FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CONCURRING STATEMENT OF CHAIR ELLEN L. WEINTRAUB
IN ADVISORY OPINION 2013-02

Today the Commission provided a response to the Advisory Opinion Request filed by Dan Winslow, a candidate for the United States Senate in Massachusetts. Mr. Winslow asked whether his campaign could apply 11 C.F.R. § 110.1(i) to contributions from lawfully married same-sex couples. Unfortunately, Section 3 of the so-called Defense of Marriage Act ("DOMA") denies same-sex married couples this protection (and many others).[1] Because Mr. Winslow expressly limited his request to this narrow issue, I very reluctantly voted to answer his question in the negative. Regardless of my personal views of DOMA, I must adhere to the law until it is repealed by Congress or invalidated by the Supreme Court.[2] I write separately to emphasize that my vote today was in no way intended to endorse the discriminatory, irrational burden that DOMA places on political participation by individuals in same sex marriages.

Section 110.1(i) provides extra protection to spouses who do not work outside the home. It makes clear that federal contribution limits "shall apply separately to contributions made by each spouse even if only one spouse has income." In millions of American families, one person contributes all or most of the family's financial resources. Often these families have decided that one spouse or partner will be a full-time homemaker – or they have had that choice made for them in these difficult economic times. Section 110.1(i) ensures that spouses who are not their families' primary breadwinners nevertheless have an equal right to use family resources to participate in the political process.

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[1] The relevant provision of DOMA, section 3, states that "[i]n 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 the 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." 1 U.S.C. § 7.

[2] A number of federal courts, including two Circuit Courts of Appeals, have already ruled that section 3 of DOMA is unconstitutional. *See, e.g., United States v. Windsor*, 699 F.3d 169 (2d Cir. 2012), *cert granted*, 133 S. Ct. 786 (2012); *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 682 F.3d 1 (1st Cir. 2012) ("*Massachusetts v. HHS*"); *Pedersen v. OPM*, 881 F. Supp. 2d 294 (D. Conn. 2012); *Golinski v. OPM*, 824 F. Supp. 2d 968 (N.D. Cal. 2011). The *Windsor* case is currently pending before the United States Supreme Court. The rulings of the other lower courts have been stayed pending the outcome of this case.

A growing number of states afford lesbian and gay families the rights and responsibilities of civil marriage.[3] A significant number of these families, like their heterosexual counterparts, subsist primarily on one spouse's income.[4] I can think of no practical reason not to give these families the benefit of section 110.1(i) on the same terms as we apply the regulation to contributions by individuals married to someone of a different sex. The objective of the regulation is entirely unrelated to the gender of the spouses.

Nevertheless, DOMA requires us to limit the word "spouse" in the text of the regulation to people in heterosexual marriages. This is but one of several disparate and seemingly unjustified burdens that DOMA places on the political expression and association rights of married same-sex couples.[5] And these disadvantages are but a few of the over 1000 federal rights, benefits, and responsibilities affected.[6]

Fortunately, as noted by more than one Commissioner, the practical effect of today's Advisory Opinion should be relatively limited. Federal contribution limitations apply separately to every individual, and contributions from any couple, married or not, who share a bank account may be attributed to each of them under the Commission's existing regulations.[7]

My preference would still have been to give same-sex married couples the additional benefit of section 110.1(i). Ultimately, however, it is not for me, as an FEC Commissioner, to disregard provisions of the law based on my personal views of their wisdom or constitutionality. For this reason, I very reluctantly voted to adopt Advisory Opinion 2013-02.

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[3] Nine states and the District of Columbia currently allow same-sex couples to marry. Nine more permit them to enter into civil unions or domestic partnerships that provide all or substantially all the rights and obligations of marriage. But for DOMA, I would favor interpreting the word "spouse" in our regulations to include all married individuals and those in civil unions, domestic partnerships, or other similar legal arrangements.

[4] According to analysis of census data by UCLA's Williams Institute, almost 20% of individuals in same-sex couples nationwide are not currently participating in the paid labor force (as compared to just over 30% of individuals in heterosexual couples). *See* Gary J. Gates, The Williams Institute, UCLA School of Law, Same-sex and Different-sex Couples in the American Community Survey, February 2013, at 3-4, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/ACS-2013.pdf.

[5] An *amicus* brief filed in *Windsor* by a bipartisan group of former Commission officials notes several other examples. *See generally* Brief of *Amici Curiae* of Former Federal Election Commission Officials Supporting Respondent Edith Schlain Windsor on the Merits, *United States v. Windsor*, No. 12-307 (Mar. 1, 2013).

[6] *Massachusetts v. HHS*, 682 F.3d at 6.

[7] *See* 11 C.F.R. § 110.1(k).