

Top 10 Things You Should Know About DOMA and the U.S. Supreme Court

November 26, 2012

Before the end of this year, the U.S. Supreme Court will likely consider whether or not to hear one or more cases challenging the constitutionality of Section 3 of the so-called Defense of Marriage Act. Here are a few key things to know while we wait for that announcement.

WHAT IS DOMA SECTION 3?

The Defense of Marriage Act was passed by Congress in 1996. Section 3 states that, for purposes of all federal laws and programs, “the word ‘marriage’ means only the legal union of a man and a 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.” DOMA thus excludes legally married same-sex couples from any federal law or program in which marriage is a factor and treats them as single rather than married.

WHY IS IT IMPORTANT TO GET RID OF SECTION 3 OF DOMA?

It’s important to get rid of DOMA Section 3 for two reasons: (1) DOMA causes real, concrete harm to legally married same-sex couples and their families. With more than 1,000 federal laws and programs at issue, DOMA’s harm is vast. DOMA denies pensions to the surviving spouses of federal employees, prevents spouses from taking Family Medical Leave to care for one another during serious illness, separates binational couples, denies military spouses support and benefits, and costs thousands of dollars for families when spouses cannot file federal taxes jointly as married; and (2) DOMA singles out gay people and our relationships as unequal, thus inviting discrimination from others and telling our children that their families are second class.

WHAT IS BEING DONE TO DEFEAT DOMA?

Litigation groups including Gay & Lesbian Advocates & Defenders (GLAD), Lambda Legal, and the ACLU have dealt significant blows to DOMA Section 3 with legal challenges: *Gill et al. v. Office of Personnel Management* (GLAD), *Pedersen et al. v. Office of Personnel Management* (GLAD), *Golinski v. Office of Personnel Management* (Lambda Legal),

and *Windsor v. United States* (ACLU). Courts in each of these cases have found DOMA unconstitutional on its merits. (Cases have also been brought by Immigration Equality and the Servicemembers Legal Defense Network, among others.) One or more of the decided cases is likely to be heard by the U.S. Supreme Court in its 2012-2013 term, and if that happens, DOMA’s constitutionality is expected to be decided by the end of June 2013.

There is also an attempt to repeal DOMA in Congress with the Respect for Marriage Act (RMA). The bill has 157 sponsors in the House of Representatives and 33 sponsors in the Senate. The bill had a Senate Judiciary Committee hearing in July 2011, and a markup in November 2011. The committee approved the bill by a vote of 10-8. It has not yet had a floor vote.

WHAT LEGAL ARGUMENTS DO THESE CASES MAKE?

These cases make equal protection arguments – that all married couples, gay and non-gay, should be treated equally by the federal government. None of these suits challenge Section 2 of DOMA (which addresses inter-state recognition) and none make a right-to-marry claim.

IF SECTION 3 OF DOMA IS STRUCK DOWN, WILL EVERY STATE HAVE TO ALLOW SAME-SEX COUPLES TO MARRY?

No - DOMA does not change state marriage laws. Section 3 of DOMA means that the federal government will not respect the legal marriages of same-sex couples. Even if Section 3 of DOMA is held unconstitutional, that ruling won’t require any new states to allow same-sex couples to marry. If DOMA is struck down, the federal government will have to respect the existing marriages of same-sex couples for purposes of all

federal statutes and programs. Of course, the scope of a positive ruling will depend on the terms of the ruling itself. The marriage lawsuits that are currently pending in a number of states, as well as efforts in state legislatures seeking the freedom to marry for same-sex couples will need to continue regardless of the DOMA outcome.

HOW CAN DOMA STILL BE IN EFFECT, WHEN SO MANY COURTS HAVE STRUCK IT DOWN?

The last seven courts to consider whether or not Section 3 of DOMA is unconstitutional have all concluded that it is. None, however, is a definitive and final ruling from the U.S. Supreme Court. As a result, in nearly all circumstances, the federal government continues to enforce DOMA in relation to the 1,138 laws it affects.

WHY IS THE OBAMA ADMINISTRATION NOT DEFENDING DOMA?

The Obama administration is no longer defending Section 3 of DOMA in court challenges because the President and the Department of Justice have determined that it is clearly unconstitutional. On February 23, 2011, the Attorney General Eric Holder notified Congress and Speaker of the House John Boehner that the Department would no longer argue that Section 3 of DOMA should be upheld in cases challenging it. The President and Attorney General had concluded that laws that discriminate against gay men and lesbians require the application of heightened scrutiny under the Constitution's Equal Protection guarantee, meaning that courts must presume such laws are unconstitutional and strike them down unless there is a very strong justification for the discrimination. The President and Attorney General concluded that DOMA cannot survive that test. Since that announcement, the Department of Justice has urged several courts, including the Supreme Court, to strike down Section 3 of DOMA. Although the administration is not defending DOMA Section 3 in legal cases, it is still enforcing the law.

In response to the Attorney General's announcement, the five leaders of the U.S. House of Representatives known as the Bipartisan Legal Advisory Group, voted 3 (Republican) - 2 (Democratic) to defend DOMA in court challenges and to hire counsel to do so. BLAG is defending DOMA in all of the cases that are now pending potential review before the Supreme Court.

WHY IS IT A GOOD IDEA TO TAKE THIS ISSUE TO THE SUPREME COURT?

Both the *Gill* and *Windsor* cases have been heard by appellate courts, which have found DOMA to be unconstitutional. These are mainstream equal protection cases involving an obvious double standard where all married people are treated the same by the federal government with the exception of same-sex couples. Equal protection cases are a routine part of the Court's docket.

WHAT IS NEXT FOR DOMA?

After the U.S. Supreme Court decides whether or not it will grant review of one or more of the DOMA lawsuits, those cases will be fully briefed and argued to the Supreme Court. There will also certainly be multiple friend-of-the-court briefs filed on both sides. Assuming the Court acts to grant review in November, the argument date will likely be in March. In the normal course, the Supreme Court would issue its decision on whether or not Section 3 of DOMA is constitutional by the end of June 2013.

HOW ARE THESE CASES DIFFERENT FROM THE CHALLENGE TO PROP 8?

In the DOMA cases the plaintiffs are already married and are simply asking the Supreme Court to require that the federal government respect their marriages for purposes of all federal statutes and programs. In "freedom to marry" cases like the Prop 8 case, in contrast, the plaintiffs are not married and argue that the federal (or in some cases state) constitution requires the state to allow same-sex couples to marry. A win in one of the DOMA cases would mean that the federal government has to respect the existing marriages of same-sex couples, but would not force any new states to let same-sex couples marry. A win in the Prop 8 case would at a minimum require California to start allowing same-sex couples to marry again, and could affect either some other states or even all states that do not currently allow same-sex couples to marry.

LINKS :

Link to *Gill* and *Pedersen*: www.glad.org/doma
Link to *Golinski v. OPM*: <http://www.lambdalegal.org/in-court/cases/golinski-v-us-office-personnel-management>
Link to *Windsor v. United States*: <http://www.aclu.org/lgbt-rights/windsor-v-united-states-thea-edie-doma>
Link to Comprehensive list of DOMA cases: <http://www.glad.org/doma/documents/>