



***Gill v. Office of Personnel Management and
Commonwealth of Massachusetts v. Department of
Health and Human Services:***

**Frequently Asked Questions Regarding the Federal
District Court's Rulings Overturning DOMA Section 3
(the federal definition of marriage for federal program purposes)**

This document attempts to answer frequently asked questions regarding the Massachusetts federal district court's July 8, 2010 decisions in the above cases, ruling that Section 3 of the so-called Defense of Marriage Act ("DOMA") is unconstitutional. It is intended to provide general information only and cannot provide guidance or legal advice as to one's specific situation. Moreover, these cases are ongoing and not static; therefore, this document is based upon the information that is available to us at the time this document was last updated.

For guidance on your particular situation, you must consult a lawyer. You should not act independently on this information. 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, or for recommending to another party any matters addressed herein. For tax issues, you should consult a tax advisor.

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.

To learn more about the plaintiffs in *Gill* and the background of these DOMA Section 3 challenges, visit <http://www.glad.org/doma/>.



THE CASES AND DECISIONS

What exactly is GLAD's *Gill v. Office of Personal Management* case about?

The *Gill* case was filed by individual Massachusetts plaintiffs who seek to end the federal government's discriminatory refusal to acknowledge their existing marriages. Some have been denied social security protections, or job protections, typically available to married couples through federal law. Others have been forced to pay extra income taxes because DOMA Section 3 forbade them from filing their federal income taxes as married filing jointly. GLAD argues that the federal government's different treatment of identically-situated married couples – that is, providing federally-based marital protections to everyone who is married except gay and lesbian married persons – violates the equal protection principles embodied in the Fifth Amendment of the U.S. Constitution.

How do GLAD's case and the Attorney General's case differ?

In a separate but related case, *Commonwealth of Massachusetts v. Department of Health and Human Services*, the Massachusetts Attorney General, on behalf of the Commonwealth of Massachusetts, challenges the reach of the power of the federal government when it intrudes on matters of traditional state sovereignty such as the creation of marital statuses. These questions invoke the Tenth Amendment of the U.S. Constitution, which protects states' rights, and the limits of Congressional power under the Spending Clause. In addition, the Attorney General's case emphasizes how DOMA Section 3 forces Massachusetts to violate the equal protection rights of its own citizens.

The arguments and court decision in GLAD's *Gill* case were focused on the equal protection principles that constrain the federal government and that are found in the Due Process guarantees in the Fifth Amendment of the Constitution. In addition, the GLAD case emphasized how DOMA Section 3 was an intrusion by the federal government – for the very first time – into an area that, subject to constitutional constraints, has traditionally been understood as the prerogative of the States – that is, the creation of marital statuses.

What was the precise result of the cases?

As a matter of procedure, in both cases Judge Tauro granted the Plaintiffs' Motion for Summary Judgment and, at the same time, denied Defendants' Motion to Dismiss. That means that the Court – all at once – denied the federal government's request that the cases should not move forward and should be dismissed, and he granted the plaintiffs' request that the case should end here with judgments in favor of the plaintiffs. In effect, the Court's rulings end the cases at the district court level. Having lost both cases, the federal government now has to decide whether it will appeal Judge Tauro's rulings to the United States Court of Appeals for the First Circuit, which sits in Boston.



As a matter of substance, and most simply, Judge Tauro ruled that Section 3 of DOMA violates the United States Constitution and therefore cannot continue to be applied as to the plaintiffs in the two cases.

There is one small caveat. In the case filed by GLAD, the Court did dismiss one single claim on a technicality – the claim by plaintiff Dean Hara that DOMA unconstitutionally prevented him from enrolling in a health plan for federal employees and their surviving spouses – because, the Court said, he did not have the right to sue in this particular court until he has received a final answer to another legal question pending in another court in Washington, D.C.

Who is the judge that issued these decisions?

The judge who was randomly assigned to hear the cases is Joseph L. Tauro. He is a well-respected jurist who was appointed to the District Court by President Richard M. Nixon in 1972.

Are these cases “marriage cases”?

No, they are not. *Gill* involves gay people who are already married, and the Commonwealth’s case involves federal interference with Massachusetts’ determination of the marital status of married gay people. As such, the availability of marriage to same-sex couples is not an issue in these cases. These cases do not ask the courts to recognize a national right for same-sex couples to marry, nor do they ask the courts to find state law bans on marriage unconstitutional. So, they are not “marriage cases” in the way one would ordinarily think of that term.

If successful, these cases will not decide whether individual states can prohibit same-sex couples from marrying. Instead, these cases ask the courts to declare that, if a state does decide that same-sex couples may marry, the federal government must respect the state’s decision and treat those couples the same as other married couples when it comes to federal marital protections and responsibilities.

Do you expect the United States to appeal?

It is up to the U.S. Department of Justice to decide if it wants to appeal Judge Tauro's rulings.

We are looking forward. If the Department of Justice decides to appeal, it gives us the chance to argue in front of a higher court with a broader reach. As it stands, the rulings for our plaintiffs do not affect married same-sex couples outside of Massachusetts. Further proceedings provide an opportunity to address the harms DOMA Section 3 causes to already married couples across the country.



We think there is no legitimate basis for the federal government to provide marital protections and responsibilities for all married couples except married couples who are gay and lesbian. For our nation’s entire history, the federal government has deferred to state determinations that a person is married for purposes of federal benefits. Congress changed those long-standing rules just for same-sex couples in 1996, when it looked like same-sex couples might begin marrying in Hawaii. Judge Tauro addressed every single argument advanced in support of DOMA – including the rationales advanced by the Congress in 1996 – and rightly found them all implausible and irrational as reasons for DOMA’s discrimination against married same-sex couples.

Will these decisions take effect immediately, or will they only take effect after appeals are concluded?

In all likelihood, these decisions will not take effect until after any appeals in these cases have concluded. The plaintiffs have not received final judgment in these cases, which should come shortly. The judgments will then be automatically “stayed” (or delayed from taking effect) for fourteen days, within which time we expect the Department of Justice to ask that the stay be extended until any appeals are completed. In these types of cases, these requests are usually granted.

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

First of all, Congress passed DOMA, and Congress can repeal it. The Respect For Marriage Act, HR 3567, which would accomplish the repeal, is currently pending in the House with over 100 co-sponsors.

Whether these cases reach the Supreme Court likely depends on how they fare in the First Circuit Court of Appeals in Boston. These cases 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.

OTHER ISSUES

How is *Gill* different from *Perry v. Schwarzenegger* in California?

Gill addresses Congress’s different treatment of already married couples, where only married same-sex couples are denied federal rights and protections for their marriages across the board, while the *Perry* case addresses a state’s denial to same-sex couples of the right to marry in the first place. The *Perry v. Schwarzenegger* case invokes the U.S. Constitution to vindicate the right of same-sex couples to marry in California. Unlike *Gill*, *Perry* is a “right to marry” case that could result in a change to California’s marriage



laws. *Gill* challenges the federal government's non-recognition of already married couples for purposes of legal protections and obligations offered by the federal government. It is not a challenge to state marriage laws.

The *Gill* case involves the equal protection rights of already married same-sex couples to have United States government agencies treat their marriages in the same way they treat all other marriages in the nation. For our nation's entire history, the United States has always respected state determinations of marital status for purposes of assessing eligibility for federal protections where marriage is a factor. Indeed, despite widely varying state marriage restrictions based on age, closeness of blood relationship, race and other factors, the only exception in the history of our nation has been the enactment of DOMA in 1996, when it looked like same-sex couples might begin to marry in Hawaii.

Can same-sex couples in Massachusetts begin applying for federal marital rights and protections right now?

No. The judgments – when they enter – will likely be “stayed” (or delayed from taking effect) pending appeal. Married couples affected by DOMA will likely be unable to benefit from these decisions until the appeals process is completed. Please check <http://www.glad.org/> for developments as these cases proceed.

That being said, even assuming that either or both of these cases actually reach the U.S. Supreme Court and are successful there, it is still unclear 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.

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 continue to 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 harms 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 at <http://www.glad.org/rights/publications/> to learn more about your various options and how you can help.

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. GLAD's Legal InfoLine



and publications at <http://www.glad.org/doma/> can provide some information on the subject. We are also happy to consult with attorneys, and individuals should be certain to obtain qualified legal opinions from their own counsel.

What one should do has to 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.

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

Some people have asserted that the U.S. Department of Justice “threw the case” by abandoning the 1996 Congressional rationales. Is there any truth in that?

Judge Tauro’s opinions were thorough. He addressed *all* of the rationales (and permutations of the rationales) advanced by Congress in support of DOMA in 1996, even the ones the government acknowledged were discriminatory and did not attempt to defend, as well as the new reasons the government advanced in the litigation. The Congressional rationales simply don’t make sense in this context. See Art Leonard, “DOMA Section 3 Held Unconstitutional by Federal District Judge in Massachusetts,” *Leonard Link*, <http://newyorklawschool.typepad.com/leonardlink/2010/07/doma-section-3-held-unconstitutional.html> (July 8, 2010); Adam Bonin, “Federal Court holds DOMA Unconstitutional,” *Daily Kos*, <http://www.dailykos.com/storyonly/2010/7/8/882745/-Federal-Court-Holds-DOMA-Unconstitutional> (July 8, 2010).

Some of the academics supporting DOMA in 1996 and other anti-marriage activists claim that the Court didn’t give weight to the “responsible procreation” argument, noting that the Obama administration expressly disavowed that argument. The administration had good reason to disavow the argument – namely, the overwhelming and irrefutable medical, psychological and social welfare consensus that children raised by gay and lesbian couples are just as likely to be well-adjusted as those raised by heterosexual parents. In any case, it is a red herring. Judge Tauro assumed, for purposes of

constitutional analysis, that the Congress in 1996 believed that children would be better off with their biological mothers and fathers. But even assuming that to be true, the constitutional question is only whether denying federal marital protections to married same-sex couples advances the federal government's interest – here, encouraging heterosexual couples to procreate and raise their children within a marriage. Judge Tauro rightly concluded that DOMA Section 3 would not encourage heterosexual couples to marry and raise their children in marriage since it operates simply to deny married gay and lesbian couples federal marital protections. There is simply no rational connection between the two.

Doesn't the states' rights argument in the Commonwealth's case bolster the right of states like California to deny marriage equality to same-sex couples?

No. The Tenth Amendment guarantees involved in the Commonwealth's case concern the relationship between the federal government and the states and ensure that the federal government does not invade state prerogatives. The federal government does not marry people; states do.

At the same time, when a state exercises its powers, as it does in setting criteria for marriage licensing, it must still comply with the equality guarantees of the federal Constitution, which is the supreme law of the land. A state that denies equal protection of the laws or withholds a protected liberty without justification violates those equality protections. The Supreme Court's decision in *Loving v. Virginia* striking down state laws barring marriages of people of different races made that clear. Whether state laws like California's that bar marriages of people of the same sex likewise violate the U.S. Constitution's guarantee of equality and liberty is an entirely different legal question from whether the federal government can pick and choose among groups of married people and respect only some of them.

In other words, these DOMA rulings do not shore up state marriage laws and amendments that ban marriage for gay and lesbian couples. To the contrary, the rulings simply say that Congress cannot override a state's determination that a person is married by making them unmarried for purposes of all federal rights and protections. While states (as opposed to Congress) may regulate marriage, they must still comply with the equality and liberty guarantees of the federal Constitution when doing so.

Do the decisions invalidate Section 2 of DOMA?

No. Section 2 of DOMA purports to allow states to choose not to recognize marriages of same-sex couples performed in other states. Neither of the DOMA cases spreads marriage equality into states that have not chosen to authorize marriage for same-sex couples. Both cases only address the relationship of the federal government to people who are already married by their home state of Massachusetts. A further victory in *Gill* and/or the Commonwealth's case will not change any other state's marriage laws.



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

No, there are no other DOMA cases that we know of pending in the five marriage equality states or the District of Columbia. The *Gill* and *Commonwealth of Massachusetts* cases are well structured, amply lawyered, and now moving forward. These cases are complex and require careful planning, so GLAD believes a proliferation of new, uncoordinated DOMA cases would not be helpful at this time. We would encourage individuals considering cases to contact any of the legal organizations dedicated to eradicating discrimination against gay people, including the ACLU's National LGBT Project, Lambda Legal, and the National Center for Lesbian Rights.

Who are the attorneys in these cases?

The *Gill* plaintiffs are represented by Gay & Lesbian Advocates & Defenders, including Civil Rights Project Director Mary L. Bonauto, Legal Director Gary D. Buseck, Staff Attorney Janson Wu, and Staff Attorney Samuel Bickett. Co-operating counsel on the case include Foley Hoag LLP (Boston), Sullivan & Worcester LLP (Boston), Jenner & Block LLP (Washington, DC), and Kator, Parks & Weiser, PLLC (Washington, DC).

The Commonwealth of Massachusetts is represented by the Office of the Massachusetts Attorney General Martha Coakley.

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 <http://www.glad.org/>.