

Is DOMA Doomed?

By Cody Perkins

The controversial Defense of Marriage Act (DOMA) was passed by Congress and signed into law by President Clinton on September 21, 1996. DOMA is codified at 1 USC section 7, and in relevant part states that the federal government will interpret the word “marriage” only as “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.” 1 USC § 7(3). It also says that no state can be forced to recognize a same-sex marriage from any other state. 1 USC § 7(2). According to the General Accounting Office, there are 1,138 federal laws that distinguish between married and unmarried persons. Although no states were conducting same sex-marriages in 1996, the passage of DOMA ensured that, regardless of future state action, legally married same-sex couples would not be seen as “married” for the purposes of those federal laws.

On February 23, 2011, President Obama instructed the Department of Justice (DOJ) to cease defending Section 3 of DOMA in federal courts. The Administration stated that the “rational basis” standard of review that has been used to determine the constitutionality of DOMA in the past was insufficient, and that laws discriminating based on sexual orientation should be held to a heightened standard of review. As a result, while the Administration will continue to enforce Section 3 of DOMA (meaning that federal agencies will continue to comply with the law as written), the DOJ will no longer be defending its constitutionality in courts that have not applied a higher standard than rational basis review. The House of Representatives’ Bipartisan Legal Advisory Group (BLAG) has directed the House Office of General Counsel to replace the DOJ in defending the constitutionality of Section 3 in the federal courts.

There are a number of cases challenging the constitutionality of Section 3 that are currently pending in federal courts. The most prominent challenge, and the one most likely to reach the Supreme Court, is *Gill v. Office of Personnel Management*. This case was originally brought in the United States District Court of Massachusetts by eight couples and three individuals who had been legally married in the state, and who had been denied federal benefits given to married couples. On July 8, 2010, District Judge Tauro granted summary judgment for the plaintiffs, holding that Section 3 of DOMA was unconstitutional on “rational basis” grounds, although failing to address whether heightened scrutiny would in fact have been warranted. That same day, in *Massachusetts v. United*

States Department of Health and Human Services, Judge Tauro again held that Section 3 is unconstitutional, but this time under the Tenth Amendment and the Spending Clause (Article 1, Section 8, Clause 1 of the Constitution). Judge Tauro subsequently granted a stay of both decisions until the conclusion of the inevitable appeals process, which the DOJ began in October 2010 but has now been taken over by BLAG. *Gill* has since been combined with multiple other cases dealing with the issue, including *Massachusetts v. United States Department of Health and Human Services*. A three-judge panel of the First Circuit Court of Appeals could begin to hear oral arguments in *Gill* as soon as early February, and is likely to come to a decision before the end of the year. Once a decision is rendered, it is likely that the losing party will petition the Supreme Court for certiorari, and if cert is granted there could be a final decision on the constitutionality of Section 3 of DOMA as soon as 2013.

In addition to challenges in the courts, a bill known as the “Respect for Marriage Act” (RMA) (H.R. 1116, S. 598) is currently making its way through Congress. The bill, first introduced in 2009 as H.R. 3567, and newly introduced in both the House and the Senate on March 16, 2011 by Representative Jerrold Nadler (D-NY) and Senator Dianne Feinstein (D-CA) respectively, would amend Section 3 of DOMA to read that, for federal purposes, individuals would be considered married if they were legally married in the state in which the marriage was entered into, or were legally married elsewhere but could have been married in that state. This means that same-sex couples who are legally married in states that have adopted same-sex marriage would be treated as married by the federal government, and would receive the benefits and protections of those 1,138 federal laws that distinguish between married and unmarried persons. RMA would also repeal Section 2 of DOMA (28 USC § 1738C), which currently prohibits any state from being required to recognize same-sex marriages entered into in another state.

The Act is supported by a number of senators and representatives who voted for DOMA in 1996, and have since change their minds (including Senator Patrick Leahy (D-VT), chairman of the Senate Judiciary Committee, and every other Democratic member of the Committee). The Act also enjoys outside support from President Clinton, who originally signed DOMA into law, and former Representative Bob Barr, who originally authored and sponsored DOMA in 1996. Although reactions to the bill have largely been divided along party lines, RMA does have some bipartisan support, receiving its first Republican co-sponsor in Representative Ileana Ros-Lehtinen (R-FL) in

September. In November, RMA passed through the Senate Judiciary Committee with a 10-8 vote (Democrats for, Republicans against).

There are numerous arguments on either side regarding the benefits and detriments of RMA. Those opposed to the Act argue that DOMA serves a legitimate moral purpose in defining marriage as one man and one woman, and that it serves to protect children. In addition, opponents of RMA cite the considerable bipartisan support it enjoyed when passed in 1996. Some, such as Senator John Cornyn (R-TX), have also argued that repeal of DOMA would increase the nation's debt by putting more pressure on Social Security and requiring an expansion in spending and benefits. Supporters of RMA have been quick to note, in response, that as recently as October, House Republican leaders authorized up to \$1.5 million to defend DOMA in court. In addition, supporters cite a 2004 report from the Congressional Budget Office indicating that nationwide adoption of same-sex marriage would save close to \$1 billion a year through at least 2014.

Those in favor of RMA also argue that DOMA is discriminatory and unconstitutional and therefore has no place in an equal society. They note that, although no state had adopted same-sex marriage when DOMA was passed in 1996, public opinion has changed considerably and there are now seven states allowing same-sex marriage, and over 131,000 legal same-sex marriages in the United States. To continue to enforce DOMA, they argue, denies legally married couples equal rights, will have detrimental future effects on those couples' children and families, and is counter to the federal precedent of deferring to states' own definitions of marriage.

It is unlikely that Senate Majority Leader Harry Reid (D-NV) will bring RMA to the Senate floor anytime soon, since Democrats do not have the 60 votes required to invoke cloture to override a filibuster. The House version of the Act has been referred to the House Judiciary Committee, but it is unclear when or if they will bring it to a vote. Some have accused Democrats of playing politics and pandering to their base in bringing RMA forward now, given the upcoming presidential election. Democrats have responded by asserting that there is no wrong time to enact justice. However, with a Republican majority in the House, it is likely that the best chance to amend Section 3 of DOMA will not be this act, but rather will be the fight in the courts in cases such as *Gill*. Although timing and momentum are key, the growing acceptance of same-sex marriage in public opinion and the increasing number of states conducting these marriages, along with the obvious Equal Protection arguments, could lead to an overturn of Section 3 of DOMA at the Supreme Court level.

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