

THE “RAINBOW TAX”: OVERCOMING REPAYMENT BARRIERS

by
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In 1996, the Defense of Marriage Act passed through Congress and was signed into law by President Bill Clinton. The Defense of Marriage Act effectively banned same-sex couples from receiving federal benefits that were otherwise available to heterosexual couples. In 2004, the first legal same-sex marriages were performed in the United States of America in the state of Massachusetts. These marriages allowed the now-married couples to access state tax benefits previously unavailable to them. However, because of section 3 of the Defense of Marriage Act, which defined marriage as a union between one man and one woman, those newly married couples could not access the same tax benefits on the federal level. This forced same-sex married couples to file individually on their federal tax returns, even though they could now file jointly on their state tax returns. Because of this, same-sex couples paid collectively almost \$57 million more in taxes than they otherwise would have if they had been permitted to file as married on federal tax returns. This overpayment in taxes can appropriately be referred to as the “Rainbow Tax.”

In recent years, there have been three legislative attempts to remedy this overpayment. All three have been headed by Senator Elizabeth Warren of the state of Massachusetts, the state most affected by the inequity. First, the Refund Equality Act of 2017, then the PRIDE Act of 2019, and most recently the Refund Equality Act of 2021—none of these attempts at remedying this inequality have been successful.

This Comment centers on the responsibility of the Internal Revenue Service and the U.S. government to refund the overpayment of taxes to the affected taxpayers and addresses three key issues of the repayment process: the statute of limitations on amending tax returns, the burden of proof in these cases, and calculating interest on these returns.

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Introduction	936
I. Pre- <i>Windsor</i> and the Defense of Marriage Act.....	937
A. <i>Brief History of Legal Same-Sex Marriage and the Defense of Marriage Act</i>	937
B. <i>Tax Filing Difficulties Before United States v. Windsor</i>	940
II. <i>United States v. Windsor</i> and Its Failure to Address Ten Years of Overpaid Taxes.....	941
A. <i>United States v. Windsor</i>	941
B. <i>The Gap in Overpayment Refunds: 2004 to 2010</i>	943
III. The Rainbow Tax and Failed Attempts to Remedy It	944
A. <i>The Rainbow Tax</i>	944
B. <i>Failed Attempts to Remedy the Overpayment</i>	944
1. <i>Refund Equality Act of 2017</i>	944
2. <i>PRIDE Act of 2019</i>	945
a. <i>Overview</i>	945
b. <i>Response from Ways and Means Committee</i>	946
3. <i>Refund Equality Act of 2021</i>	946
IV. Overcoming Repayment Barriers	947
A. <i>Extend the Statute of Limitations for Amended Filings for Same-Sex Couples Married Before 2013</i>	947
B. <i>Burden of Proof</i>	948
C. <i>Interest</i>	948
Conclusion.....	949

INTRODUCTION

When *United States v. Windsor* was decided in 2013 in favor of equal tax treatment of married same-sex couples, LGBTQ+ couples and advocates rejoiced.¹ The holding, which entitled Edith Windsor to a refund of the estate taxes she paid on her deceased partner's estate, effectively overturned section 3 of the Defense of Marriage Act,² which previously provided that same-sex married couples would not be recognized as married for the purpose of federal activities.³ This ruling was monumental in many ways; however, it left much to be desired. The ruling only allowed for amended filings for up to three years, leaving nearly six years when same-sex married couples were forced to file as individuals on the federal level, despite being legally married in their state.⁴ The inability to file as married on the federal level

¹ See *infra* Part II.A.

² *United States v. Windsor*, 570 U.S. 744 (2013).

³ Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996), *invalidated by Windsor*, 570 U.S. 744.

⁴ See *infra* Part II.B.

resulted in an aggregate overpayment of \$57 million in taxes.⁵ In this Comment, this is referred to as the “Rainbow Tax”—the burden same-sex married couples had to pay just because they were married to someone of the same sex. Two bills have attempted and failed to repay the Rainbow Tax to affected taxpayers,⁶ and one bill has recently been introduced on the floor of the Senate but is expected to fail.⁷ This Comment addresses the failures of the bills, analyzes criticisms of the bills, and proposes solutions to the three issues most often used to justify opposition to the bills.

I. PRE-*WINDSOR* AND THE DEFENSE OF MARRIAGE ACT

A. *Brief History of Legal Same-Sex Marriage and the Defense of Marriage Act*

In 1996, President Bill Clinton signed the Defense of Marriage Act (DOMA) into law.⁸ Section 3 of DOMA specifically prevented the federal government from recognizing marriages between couples of the same gender for the purposes of any federal program or law by stating:

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.⁹

Section 2 of DOMA also provided that states did not have to recognize same-sex marriages performed in other states if they chose not to.¹⁰ DOMA came in light of a pending case in Honolulu, Hawaii, which began when a non-lawyer helped three same-sex couples apply for marriage licenses in 1990 at the Hawaii Department of Health.¹¹ The case, *Baehr v. Lewin*,¹² was a landmark ruling that forced the State of Hawaii to justify its discrimination against same-sex couples. The plaintiffs

⁵ CONG. BUDGET OFF., COST ESTIMATE: H.R. 3299, PROMOTING RESPECT FOR INDIVIDUALS’ DIGNITY AND EQUALITY ACT OF 2019, at 1 (2019).

⁶ Refund Equality Act of 2017, S. 1564, 115th Cong.; Promoting Respect for Individuals’ Dignity and Equality Act of 2019, H.R. 3299, 116th Cong.

⁷ *S. 2014: Refund Equality Act of 2021*, GOVTRACK, <https://www.govtrack.us/congress/bills/117/s2014> (July 20, 2021).

⁸ See Defense of Marriage Act; Presidential Statement on Same-Gender Marriage, 1996, 2 PUB. PAPERS 1635 (Sept. 20, 1996).

⁹ Defense of Marriage Act § 3.

¹⁰ *Id.* § 2.

¹¹ Sasha Issenberg, *The Surprising Honolulu Origins of the National Fight Over Same-Sex Marriage*, POLITICO (May 31, 2021, 7:00 AM), <https://www.politico.com/news/magazine/2021/05/31/issenberg-book-excerpt-bill-woods-honolulu-doma-491401>.

¹² 852 P.2d 44 (1993), *abrogated by* Obergefell v. Hodges, 576 U.S. 644 (2015).

argued that Hawaii's prohibition of same-sex marriage violated the state's Constitution because the right to privacy included a fundamental right of marriage for both same-sex couples and opposite-sex couples, and discrimination against just same-sex couples required passing the strict scrutiny test. This test requires that any law that discriminates against a particular class of people must be narrowly tailored to achieve a compelling government interest.¹³ After six years of litigation and appeals, the plaintiffs were granted a rehearing in *Baehr v. Miike*, which was set to be heard in the circuit court of Hawaii on September 10, 1996, under the standard announced three years prior.¹⁴ A few days later, after a scramble by Congress, DOMA was passed in Washington D.C. in order to assure no same-sex marriages would be recognized by the federal government, no matter the ruling in *Baehr*.¹⁵ On remand, the State of Hawaii argued that there were five compelling reasons to continue barring same-sex couples from marrying: protecting the health and welfare of children and other persons, fostering procreation in marital settings, securing recognition of Hawaii marriages in other jurisdictions, protecting Hawaii's public perception from reasonably foreseeable backlash for allowing same-sex marriage, and protecting the civil liberties of its citizens.¹⁶ However, the court held that refusing to grant same-sex marriage licenses did violate equal protection.¹⁷ While the case was revolutionary and one of the first of its kind, it prompted an incredible amount of both public and legislative backlash, like the previously mentioned DOMA.¹⁸

DOMA was supported by President Bill Clinton, which came as a surprise to many since he was adamant in his support of the LGBTQ+ community in his campaign.¹⁹ In his July 1996 Statement of Administration Policy about DOMA, President Clinton's administration stated:

The President strongly opposes discrimination against any group of Americans, including gay and lesbian individuals, and he supports legislation to outlaw such discrimination in the workplace. The President, however, has long opposed same sex marriage. Therefore, if H.R. 3396 were presented to the

¹³ *Id.* at 50, 58, 63–64.

¹⁴ *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997), *superseded by constitutional amendment*, HAW. CONST. art I, § 23, *as recognized in* *Baehr v. Miike*, No. 20371, 1999 WL 35643448, at *1 (Haw. Dec. 9, 1999).

¹⁵ Defense of Marriage Act § 3.

¹⁶ *Baehr*, 1996 WL 694235, at *3.

¹⁷ *Id.* at *19–22.

¹⁸ *Baehr v. Miike*, LAMBDA LEGAL, <https://www.lambdalegal.org/in-court/cases/baehr-v-miike> (last visited Sept. 17, 2022).

¹⁹ Sasha Issenberg, *Bill Clinton Tried to Avoid the DOMA Trap Republicans Set. Instead, He Trapped Himself*, POLITICO (Sept. 18, 2021, 7:00 AM), <http://www.politico.com/news/magazine/2021/09/18/doma-anniversary-bill-clinton-book-excerpt-512686>.

President as passed by the House of Representatives, the President would sign the legislation.²⁰

This legislation paved the way for denial of same-sex marriage licenses until 2004 in Massachusetts.

In 2004, Massachusetts became the first state to issue marriage licenses to same-sex couples after legalizing same-sex marriage in the state.²¹ In *Goodridge v. Department of Public Health*, a case brought by GLBTQ Legal Advocates & Defenders (GLAD) after seven same-sex couples were denied marriage licenses in Massachusetts, the Supreme Judicial Court of Massachusetts held that same-sex couples could no longer be excluded from civil marriage rights in the state of Massachusetts.²² In *Goodridge*, the plaintiffs argued that “the exclusion of the Plaintiff couples and other qualified same-sex couples from access to marriage licenses, and the legal and social status of civil marriage, as well as the protections, benefits and obligations of marriage” violated Massachusetts law.²³ Initially, their argument was rejected by the superior court, but was later accepted by the Massachusetts Supreme Judicial Court.²⁴ This was the first affirmative legal ruling for same-sex marriage in the United States.²⁵ In the following years, more states legalized same-sex marriage, including New York, California,²⁶ Iowa, Washington state, and New Hampshire, among others.²⁷ Most of the states that have legalized same-sex marriage have done so via case law or by popular vote.²⁸ In 2009, Vermont became the first state to legalize gay

²⁰ OFF. OF MGMT. & BUDGET, STATEMENT OF ADMINISTRATION POLICY: H.R. 3396 – DEFENSE OF MARRIAGE ACT (1996); Presidential Statement on Same-Gender Marriage, 1996, 2 PUB. PAPERS 1635 (Sept. 20, 1996).

²¹ Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES (May 17, 2004), <https://www.nytimes.com/2004/05/17/us/massachusetts-arrives-at-moment-for-same-sex-marriage.html>; *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (2003).

²² *Goodridge*, 798 N.E.2d at 949–50, 969; *Cases and Advocacy*: *Goodridge et al. v. Dept. Public Health*, GLAD, <https://www.glad.org/cases/goodridge-et-al-v-dept-public-health/> (last visited Sept. 17, 2022).

²³ *Goodridge*, 798 N.E.2d at 950 (quoting Verified Complaint, *Goodridge v. Dep’t of Pub. Health*, No. 01-1647 (Mass. Supp. Apr. 11, 2001)).

²⁴ *Id.* at 948, 951.

²⁵ Michael J. Klarman, *How Sam-Sex Marriage Came to Be: On Activism, Litigation, and Social Change in America*, HARV. L. TODAY (June 18, 2013), <https://today.law.harvard.edu/how-same-sex-marriage-came-to-be/>.

²⁶ Same-sex marriage in California was legalized and then banned by Proposition 8 in 2008, then re-legalized in 2010. See Alexei Koseff, *Gay Marriage in California and the United States*, SACRAMENTO BEE, <https://www.sacbee.com/news/politics-government/article25639525.html> (June 26, 2015, 10:32 PM).

²⁷ *State-by-State History of Banning and Legalizing Gay Marriage*, PROCON.ORG, <https://gaymarriage.procon.org/state-by-state-history-of-banning-and-legalizing-gay-marriage/> (Feb. 16, 2016).

²⁸ *Id.*

marriage by statute.²⁹ The move by the Vermont legislature overrode the governor's veto to the Bill.³⁰ Alabama, Georgia, South Dakota, Nebraska, and Mississippi, among other states, continued to ban same-sex marriage until federal legalization in 2015.³¹ *Obergefell v. Hodges* legalized same-sex marriage nationwide on June 26, 2015, when the Court held that:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.³²

Though *Obergefell* legalized same-sex marriage nationwide, tax treatment of same-sex married couples was settled in 2013 in the landmark case, *United States v. Windsor*.³³ *Windsor* effectively overturned section 3 of DOMA and changed the way same-sex married couples were taxed federally. Before *Windsor*, there were significant filing obstacles and an increased tax burden for many couples.³⁴

B. *Tax Filing Difficulties Before United States v. Windsor*

Because treatment of same-sex marriage differed greatly among states and federal protections were not yet available, tax filing was incredibly complicated for many same-sex couples. Some states recognized and performed same-sex marriages, some states did not perform same-sex marriages but recognized marriages performed in other states, and some states refused to perform *or* recognize same-sex marriage. Same-sex married taxpayers who filed in a state where same-sex marriage was legal could file as married in their state, but had to file federal taxes separately.³⁵ Same-sex married taxpayers who had filing obligations in more than one state faced even

²⁹ Jason Szep, *Vermont Becomes 4th U.S. State to Allow Gay Marriage*, REUTERS (Apr. 7, 2009, 7:35 AM), <https://www.reuters.com/article/us-gaymarriage-vermont-becomes-4th-u-s-state-to-allow-gay-marriage-idUSTRE53648V20090407>.

³⁰ *Id.*

³¹ PROCON.ORG, *supra* note 27.

³² *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

³³ 570 U.S. 744 (2013); *see also infra* Part II.A.

³⁴ *See infra* Part II.A.

³⁵ Haniya H. Mir, *Windsor and Its Discontents: State Income Tax Implications for Same-Sex Couples*, 64 DUKE L.J. 53, 62 (2014).

more difficulty, particularly when same-sex marriage was not legal in one or more of the states in which they had filing obligations.³⁶

Because of the nature of this Comment, it is critical to understand the advantages and disadvantages of filing individually versus married filing jointly, which same-sex couples were prohibited from doing on a federal level. Couples who file as married have more favorable tax brackets, a standard deduction nearly two times higher than individual filers, a higher cap on Individual Retirement Account contributions, eligibility for student loan interest deductions, eligibility for Lifetime Learning credits and Earned Income credits, and a higher available capital loss deduction.³⁷ In most, but not all, cases, these additional benefits to couples who file together instead of separately result in a significantly more favorable tax outcome.

In addition to the logistical burdens and often higher payment burdens, another major issue facing married same-sex couples was estate planning. The federal estate tax deduction is one of the most useful estate planning tools for wealthy couples, and because of DOMA (providing that same-sex couples would not be recognized as married for federal activities), married same-sex couples were unable to access that deduction.³⁸ In 2010, Edith Windsor filed suit against the federal government to recover the estate taxes she paid after inheriting the estate of her deceased partner, Thea Spyer, under the theory that denying her the federal estate tax credit violated the Equal Protection Clause of the Fifth Amendment.³⁹ *Windsor* became a landmark civil rights case and paved the way for equality and equal dignity for same-sex couples.

II. *UNITED STATES V. WINDSOR* AND ITS FAILURE TO ADDRESS TEN YEARS OF OVERPAID TAXES

A. *United States v. Windsor*

Windsor was the first case to successfully tackle the taxation issues facing married same-sex couples. In 2010, Edith Windsor filed suit against the United States for recovery of the estate taxes she paid on her deceased wife’s estate.⁴⁰ Windsor married her partner, Thea Spyer, in Ontario, Canada, in 2007, and their marriage was recognized in the state of New York where the couple lived.⁴¹ Spyer died in

³⁶ Aryn McCumber, *Marriage Equality: Taxes, Death, and Everything in Between*, TAX ADVISER (Mar. 1, 2017), <http://www.thetaxadviser.com/issues/2017/mar/marriage-equality.html>.

³⁷ *Tax Considerations for Same-Sex Couples: Married Filing Jointly vs. Separately*, TURBOTAX, <https://turbotax.intuit.com/tax-tips/marriage/doma-tax-implications-for-same-sex-couples/L1LDCicXw> (Nov. 15, 2021, 12:18 PM).

³⁸ *Id.*; McCumber, *supra* note 36.

³⁹ *United States v. Windsor*, 570 U.S. 744, 753 (2013).

⁴⁰ *Windsor*, 570 U.S. at 753.

⁴¹ *Id.*

2009 and left the entirety of her estate to her wife, Windsor.⁴² Federal estate taxes on Spyer's estate amounted to \$363,053.⁴³ Windsor hoped to alleviate this burden by applying the federal estate tax exemption for surviving spouses; however, she was unable to do so due to section 3 of DOMA, which defined marriage as excluding those between same-sex partners.⁴⁴ Windsor contended that the exclusion of same-sex married couples from federal programs under section 3 of DOMA was unconstitutional because it deprived her of her liberty under the equal protection guarantee of the Fifth Amendment.⁴⁵ During the case, the Department of Justice withdrew its support for section 3 of DOMA.⁴⁶ However, the Bipartisan Legal Advisory Group of the House of Representatives attempted to intervene in the litigation by filing a petition-stage response in support of section 3 of DOMA.⁴⁷ Despite the attempted intervention, the Supreme Court held that section 3 of DOMA was unconstitutional because it violated both equal protection and basic due process, and that its intent was to injure same-sex married couples, a class that was protected by certain states.⁴⁸ Windsor was entitled to a refund of the paid estate taxes and section 3 of DOMA was effectively overturned.⁴⁹ The Court reasoned that because section 3 of DOMA sought to harm a group specifically protected by the state of New York, that intentional harm violated the equal protection and due process rights guaranteed by the federal government.⁵⁰ The Court explained, "The Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group."⁵¹ The Court further reasoned:

DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the pur-

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996).

⁴⁵ *Windsor*, 570 U.S. at 753.

⁴⁶ Jake Tapper, Sunlen Miller & Devin Dwyer, *Obama Administration Drops Legal Defense of 'Marriage Act'*, ABC NEWS (Feb. 23, 2011, 9:37 AM), <https://abcnews.go.com/Politics/obama-administration-drops-legal-defense-marriage-act/story?id=12981242>.

⁴⁷ Brief for Petitioner, *United States v. Windsor*, 570 U.S. 744 (2013) (No. 12-785).

⁴⁸ *Windsor*, 570 U.S. at 769.

⁴⁹ *Id.* at 751–52.

⁵⁰ *Id.* at 769–70.

⁵¹ *Id.* at 770 (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

pose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect.⁵²

This revolutionary ruling allowed same-sex married couples to file taxes as married on a federal level and access other benefits previously denied to them.⁵³ Though same-sex marriage was not made legal federally, the recognition of same-sex marriages for the purposes of federal programs was a major step towards the equal treatment of same-sex couples under the law.

B. *The Gap in Overpayment Refunds: 2004 to 2010*

Because of *Windsor*, same-sex married couples were finally permitted to file federal taxes jointly as a married couple. This meant that they were also permitted to amend their tax returns for three prior years under I.R.C. § 6013.⁵⁴ Section 6013(b) allows married couples to amend their returns in prior years where the spouses filed individually but were eligible to file jointly.⁵⁵ The statute of limitations on filing amended returns for spouses is three years.⁵⁶ Shortly after *Windsor*, the Internal Revenue Service (IRS) issued Revenue Ruling 2013-17, clarifying its treatment of same-sex couples,⁵⁷ and posted an FAQ that established that post-*Windsor*, the IRS would “look[] to state or foreign law to determine whether individuals are married” and recognize the “marriage of same-sex spouses that was validly entered into in a domestic or foreign jurisdiction whose laws authorize the marriage of two individuals of the same sex even if the married couple resides in a domestic or foreign jurisdiction that does not recognize the validity of same-sex marriages.”⁵⁸

While allowing three years of amended filings was an important step in remedying the inequity, it left six full years of tax returns unaccounted for. The gap between 2004, when the first marriage licenses were issued in Massachusetts, and 2010, the last year covered by § 6013(b)(2)(A), still imposed an undue burden on married same-sex couples who were not eligible for the same refunds opposite-sex married couples received.

⁵² *Id.* at 772.

⁵³ Carl D. Fortner, William R. Hughes, John L. Litchfield, John S. Lord Jr., Leigh C. Riley & Morgan J. Tilleman, *The Impact of the Supreme Court's Decision in Windsor (DOMA) on Individuals and Businesses*, FOLEY & LARDNER LLP (July 17, 2013), <https://www.foley.com/en/insights/publications/2013/07/the-impact-of-the-supreme-courts-decision-in-emwin>.

⁵⁴ I.R.C. § 6013(b)(2)(A).

⁵⁵ *Id.* § 6013(b).

⁵⁶ *Id.* § 6013(b)(2)(A).

⁵⁷ Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

⁵⁸ *Answers to Frequently Asked Questions for Individuals of the Same Sex Who Are Married Under State Law*, INTERNAL REVENUE SERV., <http://www.irs.gov/newsroom/answers-to-frequently-asked-questions-for-same-sex-married-couples> (last visited Sept. 17, 2022).

III. THE RAINBOW TAX AND FAILED ATTEMPTS TO REMEDY IT

A. *The Rainbow Tax*

Nearly a decade of different tax treatment of married couples based on the genders of partners—under now-unconstitutional section 3 of DOMA—resulted in millions of dollars of overpaid taxes.⁵⁹ Section 6013(b)(2)(A) helped to relieve some of the injustice, but still left nearly six years of overpaid taxes by LGBTQ+ married couples untouched. In 2019, the Joint Committee on Taxation estimated the amount of overpaid taxes to be well over \$57 million.⁶⁰ There have been three notable legislative attempts to address this discrepancy: the Refund Equality Act of 2017, the PRIDE Act of 2019 (which passed the House but died in the Senate), and the Refund Equality Act of 2021 (which is not expected to make it out of the Republican-controlled Senate).⁶¹

B. *Failed Attempts to Remedy the Overpayment*

1. *Refund Equality Act of 2017*

In 2017, Senator Elizabeth Warren (D-Mass.) introduced the Refund Equality Act of 2017 with the support of 36 other senators.⁶² Representative Richard Neal (D-Mass.) voiced his support for the Bill, saying:

All legally married couples in this country deserve to be treated equally This bill would codify into law an important correction that would enable same-sex married couples to go back and claim the tax refunds and credits for which they qualify. The Supreme Court has ruled as such, and now it's time for Congress to act and make sure all Americans are treated with the fairness and equality they deserve under the law.⁶³

This Bill was introduced and subsequently sent to the Senate Committee on Finance.⁶⁴ The Committee did not provide an analysis of the Bill, and the Bill never left the Senate.⁶⁵ The next attempt at legislation to remedy the tax overpayment was introduced in 2019 in the House of Representatives.

⁵⁹ Chris Johnson, *House Approves PRIDE Act to Give Gay Couples Refund on Back Taxes*, WASH. BLADE (July 24, 2019), <https://www.washingtonblade.com/2019/07/24/house-approves-pride-act-to-give-gay-couples-refunds-on-back-taxes/>.

⁶⁰ CONG. BUDGET OFF., COST ESTIMATE: H.R. 3299, PROMOTING RESPECT FOR INDIVIDUALS' DIGNITY AND EQUALITY ACT OF 2019, at 2 tbl.1 (2019).

⁶¹ GOVTRACK, *supra* note 7.

⁶² Refund Equality Act of 2017, S. 1564, 115th Cong.

⁶³ Press Release, Warren, Neal, Dozens of Members of Congress Introduce Refund Equality Act to Provide Equal Tax Treatment for Married Same-Sex Couples (July 13, 2017).

⁶⁴ S. 1564.

⁶⁵ *Id.*

2. PRIDE Act of 2019

a. Overview

House Resolution 3299, the Promoting Respect for Individuals’ Dignity and Equality (PRIDE) Act, was introduced in the House of Representatives by Representative Judy Chu (D-Cal.) on June 18, 2019.⁶⁶ The Bill was co-sponsored by Representative Andy Levin (D-Mich.), Representative Karen Bass (D-Cal.), Representative Adam Schiff (D-Cal.), and Delegate Eleanor Holmes Norton (D-D.C.).⁶⁷ The Bill contained multiple provisions intended to benefit the LGBTQ+ community, including a provision to eliminate gendered language in the tax code and institute a plethora of gender-neutral phrases in lieu of unnecessarily gendered language in order to ensure equal dignity for all taxpayers.⁶⁸ The main provision was a proposed extension of the period of limitation, established in § 6013(b)(2)(A), on same-sex married couples for filing amended tax returns and an extension on receiving a tax refund under I.R.C. § 6511(a).⁶⁹ Representative Mark Takano (D-Cal.) issued a statement on behalf of the LGBTQ+ Equality Caucus, stating “[e]quality takes many forms It means civil, social and financial equality. This legislation directly tackles financial inequality created by parts of our tax code head-on.”⁷⁰ The Bill passed the democratically controlled House but did not get put to a vote in the Senate, largely due to Majority Leader Mitch McConnell’s personal refusal to present bills to the Senate.⁷¹ House Democrats were hopeful after the Bill’s success in the House, as evidenced by this statement by Nancy Pelosi, Speaker of the House:

Advancing the PRIDE Act is a critical step in bringing our nation closer to fulfilling its founding promise that all are created equal As we celebrate this important success, House Democrats will continue to drive progress for all Americans, making clear that liberty, justice, and equality are America’s guiding principles—not bigotry or discrimination.⁷²

⁶⁶ Promoting Respect for Individuals’ Dignity and Equality Act of 2019, H.R. 3299, 116th Cong.

⁶⁷ *Id.*

⁶⁸ *Id.* § 3.

⁶⁹ *Id.* § 2(a)(1)–(a)(2).

⁷⁰ Johnson, *supra* note 59.

⁷¹ James Crowley, ‘Grim Reaper’ Mitch McConnell Admits There Are 395 House Bills Sitting in the Senate: ‘We’re Not Going to Pass Those,’ NEWSWEEK (Feb. 14, 2020, 12:14 PM), <https://www.newsweek.com/mitch-mcconnell-grim-reaper-395-house-bills-senate-wont-pass-1487401>; Katherine Fung, Mitch McConnell’s ‘Legislative Graveyard’ Helping Current Congress to Be the Least Productive in History, Report Says, NEWSWEEK (Sept. 16, 2020, 3:48 PM), <https://www.newsweek.com/mitch-mcconnells-legislative-graveyard-helping-current-congress-least-productive-history-1532424>.

⁷² Katie Burkholder, House Unanimously Votes to Give Tax Refunds to LGBTQ Couples, GA. VOICE (July 26, 2019), <https://thegavoice.com/news/house-unanimously-votes-to-give-tax-refunds-to-lgbtq-couples/>.

b. Response from Ways and Means Committee

While the Bill was in the House, it underwent a stringent analysis from the Ways and Means Committee. The Ways and Means Committee has jurisdiction over taxation, tariffs, and other revenue-producing measures.⁷³ The Committee produced a 588-page report detailing current law, estimated budget effects, recommendations, and issues with the Bill.⁷⁴ Two major issues the dissenting committee members presented were: (1) the issue of burden of proof and the taxpayers' ability to meet that burden, and (2) the uncertainty of which date would be used to calculate interest on the tax repayment.⁷⁵ Part IV *infra* will discuss the proposed solutions to both the burden of proof issue and a prospective interest date for the purposes of collecting interest on the refunded tax due to same-sex couples.

3. Refund Equality Act of 2021

In June of 2021, Senator Elizabeth Warren introduced the Refund Equality Act of 2021 with the support of 39 senators.⁷⁶ Senator Warren echoed her sentiments regarding the 2017 version of the Bill, saying:

The federal government forced legally married same-sex couples to file as individuals and pay more in taxes for nearly a decade because of who they love We need to call out that discrimination and make it right, and that's why Congress should pass the Refund Equality Act immediately.⁷⁷

The Bill contains similar provisions as the PRIDE Act of 2019, but the Bill does not include the provision for gender-neutral language that was included in the PRIDE Act of 2019.⁷⁸ At this time, the Bill has gone no further than being introduced to the Senate.⁷⁹ Eventually, the Bill will undergo scrutiny by the Senate Committee on Finance.⁸⁰ The Bill does not, in its current form, address the previous shortcomings of the earlier bill regarding the burden of proof and prospective dates for interest calculations.⁸¹ According to GovTrack, a website that produces relatively

⁷³ *Jurisdiction & Rules*, WAYS & MEANS COMM., <https://waysandmeans.house.gov/about/jurisdiction-and-rules> (last visited Sept. 17, 2022).

⁷⁴ H. COMM. ON WAYS & MEANS, PROMOTING RESPECT FOR INDIVIDUALS' DIGNITY AND EQUALITY ACT OF 2019, H.R. REP. NO. 116-161 (2019).

⁷⁵ *Id.* at 588.

⁷⁶ Refund Equality Act of 2021, S. 2014, 117th Cong.

⁷⁷ Press Release, Warren Leads 40 Senators in Reintroducing Refund Equality Act to Provide Equal Tax Treatment for Married Same-Sex Couples (June 11, 2021).

⁷⁸ *Compare* Promoting Respect for Individuals' Dignity and Equality Act of 2019, H.R. 3299, 116th Cong. § 3, *with* S. 2014.

⁷⁹ *S. 2014 - Refund Equality Act of 2021*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/senate-bill/2014/actions> (last visited Sept. 17, 2022).

⁸⁰ *Id.*

⁸¹ *Compare* H.R. 3299 § 2(a)(1)–(a)(2), *with* S. 2014.

accurate projections on the likelihood of congressional bills passing, the Refund Equality Act has a 3% chance of passing Congress and being enacted.⁸²

IV. OVERCOMING REPAYMENT BARRIERS

A. *Extend the Statute of Limitations for Amended Filings for Same-Sex Couples Married Before 2013*

The first change that needs to be implemented in order to make refunding the tax overpayment possible is an extension of the statute of limitations to amend a tax filing for more than three prior years. This is the issue least contested by the Ways and Means Committee.⁸³ Section 6013 currently provides that tax filings can only be amended for the prior three years.⁸⁴ Revenue Ruling 2013-17 granted this already existing privilege to same-sex couples after *Windsor*, but only for the three prior years.⁸⁵ The statute of limitations on claims under Rev. Ruling 2013-17 only allowed for three years of amended filings, therefore denying couples a claim to federal tax benefits associated with their marital status in years where they were lawfully married in their state. This affected same-sex married couples from Massachusetts, California, Iowa, Connecticut, and Vermont,⁸⁶ where same-sex marriage was legalized before 2010. Therefore, legislation should be introduced, much like the prior bills, to extend the statute of limitations.

In addition, it may be sensible to implement an expiration date on the extension. For instance, in order to reduce increased burdens on the IRS, a two-year period for filing amended returns could prove useful. One year would likely prove too short, as it may take affected taxpayers a considerable amount of time to obtain tax records from up to 16 years ago.

Any new legislation should also include a provision for reclamation of overpaid estate taxes for taxpayers in cases like *Windsor*, where surviving spouses had to pay significantly more in estate taxes than they otherwise would have if the estate tax credit had been available to them. The refund system for these taxes should function in a parallel manner to that proposed here for income taxes.

⁸² GOVTRACK, *supra* note 7.

⁸³ See H. COMM. ON WAYS & MEANS, PROMOTING RESPECT FOR INDIVIDUALS' DIGNITY AND EQUALITY ACT OF 2019, H.R. REP. NO. 116-161 (2019).

⁸⁴ I.R.C. § 6013(b)(2)(A).

⁸⁵ *Id.*; Rev. Rul. 2013-17, 2013-38 I.R.B. 201, 204.

⁸⁶ Christine C. Hawkins, Dipa N. Sudra & Richard Birmingham, *UPDATE - State of Celebration Governs Same-Sex Marriage for Federal Tax Purposes*, DAVIS WRIGHT TREMAINE (Sept. 4, 2013), https://www.dwt.com/blogs/employment-labor-and-benefits/2013/09/update—state-of-celebration-governs-samesex-marri#_ftn1; PROCON.ORG, *supra* note 27; Koseff, *supra* note 26.

B. *Burden of Proof*

The burden of proof is a concerning issue when it comes to these refunds. The minority members of the Ways and Means Committee noted that taxpayers may not be able to provide the necessary records due to the IRS information destruction schedule.⁸⁷ In general, the burden of proof for amended returns lies with taxpayers.⁸⁸ It is true that the IRS destroys records on a regular basis, as provided in the Records Control Schedules in IRS Document 12990.⁸⁹ Many taxpayer documents are destroyed after three to five years.⁹⁰ However, the IRS keeps some records for up to 20 years.⁹¹ Although taxpayers usually do bear the burden of proof in tax cases, it is entirely sensible to implement a shared burden of proof between taxpayers and the IRS in these cases because this is a tax injustice perpetuated by the U.S. government and the IRS on a specific subset of taxpayers.

Because the IRS is in possession of many taxpayer documents, when the period for amending filings begins, all relevant records that have not been destroyed per the Records Control Schedules should be relinquished to the taxpayer on request. Taxpayers could then bear the burden of locating and providing the remaining required documentation. This shared burden of proof alleviates some of the burdens on taxpayers while requiring the IRS to bear as much of the burden as they possibly can.

There also exists the possibility of implementing a reduced burden of proof for some documents and extending good faith trust in taxpayers. Because of the significant time that has passed between the creation of some needed documents, concern has been raised about the IRS's ability to audit returns that go back to 2004.⁹² However, this is a problem for the IRS, not the taxpayer.

C. *Interest*

Another concern expressed by the Ways and Means Committee about the PRIDE Act of 2019 was its lack of specificity about when interest should start accruing on these returns.⁹³ For standard tax filings in normal years, the interest begins accruing on the due date of the tax returns for that year.⁹⁴ However, collecting on potentially 17-year-old amended returns due to a tax injustice is a special situation.

⁸⁷ H.R. REP. NO. 116-161, at 588.

⁸⁸ *Burden of Proof*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/burden-of-proof> (Mar. 10, 2022).

⁸⁹ I.R.S. Document 12990 (Rev. 4-2014), IRM 1.15.2.1 (Aug. 8, 2017).

⁹⁰ IRM 1.15.2.9 (Feb. 11, 2021).

⁹¹ I.R.S. Document 12990 (Rev. 4-2014), IRM 1.15.3.1 (Feb. 15, 2021).

⁹² H.R. REP. NO. 116-161, at 588.

⁹³ *Id.*

⁹⁴ *Interest on Underpayments and Overpayments*, INTERNAL REVENUE SERV., <https://www.irs.gov/payments/interest-on-underpayments-and-overpayments> (Sept. 23, 2021).

Should it be calculated for each individual amended yearly return? And if so, should interest begin accruing when the amended return is filed or when it originally could have been filed? All of the perceivable options for interest accrual have a pitfall. For example, if interest starts accruing when the filing would have been originally due for a couple filing an amended return for the 2004 tax year, the interest payment would be quite large, and calculation would be a complicated undertaking. Interest rates are adjusted quarterly,⁹⁵ and for some returns that could mean up to 68 quarterly adjustments. Interest payments are paid by the IRS when they are expected to remit a refund for overpayment to a taxpayer, but do not do so in a timely manner.⁹⁶ Taxpayers who have not filed an amended return have not been waiting for the IRS to fulfill an obligation to them, and therefore interest should not be collected during the period when the IRS was not liable for the overpayment of taxes.

Because of the nature of these returns and the complicated issues associated with interest collections consistent with the way the IRS currently calculates interest due, the following proposal presents the most fair, least burdensome, and most equitable solution: the IRS should pay to same-sex married couples the tax that would have been due to them in each tax year for which they file an amended return, adjusted for inflation, with the interest accruing on the adjusted amount on the due date of the *amended* filing. This maintains consistency with the current IRS rules regarding interest calculations, avoids burdensome adjustments for quarterly interest rates, and still gives the taxpayers what they are due, therefore achieving goals for both the taxpayer and the IRS.

CONCLUSION

Though tax treatment of same-sex couples is now equal under the law due to *United States v. Windsor* and *Obergefell v. Hodges*, there still remains a significant inequity to be remedied. Remedying this inequity would restore dignity to the marriages of the affected taxpayers from Massachusetts, California, New York, Iowa, Connecticut, and Vermont. It is an injustice that for nearly ten years, same-sex couples were treated differently than similarly situated opposite-sex couples under the law of the United States. The U.S. government and the IRS should strive to remedy that injustice in any way they can. At a maximum cost of \$57 million, this is an easily attainable goal. Using the above proposals for extending the statute of limitations, sharing the burden of proof, and calculating interest to draft an improved version of previously drafted legislation should lead to a comprehensive bill that easily addresses the major concerns of the previously attempted bills. The overall goal is to repay the unjustly charged Rainbow Tax and complete the process of restoring the tax equality that was so deeply burdened by the Defense of Marriage Act.

⁹⁵ *Id.*

⁹⁶ I.R.C. § 6611(b)(2).