly harder to carry, as DOMA alone is no longer a legitimate reason to dismiss a joint petition by same-sex married couples.

B. *In re Kandu* and the Holder Letter

Before *In re Balas & Morales* and *In re Somers*, there was *In re Kandu*,<sup>17</sup> a 2004 Washington case that upheld DOMA as applied to an American lesbian couple legally married in Canada. The court asserted that DOMA only recognizes marriages between a man and woman, and does not give deference to same-sex marriages simply because they are recognized in other nations. There, the debtors could not legally marry in their home state, and so their joint chapter 7 petition was dismissed, and DOMA was held constitutional under a rational basis review.<sup>18</sup> The court in *In re Kandu* analyzed DOMA under the Fourth, Fifth, and Tenth Amendments. Neither equal protection nor due process arguments were deemed valid.<sup>19</sup> The Tenth Amendment issue (that domestic relations are left to the states) was dismissed based on the fact

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<sup>14</sup> 11 U.S.C. § 1307 (2006) (concerning conversion or dismissal of case).

<sup>15</sup> 11 U.S.C. § 707 (regarding dismissal of a case or conversion to a case under chapter 11 or 13).

<sup>16</sup> *In re Wertz*, 410 B.R. 677, 690 (Bankr. D. Kan. 2009).

<sup>17</sup> 315 B.R. 123 (Bankr. W.D. Wash. 2004).

<sup>18</sup> *Id.* at 133.

<sup>19</sup> *Id.* at 148.

that the definition of marriage in DOMA is applicable to federal law, and that the states individually can still define marriage.<sup>20</sup> Regarding the Fourth Amendment, the court found that it was not a “taking” to deprive certain types of couples from legally marrying.<sup>21</sup> The court found no Fifth Amendment due process violation, as the right to marry a same-sex partner was not considered a “fundamental right.”<sup>22</sup> Lastly, there was no equal protection issue under the Fourteenth Amendment, as the court held that sexual orientation was not a suspect class for heightened scrutiny purposes.<sup>23</sup> The court applied rational basis and upheld DOMA based on the government’s “legitimate” purposes in defining marriage as between a man and woman.

The *In re Kandu* analysis of DOMA in regard to same-sex married couples shifted when Attorney General Eric Holder announced in a February 23, 2011 letter (the “Holder Letter”) that the Department of Justice would no longer defend cases based on DOMA’s definition of “spouse.”<sup>24</sup> The Holder Letter concluded with President Obama’s determination that “section 3 of DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law.”<sup>25</sup> The letter addressed the executive branch’s previous policy of defending Section 3 of DOMA, defining “spouse,” and the administration’s decision to no longer do so.<sup>26</sup> Not only did the Holder Letter declare that the President and Mr. Holder believe that DOMA is unconstitutional, but also that heightened scrutiny must be applied to cases involving

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<sup>20</sup> *Id.* at 132.

<sup>21</sup> *Id.* at 135.

<sup>22</sup> *Id.* at 139.

<sup>23</sup> *Id.* at 143.

<sup>24</sup> Letter from Eric H. Holder, Jr., Attorney Gen., to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011) *available at* [http://metroweekly.com/poliglot/LETTER\\_BOEHNER.pdf](http://metroweekly.com/poliglot/LETTER_BOEHNER.pdf) (last visited April 3, 2012) [hereinafter Holder Letter].

<sup>25</sup> *Id.* at 5–6.

<sup>26</sup> Holder Letter at 1.

sexual orientation as a class.<sup>27</sup> The Holder Letter ultimately declares that the Department of Justice will now take an affirmative stance in upholding this level of scrutiny.

Introducing the constitutional scrutiny that the court later adopted in *In re Balas & Morales*, the Holder Letter reached the conclusion that section 3 of DOMA as applied to all same-sex legally married couples is unconstitutional.<sup>28</sup> Again, while Congress can still intervene on its own behalf, as Speaker of the House Boehner has initiated through the House Bipartisan Legal Advisory Group (“BLAG”) in several instances and inevitably will again, this still signals a change that the current administration will demand courts apply heightened scrutiny to these cases.

## **II. *In re Balas & Morales***

In *In re Balas & Morales*, the United States Bankruptcy Court for the Central District of California held that a legally married same-sex couple could jointly petition for bankruptcy.<sup>29</sup> The debtors, Gene Balas and Carlos Morales, are a same-sex couple legally married in California who jointly filed for bankruptcy under chapter 13.<sup>30</sup> The Trustee moved to dismiss the case, alleging that section 1307(c) of the Code prohibits two males (or females) from jointly filing for bankruptcy<sup>31</sup> because DOMA defines “spouse” as a person of the opposite sex who is a husband or a wife,<sup>32</sup> and so the Trustee alleged that the debtors’ case should be dismissed “for cause” pursuant to section 1307(c) of the Code.<sup>33</sup> The court concluded that DOMA was unconstitutional as applied to a legally married same-sex couple under equal protection of the

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<sup>27</sup> *Id.* at 2.

<sup>28</sup> *Id.* at 5.

<sup>29</sup> *In re Balas & Morales*, 449 B.R. at 579.

<sup>30</sup> *Id.* at 570.

<sup>31</sup> *Id.* at 569.

<sup>32</sup> 1 U.S.C. § 7 (2006).

<sup>33</sup> *In re Balas & Morales*, 449 B.R. at 571.

Fifth Amendment, no legitimate government interest was served in applying the statute, and none of the eleven grounds for dismissal listed in section 1307 were implicated.<sup>34</sup>

The *Balas & Morales* court performed a constitutional analysis of DOMA in reaching its conclusion. The main issues involved whether sexual orientation is considered a “suspect class” and whether heightened scrutiny should apply to this class of persons. The *Balas & Morales* court repeatedly cited to the Holder Letter.<sup>35</sup> The Holder Letter listed four factors to consider in determining whether a class of people have faced discrimination deserving of heightened scrutiny: (1) whether the class has faced a history of discrimination; (2) whether individuals in the class have distinguishing characteristics defining the group; (3) whether the group is a minority or politically powerless; and (4) whether the distinguishing characteristics relate to either an individual in the group’s ability to perform in society, or legitimate government objectives.<sup>36</sup> Here, the court held that (1) there is a history of discrimination against lesbians and gays; (2) sexual orientation is a “defining” characteristic; (3) lesbians and gays face political obstacles; and (4) sexual orientation is irrelevant to an individual’s ability to perform in society.<sup>37</sup> While this conclusion triggered a heightened scrutiny review of DOMA, the court noted that the law would not even be able to withstand rational basis review; “DOMA violates the equal protection rights of the Debtors as recognized under the due process clause of the Fifth Amendment.”<sup>38</sup>

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<sup>34</sup> *Id.*

<sup>35</sup> See generally *In re Balas & Morales*, 449 B.R. 567 (quoting and adopting the Holder Letter throughout entire opinion).

<sup>36</sup> Holder Letter at 2.

<sup>37</sup> *In re Balas & Morales*, 449 B.R. at 576–77.

<sup>38</sup> *Id.* at 579.

The *Balas & Morales* court held that “cause” to dismiss was not present under section 1307(c), especially where none of the debtors’ creditors sought the case’s dismissal.<sup>39</sup> The Trustee’s sole reliance on DOMA was insufficient to dismiss the debtors’ case.<sup>40</sup> This Central California holding, if nothing else, clarifies this controversial point of law at least for debtors in that jurisdiction, and potentially other Ninth Circuit districts as well. It is also likely that this signals a change in jurisdictions that are already embracing the rejection of DOMA. This case should mark an inflow of same-sex debtors filing jointly, especially in jurisdictions like New York, that have recently approved same-sex marriages on the state level, regardless of the federal DOMA.<sup>41</sup>

### **III. *In re Somers*: the Southern District of New York’s Holding**

In *In re Balas & Morales*, the court cited with approval *In re Somers*, a similar case from the Southern District of New York. The district court held (and the court in *In re Balas & Morales* quoted) that, “[t]he mere existence of DOMA is not sufficient to remove the duty imposed . . . by section 707(a) to find ‘cause’ prior to dismissing the case.”<sup>42</sup> *In re Somers* involved a same-sex female couple married in Vermont who filed for chapter 7 protection jointly in New York.<sup>43</sup> The Trustee indicated to the debtors that it would bring a motion to dismiss the case unless the debtors severed their case and filed separately.<sup>44</sup> The debtors filed to sever their case, but withdrew a few weeks later, claiming the Holder Letter and the Justice Department’s

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<sup>39</sup> *Id.* at 572.

<sup>40</sup> *Id.*

<sup>41</sup> *See generally* N.Y. Dom. Rel. Law § 10-a (McKinney 2011) (declaring marriage that is otherwise valid shall be valid regardless of whether parties are of same sex).

<sup>42</sup> *In re Somers*, 448 B.R. at 682.

<sup>43</sup> *Id.* at 679.

<sup>44</sup> *Id.*

determination to cease defending DOMA allowed them to file jointly as a married couple.<sup>45</sup> The Trustee consequently filed a motion to dismiss pursuant to section 707(a)<sup>46</sup> of the Bankruptcy Code, claiming DOMA was adequate ground for dismissal.<sup>47</sup>

The court distinguished the two cases the Trustee offered in support of its motion, neither of which involved legally married debtors.<sup>48</sup> *In re Jephunneh Lawrence & Associates Chartered*<sup>49</sup> allowed the dismissal of a case based on the fact that the “debtors” filing jointly were a corporation and its sole shareholder.<sup>50</sup> The second proffered case, *In re Malone*,<sup>51</sup> involved a heterosexual couple that had never been legally married and attempted to file jointly.<sup>52</sup> In distinguishing both of these cases on the ground that neither case involved married debtors, the court turned to the Trustee’s sole reliance on DOMA for cause of dismissal.<sup>53</sup>

The *Somers* court did not perform a constitutional analysis of DOMA, unlike the *Balas & Morales* court. Instead, the court focused on the analysis of the motion to dismiss under section 707(a).<sup>54</sup> None of the three listed causes for dismissal were implicated, so the court turned to the “for cause” language of the statute. The district court used the Second Circuit’s approach, which involves a case-by-case analysis of a motion to dismiss to determine whether dismissing the case is in the best interest of all parties involved.<sup>55</sup> Here, the debtors would be disadvantaged if their

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<sup>45</sup> *Id.*

<sup>46</sup> 11 U.S.C. § 707(a) (2006). This section is similar in function to section 1307, but only lists three reasons to dismiss a case, while the list is also nonexclusive. The language of the statute is discretionary in that a court “may” dismiss a case “only for cause.” *Id.*

<sup>47</sup> *In re Somers*, 448 B.R. at 680.

<sup>48</sup> The court in *In re Balas* also distinguished these cases summarily.

<sup>49</sup> 63 B.R. 318 (Bankr. D. Colo. 1986).

<sup>50</sup> *Id.* at 319.

<sup>51</sup> 50 B.R. 2 (Bankr. E.D. Mich. 1985).

<sup>52</sup> *Id.* at 3.

<sup>53</sup> *In re Somers*, 448 B.R. at 681.

<sup>54</sup> *Id.* at 683.

<sup>55</sup> *In re Dinova*, 212 B.R. 437, 442 (2d Cir. B.A.P. 1997).

case was dismissed or severed; they would incur more costs and also create expenses for their creditors.<sup>56</sup> Furthermore, much of their debt was jointly held, and their joint filing created a bigger pool of assets for their creditors.<sup>57</sup> Based on this reasoning, the court denied the Trustee's motion to dismiss and allowed the debtors to continue their joint petition for bankruptcy.<sup>58</sup>

#### **IV. Implications of the *In re Balas & Morales* Decision**

Twenty out of the twenty-four judges in the Central District of California signed on to the opinion, signaling that the effects of this case are likely to reach beyond Balas and Morales.<sup>59</sup> Considering the Department of Justice and the Executive Branch's decision to no longer defend cases based on DOMA's definition of spouse, the door is seemingly now open, particularly in California, for legally married same-sex debtors to file joint petitions under section 302(a). On the other hand, Congress may decide to defend these cases on its own behalf<sup>60</sup> through channels such as the BLAG and enforce DOMA.<sup>61</sup> However, according to Brendan Buck, a spokesperson for the Speaker of the House, Representative John Boehner, *In re Balas & Morales* would not be appealed, and litigation and appeals of similar cases will be too expensive to pursue.<sup>62</sup>

Now, debtors have two clear paths to filing joint petitions: (1) challenge the DOMA successfully in court, or (2) disregard DOMA and challenge the Trustee's motion to dismiss the case, as same-sex marriage is not a legitimate cause for dismissal. The first approach, as seen in

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<sup>56</sup> *In re Somers*, 448 B.R. at 683.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 684.

<sup>59</sup> John Schwartz, *A California Bankruptcy Court Rejects U.S. Law Barring Same-Sex Marriage*, N.Y. TIMES, June 14, 2011, <http://www.nytimes.com/2011/06/15/us/politics/15bankruptcy.html> (last visited April 3, 2012).

<sup>60</sup> *See I.N.S. v. Chadha*, 462 U.S. 919, 940 (1983) (holding "that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.").

<sup>61</sup> Schwartz, *supra* note 59.

<sup>62</sup> *Id.*

*In re Balas & Morales*, seemingly depends greatly on the constitutional stance the federal judge takes on DOMA. In a state, such as New York or California that recognizes same-sex marriages under state law, debtors may be more likely to succeed in a bankruptcy court applying federal law. The second approach for joint filing depends less on the constitutional validity of DOMA and more on the substance of the debtors' claim and the Trustee's motion to dismiss. Again, bankruptcy judges sitting in jurisdictions that recognize same-sex marriages are also more likely to disregard a same-sex marriage as a reason to dismiss "for cause" under the dismissal provisions of the Code.

### **Conclusion**

The *Balas & Morales* court brought national attention to DOMA through bankruptcy, a field of law not often associated with fundamental civil rights, nor with U.S. Supreme Court review generally. While the House of Representatives may not appeal this particular line of bankruptcy cases to determine DOMA's future, this is certainly a push toward Supreme Court review of DOMA. More married couples will be able to file jointly under this precedent, creating obvious benefits for the debtors and for creditors and bankruptcy judges as well. While the future of DOMA is still unknown, the states have a great deal of traditional control over regulating marriage, and so the amount of debtors this change will affect will also reflect how many states move to allow same-sex marriage, or to recognize same-sex marriages performed out of state. The Department of Justice's decision to no longer defend DOMA in these cases and to uphold heightened scrutiny will ultimately allow same-sex debtors to file jointly, at least while President Obama and Mr. Holder dictate this policy and no other groups intervene successfully.