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“DOMA” Means Federal Discrimination Against Married Same-Sex Couples

GLAD CHALLENGES DOMA § 3

On March 3, 2009, GLAD filed a lawsuit in Federal District Court in Boston on behalf of eight married couples and three surviving spouses from Massachusetts who have been denied federal legal protections available to spouses. Two of these couples will be filing suit after receiving rejections of their amended tax returns from the IRS. Each plaintiff is currently eligible for a particular program or benefit, applied for it, and was denied that legal protection because of Section 3 of the Defense of Marriage Act (“DOMA”). You can view the Complaint [here](#).

DOMA was enacted in 1996 before any state began issuing marriage licenses to qualified same-sex couples. It has two substantive parts. Section 2 authorizes states to establish policies with respect to marriages of same-sex couples. Section 3 deals with federal discrimination and is the only portion of DOMA challenged in GLAD’s lawsuit. (Section 1 merely names the act.)

Section 3 of DOMA applies to the federal government only. It overrides a state’s determination that a same-sex couple is married and says that they are not married for purposes of all federal laws and programs, even though the federal government has always deferred to state determinations of marital status. Under this law, “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.”¹ This law requires all federal departments and agencies to disrespect the valid state-licensed marriages of same-sex couples but not other married couples. As a result, only married same-sex couples are denied all rights, protections and responsibilities associated with marriage at the federal level.

What is DOMA § 3 and Why Is It a Problem?

When people marry, as over 10,000 same-sex couples have now done in Massachusetts since 2004, and as couples have been doing in Connecticut since November 2008, they take on legal responsibilities for one another and their families.

¹ This is codified at 1 United States Code section 7. It provides:

“In determining the meaning of any act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies in the United States, the word ‘marriage’ means only 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.”

The federal government does not license marriages – only states do – but many federal programs take state-granted marital status into account in determining eligibility and the extent of coverage. Due to this unprecedented law, the federal government denies rights, protections and responsibilities to married couples of the same sex in every federal program that takes account of marital status. There are at least 1,138 federal laws in which marital status is a factor according to government studies conducted in 1997 and 2004. In another 2004 report, the Congressional Budget Office estimated the federal government would save \$1 billion each year through 2014 if same-sex couples could marry nation-wide. You can see these reports and a GLAD overview of the GAO Reports [here](#).

The federal programs to which same-sex married couples are denied access represent some of the critical legal safety nets that couples count on when they marry, as they plan their lives and futures together, as they raise children and deal with hard times, and for which they contribute their American tax dollars. These include:

- Social Security spousal protections that ground a family’s economic security while living in old age, and upon disability and death;
- protections for one spouse’s essential monetary resources and the ability to stay in the family home when the other spouse needs Medicaid for nursing home care;
- the ability to be included in a family policy of health insurance, and if receiving that family health insurance, to be free of income tax on the value of that insurance;
- the ability to use the “Married Filing Jointly” status for federal income tax purposes that can save families money;
- family medical leave from a job to care for a seriously ill spouse;
- disability, dependency or death benefits for the spouses of veterans and public safety officers;
- employment benefits for federal employees, including access to family health insurance benefits, as well as retirement and death benefits for surviving spouses;
- estate/death protections that allow a spouse to leave assets to the other spouse – including the family home – without incurring any taxes; and
- the ability of a citizen to obtain a visa for a non-citizen spouse and sponsor that spouse for purposes of citizenship.

There are two sides of the marital contract – with rights also come responsibilities – including under federal law. For example:

- Eligibility for federal student financial aid requires, for married students, an assessment of the income of both the student and his/her spouse because the married couple is rightly consolidated as a legal economic unit. Ignoring the marriage of a same-sex couple can unfairly allow a married student greater aid than would be available if his/her marriage were recognized by the federal government. Married same-sex couples would welcome having this responsibility for the recognition of their marriage.
- Public officials with hiring or supervisory authority are barred from appointing, employing, promoting or advancing their own relatives to positions within governmental agencies, whether related by blood or marriage.

Overall, DOMA Section 3 deprives tax-paying American families of the federally-created economic safety nets for married families, to the detriment of those couples and their children or other dependents. In addition, it creates a system of first and second class marriages, where some married persons receive all federal legal protections, but gay and lesbian married couples are denied them across the board, even while taking on the commitment and duties of their legal marriage vow.

People joined in civil union or in a domestic partnership are also denied these federal rights and protections, but for the reason that they are not married. The federal programs at issue were created for, and are currently available to, married families, so it is only married same-sex couples who are eligible for, but are denied these rights and protections because of DOMA Section 3.

Why Is DOMA Legally Invalid?

In GLAD's view, DOMA Section 3 is unconstitutional and should be struck down by the courts or repealed by Congress.

GLAD believes Section 3 of the law violates the federal government's promise of equal protection of the laws contained in the 5th Amendment of the United States Constitution. DOMA takes married couples and divides them into two groups – those who are respected and those who are effectively “unmarried” by operation of DOMA and are denied all federal legal protections and responsibilities. In GLAD's view, there is no adequate justification for the federal government's non-recognition of valid state marriages of same-sex couples.

DOMA Section 3 is also unprecedented because determinations of marital status are made by states and not the federal government. For the first time in our nation's history, this law requires the federal government to override a state's decision about who is married as to an entire class of marriages. DOMA Section 3 is a radical and unjustifiable departure from the division of power between the states and federal government.

Those favoring DOMA Section 3 argue that the federal government should be able to define terms for its own programs. But DOMA Section 3 is so broad that it defies any legitimate concern with implementation of any particular federal law. It also ignores that the federal government has no business making national marriage laws. That is why for over 200 years the federal government has relied on states to tell them whether a person is married or not. When a state makes a determination of a person's marital status, the Congress cannot undo that by simply claiming, as DOMA Section 3 does, that the person is unmarried. The Congress stepped out of its role and ignored its precedent and practice of deferring to states for one reason: to disrespect the marriages of same-sex couples.

What Does GLAD's Case Address?

GLAD's is filing suit on behalf of individuals and couples who, because of DOMA Section 3, have been denied legal protections for which they are currently eligible and for which they have applied.

**Federal Employees, Federal Retirees,
Surviving Spouse of Federal Employee**

Several of the plaintiffs seek spousal protections based on their employment with, or their spouse's employment with, the United States government. One plaintiff, a 21+ year employee of the United States Post Office, already receives "Self and Family" health insurance coverage for herself and the couple's two children through her job. Yet, she is unable to add her spouse to that plan, or to her vision plan, or to use her flexible spending account for her spouse's medical expenses, as other married postal workers are entitled to. Another plaintiff, a retiree from the Social Security Administration, has been denied health insurance coverage for his spouse although other retired employees may add their spouses to such coverage. Another plaintiff is the surviving spouse of a retired Member of Congress. He has been denied both health insurance and the survivor annuity (pension) normally available to surviving spouses. In each instance, the government has cited DOMA Section 3 in denying spousal benefits to the postal employee, to the retiree, and to the surviving spouse.

Taxpayers

Several of the plaintiffs have been denied spousal protections available under the Internal Revenue Code and thus pay more in federal income taxes than other similarly situated married couples in Massachusetts. In filing their federal income tax returns, each of these plaintiffs seeks to file as "married filing jointly" rather than as "single" or "head of household." One plaintiff also seeks to establish a "spousal IRA" for her spouse who cares for their children at home, as other working married people may establish such retirement accounts to provide for the well-being of their spouse. Another plaintiff seeks relief from having to pay federal income taxes on the value of the health insurance her employer (the Commonwealth of Massachusetts) provides for her spouse, just as other spouses are not required to pay income tax on such employer-provided health benefits. Each plaintiff filed an amended return with the IRS, asking to be recategorized as a married taxpayer, and requesting a refund. Each amended tax return and accompanying request for refund has been rejected by the Internal Revenue Service ("IRS") based on DOMA Section 3.

Social Security Protections

Several of the plaintiffs seek spousal protections afforded by the Social Security program. Three widowers, already distressed by the death of their spouses, seek the lump-sum death benefit normally available upon the death of a spouse to help pay for funeral costs. One of the widowers also seeks the survivor benefit, namely to substitute his deceased spouse's higher benefit for his own lower benefit, as is standard for spouses. Another retiree seeks to increase her monthly payment to the standard one-half of her higher-earning spouse's payment, as other spouses are entitled to do. Each of these plaintiffs has been denied Social Security benefits based on DOMA Section 3.

Passports

Another plaintiff seeks a passport to be issued in his correct name, which he lawfully changed as a consequence of his marriage in 2004. Invoking DOMA, the State Department has denied a request for a passport in his married name because he changed his name through his marriage, even though it accepts name changes effectuated through marriage for other married persons. **On May 27, 2009, the Passport Agency changed its policy and now does allow same-sex married couples to submit a marriage certificate as proof of a name change, provided the marriage certificate creates a way to legally change one's surname by operation of state law. As a result of this change, this issue is no longer included as part of GLAD's lawsuit.**

What Legal Remedy Does GLAD's Case Seek?

GLAD seeks a ruling that DOMA Section 3 is unconstitutional as a matter of equal protection as applied to the plaintiffs in Federal Income Tax, Social Security, federal employment benefits, and the issuance of passports. The case seeks a determination that DOMA Section 3, codified in law as 1 U.S.C. section 7, violates the United States Constitution and an injunction to stop the Office of Personnel Management, IRS, Social Security Administration and the State Department from applying the law as declared. It is GLAD's hope that a favorable ruling in these areas can be applied to other areas of federal law, and/or that such a ruling would encourage Congress to consider repealing the law.

Why Didn't GLAD Take On Other Benefits Like Family Medical Leave or Immediate Relative Visas for Non-Citizen Spouses?

The battle to end federal discrimination against married same-sex couples has to begin somewhere, and for reasons discussed below (*see* "What This case Does and Does Not Do"), GLAD believes that the battle must begin with programs where it is painfully obvious that Congress could not have been thinking of the true purposes of the programs when it blithely excluded gay and lesbian married couples. These programs show clearly that Congress was quite simply showing disdain for and disapproval of gay people.

GLAD recognizes that, as a consequence, this lawsuit is not highlighting some other harsh and heart-rending effects of Congress' callous behavior in enacting DOMA Section 3 – such as the denial of family medical leave to care for a seriously ill spouse or the right of a citizen to sponsor a non-citizen spouse for an immediate relative spousal visa. These wrongs must end, and GLAD believes that a victory in the current lawsuit will hasten the day when every aspect of DOMA Section 3 will be history. However, some claims against the federal government are simply more difficult to prepare for litigation or to prevail upon.

Particularly with respect to the hardship caused by the current unjust immigration laws, there are vibrant efforts underway in Congress that have gained traction and could pass sooner than GLAD's lawsuit could see the demise of DOMA Section 3 in the program areas being challenged. The Uniting American Families Act has more sponsors and supporters than ever, and it behooves all of us to do all we can to see that Congress passes such legislation as quickly as possible.

Why A Court Case? Why Not the Congress?

While President Obama supports the repeal of DOMA, given the current wars, economic conditions, and a host of other issues, including other LGBT issues, many political experts believe that repeal of DOMA Section 3 is unlikely to happen in the next four years. Repealing DOMA Section 3 will take time and investment in public education and lobbying, something this lawsuit will prompt regardless of its ultimate outcome. As yet, Congress does not grasp that Section 3 mandates denial of all federal legal protections to married couples of the same sex. After all, Congress passed the law eight years before there were any married same-sex couples to actually be harmed by their actions. Likewise, the public in most states has not had to grapple with the real-life consequences of DOMA Section 3. Moreover, the public also needs to understand that ending federal discrimination will not change the marriage laws in any state. It is all of our jobs to explain the harms that discrimination causes to married same-sex couples and their children and create a climate in which repeal is possible.

There are many priorities for the LGBT community that likely rank ahead of a DOMA Section 3 repeal, including the passage of the Employment Non-Discrimination Act (ENDA), a hate crimes bill, the Uniting American Families Act (UAFA), and repeal of Don't Ask, Don't Tell (DADT). Congressional Representative Barney Frank has confirmed that these are the top legislative priorities for the LGBT community. Representative Frank was a forceful critic of DOMA when he served on the House Judiciary Committee in 1996, and has continued to lead on this issue by sponsoring a number of bills to repeal DOMA Section 3 in the Congress. Representative Frank readily acknowledges that repeal of DOMA Section 3 remains a greater challenge than these other bills.

Likewise, leaders of the two national LGBT advocacy organizations, Human Rights Campaign and The Task Force, have stated that the repeal of DOMA Section 3 presents a tougher challenge that is best addressed only after hate crimes and ENDA pass first.

Of course it is important that we apply pressure to all branches of government simultaneously – and that includes Congress – to correct the injustices that DOMA, and specifically Section 3, imposes on same-sex married couples and their families and children. At the same time, the federal courts have an independent obligation to uphold the constitutional promises of equal treatment and to say when a law draws the wrong lines, as GLAD believes DOMA Section 3 does. Enforcing the equal protection guarantee means ensuring fairness for all Americans – and that includes the federal government treating all married couples the same regardless of sexual orientation. That is what this lawsuit aims to demonstrate to the courts, Congress and the general public – that the denial of valuable federal rights and benefits to validly married same-sex couples and their children is just wrong and unfair.

What This Case Does and Does Not Do.

This case only addresses DOMA Section 3. It seeks to end discrimination by the federal government against people who are validly married and ensure they are not denied rights, protections and responsibilities afforded to other married persons.

If GLAD's lawsuit is successful, then DOMA Section 3 could not be applied to federal tax laws, Social Security laws, benefits programs for federal employees, retirees and their surviving spouses, and the regulations and practices governing issuance of passports in states where people can marry. It would establish an important principle that could be used in other cases and in advocating repeal.

If a non-resident couple were married in Massachusetts or Connecticut and their home state did not recognize their marriage, then, as a general matter, a favorable result in this case will not allow them to seek federal legal protections.

By design, this lawsuit is limited to particular programs and does not seek to invalidate DOMA Section 3 in its entirety. The U.S. Supreme Court has made clear that it strongly disfavors attempts to strike a federal law in its entirety and prefers to evaluate cases with concrete examples of how a federal law as applied violates constitutional rights.

This case is only about the relationship between the federal government and a class of people who are married by their states. While the federal government must follow state determinations of marital status, states remain free to establish their own marriage policies and recognition laws. This lawsuit has no impact on any state's marriage licensing or recognition laws – whether those laws allow same-sex couples to marry or not.

This is not a case seeking a federal constitutional right to marry that would override any state's marriage law or amendment.

This case does not address Section 2 of DOMA and its "permission slip" to states to establish public policies regarding marriages of same-sex couples.

In short, if DOMA Section 3 is declared unconstitutional in GLAD's lawsuit, no state would, as a result, be required to issue marriage licenses to same-sex couples and no state would be required to recognize and respect a Massachusetts marriage of a same-sex couple.

What can I do to help defeat DOMA?

There are things you can do to help, including supporting organizations like GLAD that are fighting to end this federal discrimination.

- You can lobby your Member of Congress and Senators for enactment of ENDA, hate crimes protection, UAFAs, repeal of DADT, and the repeal of DOMA.
- If you live in a state that does not allow same-sex couples to marry, you can support your local marriage equality organization. The availability of federal rights and protections to same-sex couples should be a powerful incentive for states to reconsider restrictive amendment and laws. As the number of states that offer same-sex couples the protection of marriage and the number of married same-sex couples increase, so will the pressure to end the federal discrimination against same-sex married couples.

GLAD believes that there are sound and unsound legal strategies to challenge this federal discrimination, and that putting together a winning case will take substantial resources and expertise. GLAD strongly encourages people not to file an individual lawsuit challenging DOMA Section 3 at this time, since a loss would make it more difficult to mount a successful challenge, and to contact GLAD, Lambda Legal, the ACLU Lesbian and Gay Rights Project, and the National Center for Lesbian Rights about any legal concerns. Any lawsuit requires doing the right work at the right time.

GLAD is seeking to collect as much information as possible about the federal discrimination same-sex married couples face. If your marriage is not respected, we encourage you to call GLAD's Legal InfoLine at 800-455-GLAD (4523) to discuss your options. We encourage all married same-sex couples to fill out the "Married Couples Survey" at https://www.glad.org/marriage/federal_discrimination_survey.php.

If you have any questions about this document or have questions about LGBT or HIV legal issues, call GLAD's Legal InfoLine at 800-455-GLAD (4523). This is a free service.

If you would like information about LGBT or HIV legal issues, or need advice from an attorney who is knowledgeable and sensitive to these issues, please contact GLAD's Legal InfoLine at 800-455-GLAD (4523).

GLAD THANKS ITS CO-COUNSEL IN THIS MATTER, INCLUDING ATTORNEYS FROM THE LAW FIRMS OF FOLEY HOAG, LLP (BOSTON), SULLIVAN & WORCESTER (BOSTON), JENNER & BLOCK (WASHINGTON, D.C.), and KATOR, PARKS & WEISER, P.L.L.C. (WASHINGTON, D.C.)