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Frequently Asked Questions Regarding the Statements of the U.S. Department of Justice Regarding Section 3 Of DOMA

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Section 3 of the “Defense of Marriage Act” (DOMA), enacted in 1996, denies federal recognition to validly married same-sex couples.¹ This document addresses the momentous decision of the U.S. Department of Justice (DOJ) that laws like DOMA that distinguish between people based on sexual orientation are presumptively unconstitutional and so merit “heightened scrutiny,” or much more careful review by courts. In the past, the DOJ has taken the position that the lowest level of review, called “rational basis” review, applies, meaning that the discriminatory law is presumed to be constitutional and the burden of negating every conceivable justification for the law is placed on the challenger. DOJ’s position, if adopted by courts, would place discriminatory laws under suspicion and impose an obligation on the government entity making the distinction to justify the different treatment with substantial or compelling justifications.

As a consequence of DOJ’s determination, it has decided not to defend GLAD’s DOMA case, *Pedersen v. O.P.M.*, currently pending in the federal district court in Connecticut.

DOJ is also stepping back from its defense of GLAD’s other DOMA challenge, *Gill v. O.P.M.*, pending in the First Circuit Court of Appeals in Boston. At the same time, DOJ has not stated it will cease defending DOMA altogether in *Gill*. For more general information about these two cases, please see visit www.glad.org/doma.

DOMA is still the law of the land until it is struck down in the courts or repealed by Congress. Since these cases are ongoing and developing, this document is based upon the information that is available to us at the time this document was last updated.

If you have questions about your personal circumstances, please consult a lawyer or other specialist. The provision of this information is not meant to create an attorney-client relationship. In addition, any tax advice in this advisory is not intended to be written or used for the purpose of avoiding penalties that may be imposed on a taxpayer.

If you have questions about this publication, other legal issues or need lawyer referrals, please call GLAD’s Legal InfoLine weekdays between 1:30 and 4:30p.m. at 800-455-GLAD or 617-426-1350.

¹ Currently, same-sex couples can marry in 5 states (Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont) as well as in the District of Columbia. Same-sex couples could and did marry in California between June 16, 2008 and November 4, 2008. In addition, New York, Rhode Island, Maryland and New Mexico all recognize the validity of marriages of same-sex couples, even though they do not currently license marriages for such couples.

Legal Questions

What exactly did DOJ announce? How does this announcement affect the pending DOMA cases?

DOJ has informed Congress that the Administration has made the determination that laws discriminating against a person based upon his or her sexual orientation should be held to a higher standard of review (“heightened scrutiny”) in equal protections claims under the federal Constitution. Because Section 3 of DOMA fails this higher standard of review, the Administration believes that it is unconstitutional. Thus, the Administration will no longer defend Section 3’s constitutionality in those appellate circuits where it believes that heightened scrutiny has not been foreclosed, including in GLAD’s case [*Pedersen v. O.P.M.*](#) in the District of Connecticut, which is in the Second Circuit Court of Appeals.

DOJ has also notified the clerk of the First Circuit Court of Appeals that it will “cease to defend” in the two consolidated DOMA cases there: GLAD’s [*Gill v. Office of Personnel Management*](#) and the Mass. Attorney General’s case *Massachusetts v. HHS*. However, the DOJ has not sent a letter to the Congress declining to defend DOMA *in toto* in the *Gill* case, so DOJ may “cease to defend” only to the extent the court determines that heightened scrutiny is the proper standard of review.

No matter what happens, all the cases will proceed with DOJ as the attorneys for the government defendants. While the Department of Justice will remain as counsel in both *Pedersen* and *Gill*, it has made clear that it wishes to give Congress a full and fair opportunity to participate in all pending litigation. Either chamber of Congress may appoint special counsel to defend the constitutionality of Section 3 in the various litigations.

The Administration has made clear it will continue to enforce Section 3, recognizing that the judiciary will be the final arbiter of the constitutional claims raised in these cases. For more information about what this means for you as a practical matter, please see the section “Practical Questions” below.

But didn’t the Department of Justice argue the exact opposite in GLAD’s *Gill* case – that gay and lesbian individuals are not entitled to heightened scrutiny?

In *Gill*, DOJ actually argued that because of its reading of existing law in the First Circuit, rational basis (i.e. the lowest level of review) was the correct test in that Circuit. DOJ relied upon a statement in another First Circuit case, *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008), interpreting it as holding that gay and lesbian citizens were not entitled to heightened scrutiny. By relying on that case as controlling precedent in the First Circuit – something GLAD contested and which DOJ has now conceded is likely incorrect – the Department of Justice asserted that only rational basis would apply to our constitutional claims. As a result, DOJ claimed it did not need to address the question of whether heightened scrutiny is appropriate.

Is it unusual for DOJ to refuse to defend a law? Has this happened before?

This is rare, and certainly momentous, but it is well-established that DOJ will refuse to defend laws that the President deems to be unconstitutional. There is a specific law governing the

process of what happens in such circumstances, including notice to Congress so that it has the opportunity to step in to defend its interests and the law's constitutionality. 28 U.S.C. § 530D.

In *ACLU et al., v. Norman Y. Mineta*, the George W. Bush Administration chose not to defend a law prohibiting the display of marijuana policy reform ads in public transportation systems. The Clinton administration refused to defend a federal law mandating the dismissal of military personnel who were HIV-positive. The George H.W. Bush Administration would not defend a Federal Communications Commission affirmative-action program presented to the Supreme Court in the case of *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547 (1990) because it “could not withstand the exacting scrutiny required by the Constitution.” The Reagan administration refused to defend the constitutionality of the one-House veto presented to the U.S. Supreme Court in the case of *INS v. Chadha*, 462 U.S. 919 (1983).

Additionally, there is significant judicial approval of this proposition, dating back at least as far as *Myers v. United States*, 272 U.S. 52 (1926), where the United States sided with the Postmaster General in challenging a statute that limited the President's power to remove postmasters. There the Court sustained the President's view that the statute at issue was unconstitutional without any member of the Court suggesting that the President had acted improperly in refusing to abide by the statute. There is nothing unprecedented about an administration refusing to defend a law that is simply indefensible under our Constitution, as is Section 3 of DOMA.

Isn't this just politically motivated?

This was a principled legal decision that was timely given the specific circumstances. DOJ was faced with a March 11 deadline for filing a response to GLAD's *Pedersen* case in Connecticut and the ACLU's case *Windsor v. United States*, No. 10-CV-8435 (S.D. N.Y. 2011) in New York, which are both in the Second Circuit Court of Appeals. There is no court opinion in the Second Circuit even obliquely addressing the standard of review to be applied to sexual orientation classifications. As such, the President and the Attorney General for the first time had to make an independent assessment of the proper standard of review and applied the established test.

And as the Attorney General's February 23, 2011 letter to Congress made clear, each of the relevant considerations supports granting lesbian and gay individuals heightened scrutiny. Those considerations include: (1) whether the group in question has suffered a history of discrimination; (2) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's “ability to perform or contribute to society;” and in some cases (3) whether the group is a minority or is politically powerless; and (4) whether individuals “exhibit obvious, immutable or distinguishing characteristics that define them as a discreet group.” DOJ found that each one of those considerations favored being “suspicious of classifications based on sexual orientation.”

Ultimately, DOJ was in a difficult position trying to defend a law that is plainly unconstitutional. DOMA was enacted for only one reason – to hurt the families of gay men and lesbians. And such an invidious reason is not permissible under the Constitution. We are thrilled that President Obama and the Department of Justice finally agree with what we have been arguing all along – that there should not be first and second-class marriages in our country.

Will these cases reach the U.S. Supreme Court?

These cases challenging DOMA deal with important questions of equal protection principles and the role of the states vis-à-vis the federal government. Those questions have consistently been part of the Supreme Court's caseload in recent history, and, therefore, the Supreme Court will likely see these cases as important if, indeed, they are brought to them at some point in the future. It is also important to remember that Congress passed DOMA, and Congress can repeal it.

Practical Questions

Does this mean that I can now file my taxes jointly as married or receive other federal marital benefits?

No. DOMA Section 3 remains in effect until the appeal process is concluded in the DOMA litigation or the law is repealed, regardless of what position the Administration has taken. DOMA remains the law of the land and the Obama Administration has stated that it will continue to enforce it. Assuming that any of these cases actually reach the U.S. Supreme Court and are successful there, we would need to see the scope of the Supreme Court's decision before we would know whether such a victory would eliminate DOMA Section 3 entirely with regard to all federal laws. However, such a victory would, as a practical matter, signal the demise of DOMA – whether by Congress or through subsequent court action.

Please check www.glad.org/doma for developments as these cases proceed. Also, please see below more information about what you can do now to protect your interests right now.

What about immigration protections for married couples? I am a U.S. citizen married to a non-citizen same-sex spouse, and up until now, I have been unable to sponsor my spouse as a legal permanent resident.

Unfortunately, until DOMA Section 3 is conclusively overturned or repealed, U.S. citizens will still be unable to sponsor their non-citizen, same-sex spouse for legal permanent residency. Moreover, applying for such protections may put the non-citizen spouse in harm's way with regard to his or her immigration status. We highly recommend that you talk to a qualified immigration attorney for advice on your particular situation. Also, please see GLAD's [publication for bi-national couples](#) to learn more about your various options and how you can help. Please [contact us](#) if you are facing such a situation.

What can people do to protect themselves until DOMA Section 3 is conclusively repealed or overturned?

There may be reasons for couples to act now to preserve their rights in anticipation of a potential positive final ruling or repeal of DOMA Section 3. We recommend that individuals with further questions seek out a qualified attorney, and we are happy to consult with any attorneys.

What one should do must be determined on a situation-by-situation basis. For example, with respect to federal income taxes already paid for past tax years, married same-sex couples in Massachusetts who would benefit financially if their filing status were "Married Filing Jointly" or "Married Filing Separately" may want to consider amending the returns they filed as "Single" or

“Head of Household.” Refund claims must be filed within three years from the time the original return was filed or two years from the time the tax was paid, whichever is later. See *IRS Form 1040X* and accompanying instructions for more information. The IRS will likely deny the refund claim, but taxpayers then have two years from the notice of disallowance in which to file suit for their refund in federal court. A taxpayer should also consider potential downsides of taking these steps, such as an increased risk of audit, possible assessment of a tax deficiency, and the burden, expense and uncertainty of litigation.

Going forward, individuals who are married to a person of the same sex should still file their federal income tax returns as “Single” or “Head of Household” until DOMA Section 3 is conclusively overturned or repealed. Those individuals living in community property states may be subject to different rules and should consult a tax attorney.

Of course, applicability of these issues to any particular person should be determined through consultation with a tax advisor.

Are there any other DOMA challenges in progress in states where same-sex couples are able to legally marry?

In addition to GLAD’s *Gill* case in Massachusetts and GLAD’s *Pedersen* case, there are other pending cases challenging the constitutionality of Section 3 of DOMA:

- *Commonwealth of Massachusetts v. U.S. Dept. of Health and Human Services*, 698 F.Supp.2d 234 (D. Mass. 2010): The Massachusetts Attorney General has brought this challenge, arguing that DOMA violates constitutional principles of federalism. The *Commonwealth of Massachusetts* case has been consolidated with the *Gill* case and is currently pending at the First Circuit Court of Appeals.
- *Windsor v. United States*, No. 10-CV-8435 (S.D. N.Y. 2011): The *Windsor* case is currently pending in the Southern District Court of New York. In this case, the plaintiff, a widowed same-sex spouse, sued the federal government after it levied a tax on the estate of her deceased spouse, which would not have been the case absent DOMA.
- *Dragovich v. U.S. Dept. of the Treasury*, --- F.Supp.2d ---, 2011 WL 175502 (N.D. Cal. 2011): In this case, multiple plaintiffs have challenged Section 3’s application to California’s retirement system’s long-term care insurance benefits, preventing the extension of such benefits to a same-sex spouse. The *Dragovich* case is currently pending in the Northern District Court of California.
- *Golinski v. Office of Personnel Management*, No. 10-CV-0257 (N.D. Cal. 2011): The plaintiff in this case has requested an order directing the U.S. Office of Personnel Management (OPM) to obey prior rulings by Ninth Circuit U.S. Court of Appeals Chief Judge Alex Kozinski awarding spousal health insurance benefits to Ninth Circuit judicial attorney Karen Golinski. This case is currently pending in the Northern District Court of California.

GLAD encourages individuals considering cases to contact any of the legal organizations dedicated to eradicating discrimination against LGBT people, including GLAD, the ACLU’s National LGBT Project, Lambda Legal, and the National Center for Lesbian Rights.

Gay & Lesbian Advocates & Defenders (GLAD) is the leading legal rights organization in New England dedicated to ending discrimination based on sexual orientation, HIV status and gender identity and expression. Through impact litigation, education and public policy work, GLAD seeks to create a better world that respects and celebrates diversity—a world in which there is equal justice under law for all. To support GLAD’s work, please visit us at www.glad.org

If you have questions about this or any other LGBT/HIV legal topic, contact GLAD’s Legal InfoLine, 1:30-4:30pm, Monday-Friday at 800-455-GLAD (4523).