Mayer, Ellie (ATG)

From: Jensen, Dan (ATG)
Sent: Friday, February 20, 2026 7:40 AM
To: Zalesky, Chuck (ATG)
Subject: RE: quick research for meeting tomorrow

This is great, Chuck. Thanks for forwarding. Based on these materials, I agree with your conclusions below. I do think that it would be helpful to understand what the Legislature's basis for this particular marriage penalty is so we can defend it and that the better course is to eliminate it so that the case can focus on *Culliton*.

From: Zalesky, Chuck (ATG) <chuck.zalesky@atg.wa.gov>
Sent: Thursday, February 19, 2026 5:49 PM
To: Jensen, Dan (ATG) <dan.jensen@atg.wa.gov>
Subject: quick research for meeting tomorrow

Key language from Druker v. Commissioner, 697 F.2d 46 (2d Cir. 1982), in which Second Circuit held that "marriage penalty" in federal income tax code did not violate the constitution:

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> The 1969 reform spawned a new class of aggrieved taxpayers—the two wage-earner married couple whose combined tax burden, whether they chose to file jointly under § 1(a) or separately under § 1(d), was now greater than it would have been if they had remained single and filed under § 1(c). It is this last phenomenon which has been characterized, in somewhat loaded fashion, as the "marriage penalty" or "marriage tax".[2] Here, again, while constitutional attack has been unavailing, see *Johnson v. United States,* 422 F.Supp. 958 (N.D.Ind.1976), *aff'd per curiam sub nom. Barter v. United States,* 550 F.2d 1239 (7 Cir.1977), *cert. denied,* 434 U.S. 1012, 98 S.Ct. 725, 54 L.Ed.2d 755 (1978); *Mapes v. United States,* 576 F.2d 896 (Ct.Cl.), *cert. denied,* 439 U.S. 1046, 99 S.Ct. 722, 58 L.Ed.2d 705 (1978), as well as the decision here under review, Congress has acted to provide relief. The Economic Recovery Tax Act of 1981, Pub.L. No. 97–34, § 103, 95 Stat. 172, 187, allows two-earner married couples a deduction from gross income, within specified limits, equal to 10% of the earnings of the lesser-earning spouse.
>
> Subsequent to the decisions in *Johnson* and *Mapes,* the Supreme Court made explicit in *Zablocki v. Redhail,* 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), what had been implicit in earlier decisions, that the right to marry is "fundamental". The Court, however, citing *Califano v. Jobst,* 434 U.S. 47, 98 S.Ct. 95, 54 L.Ed.2d 228 (1977), took care to explain that it did "not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may be legitimately imposed." 434 U.S. at 386, 98 S.Ct. at 681. Whereas differences in race, religion, and political affiliation are

almost always irrelevant for legislative purposes, "a distinction between married persons and unmarried persons is of a different character". *Jobst, supra,* 434 U.S. at 53, 98 S.Ct. at 99. "Both tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status." *Id.*

We do not doubt that the "marriage penalty" has some adverse effect on marriage; indeed, James Druker stated at argument that, having failed thus far in the courts, he and his wife had solved their tax problem by divorcing but continuing to live together. The adverse effect of the "marriage penalty", however, like the effect of the termination of social security benefits in *Jobst,* is merely "indirect"; while it may to some extent weight the choice whether to marry, it leaves the ultimate decision to the individual. See generally, Developments in Law—The Constitution and the Family, 93 Harv.L.Rev. 1156, 1255 (1980). The tax rate structure of I.R.C. § 1 places "no direct legal obstacle in the path of persons desiring to get married". *Zablocki, supra,* 434 U.S. at n. 12, 98 S.Ct. at 681 n. 12. Nor is anyone "absolutely prevented" by it from getting married, *id.* at 387, 98 S.Ct. at 681. Moreover, the "marriage penalty" is most certainly not "an attempt to interfere with the individual's freedom [to marry]". *Jobst, supra,* 434 U.S. at 54, 98 S.Ct. at 99. It would be altogether absurd to suppose that Congress, in fixing the rate schedules in 1969, had any invidious intent to discourage or penalize marriage—an estate enjoyed by the vast majority of its members. Indeed, as has been shown, the sole and express purpose of the 1969 reform was to provide some relief for the single taxpayer. See S.Rep. No. 552, *supra,* at 260–261. Given this purpose Congress had either to abandon the principle of horizontal equity between married couples, a principle which had been established by the 1948 Act and the constitutionality of which has not been challenged, or to impose a "penalty" on some two-earner married couples. It was put to this hard choice because, as Professor Bittker has shown, *supra,* 27 Stan.L.Rev. at 1395–96, 1429–31, it is simply impossible to design a progressive tax regime in which all married couples of equal aggregate income are taxed equally and in which an individual's tax liability is unaffected by changes in marital status.[3] . . . . Faced with this choice, Congress in 1969 decided to hold fast to horizontal equity, even at the price of imposing a "penalty" on two-earner married couples like the Drukers. There is nothing in the equal protection clause that required a different choice. Since the objectives sought by the 1969 Act—the maintenance of horizontal equity and progressivity, and the reduction of the differential between single and married taxpayers—were clearly compelling, the tax rate schedules in I.R.C. § 1 can survive even the "rigorous scrutiny" reserved by *Zablocki* for measures which "significantly interfere" with the right to marry. Cf. *Johnson, supra,* 422 F.Supp. at 973–74. Clearly, the alternative favored by the Drukers, that married persons be permitted to file under § 1(c) if they so wish, would entail the loss of horizontal equity.

In the area of family taxation every legislative disposition is "virtually fated to be both overinclusive and underinclusive when judged from one perspective or another". The result, as Professor Bittker has well said, is that there "can be no peace in this area, only an uneasy truce." 27 Stan.L.Rev. at 1443. Congress must be accorded wide latitude in striking the terms of that truce. The history we have reviewed makes clear that Congress

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has worked persistently to accommodate the competing interests and accomplish fairness. While we could elaborate still further, we think that this, along with the discussion in *Johnson, Mapes,* and in Chief Judge Tannenwald's opinion below, is sufficient to show that what the Drukers choose to call the "marriage penalty" deprived them of no constitutional right.

There is a similar discussion in *Johnson v. Pomeroy*, 294 F. App'x 397, 402–04 (10th Cir. 2008)

Courts have subsequently applied the *Jobst*/*Zablocki* analysis to cases involving claims of impermissible interference with the right to marry. Following the Tax Reform Act of 1969, many two wage-earner married couples were subjected to the "marriage penalty," where their combined tax burden, whether they chose to file jointly or separately, was greater than it would have been if they had remained single and filed as single taxpayers. In *Druker v. Commissioner of Internal Revenue,* 697 F.2d 46 (2d Cir.1982), *cert. denied,* 461 U.S. 957, 103 S.Ct. 2429, 77 L.Ed.2d 1316 (1983), the plaintiff taxpayers alleged that the "marriage penalty" was unconstitutional. The Second Circuit had no doubt that the "marriage penalty" had some adverse effect on marriage, but concluded that the adverse effect, "like the effect of the termination of social security benefits in *Jobst,* is merely 'indirect'; while it may to some extent weight the choice whether to marry, it leaves the ultimate decision to the individual." *Id.* at 50, 98 S.Ct. 95. The challenged tax rate structure placed no direct legal obstacle in the path of persons desiring to get married, it did not absolutely prevent anyone from getting married, and it did not attempt to interfere with the individuals' freedom to marry. The Second Circuit concluded that the "marriage penalty" did not deprive the Drukers of a constitutional right. *Id.* at 51, 98 S.Ct. 95.

Similarly, in *Mapes v. United States,* 217 Ct.Cl. 115, 576 F.2d 896 (1978), *cert. denied,* 439 U.S. 1046, 99 S.Ct. 722, 58 L.Ed.2d 705 (1978), the United States Court of Claims held that the tax rates resulting in the "marriage penalty" were constitutional.

> The additional tax liability suffered by two-income couples who cannot avail themselves of the rates for single persons is an indirect burden on the exercise of the right to marry. It is suffered not for marrying but for marrying one in a particular income group. This does not rise to the level of an 'impermissible' interference with the enjoyment of a fundamental right.

576 F.2d at 901. "[T]he elevated tax burden might in fact dissuade some couples from entering into matrimony, but does not present an insuperable barrier to marriage." *Id.* Strict scrutiny is appropriate only where the obstacle to marriage "operates to preclude the marriage entirely for a certain class of people." *Id.*

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We have previously considered and rejected a claim similar to the Johnsons'. In *Martin v. Bergland,* 639 F.2d 647 (10th Cir.1981), the appellants, husband and wife, challenged a regulation promulgated by the Secretary of Agriculture that defined a husband and wife as a single person for purposes of a statute limiting farm subsidy payments to $20,000 per person. In 1973, Congress directed the Secretary to define the term "person" in order to limit farm subsidy payments to farmers who kept their land idle. Appellants argued that the Secretary's refusal to pay farm subsidy payments to both of them solely because of their marriage denied them equal protection of the laws under the Fifth Amendment. Using the principles outlined in *Jobst* and *Zablocki,* we determined that the regulation was not such a direct and substantial burden on the freedom to marry that it should be strictly scrutinized. *Id.* at 649. We upheld the regulation under the rational basis test, finding that the husband-wife rule rationally furthers Congress' interest in limiting farm subsidy payments. *Id.* at 650.

We agree with the district court that the Johnsons have not established an impermissible interference with the right to marry or associate with family. Like the "marriage penalty" discussed in *Druker* and *Mapes,* and the farm subsidy regulation considered in *Martin,* the Employees' interpretation and application of the Wyoming statute did not present a direct legal obstacle in the path of persons desiring to get married. Nor did it absolutely prohibit a class of persons from getting married. Moreover, there is no plausible indiction that the denial of Mr. Johnson's claim for extended PTD benefits was an attempt to interfere with the Johnsons' freedom to make a decision as important as marriage. While the Johnsons may have suffered an indirect burden on their marriage, there was no direct and substantial burden on their freedoms to marry and to associate with family.[5]

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My initial takeaway is that a court would likely hold that the marriage penalty in the Millionaire Tax does not "significantly interfere" with the right to marry and, therefore, is subject to rational basis review. However, it would certainly help if we could articulate a solid reason for the Legislative choice, was the case in *Drukers* and *Johnson v. Pomeroy.*

Regardless, keeping the marriage penalty creates another constitutional challenge that the tax must overcome. In my view, that is not a fight worth having as the important constitutional issue is to get Culliton overturned.