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**Frequently Asked Questions Regarding The Decisions In
*Gill v. Office of Personnel Management And
Commonwealth of Massachusetts v. Department of Health and Human
Services***

Updated November 12, 2010

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 (the section that defines marriage as the legal union of one man and one woman for all federal purposes) of the so-called Defense of Marriage Act ("DOMA") is unconstitutional and the subsequent decision by the United States Department of Justice on October 12, 2010 to appeal these cases to the United States Court of Appeals for the First Circuit. 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 developing; 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 Personnel 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 benefits 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 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 the state's creation of a marital status, a matter of traditional state sovereignty. This question invokes 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, GLAD's case emphasized how DOMA Section 3 was an intrusion by the federal government – for the very first time – into the creation of marital statuses, an area that, subject to constitutional constraints, has traditionally been understood as the prerogative of the states.

What was the precise result of the decisions?

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.

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 decided in favor of the plaintiffs. 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. The Court said Mr. Hara 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.

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.

However, during the time period given to the Department of Justice (DOJ) to appeal these cases, the judge’s ruling was stayed, and, now that the defendants have filed an appeal in each of these cases, the stay will continue until the appeals process is concluded.

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. 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. *Gill* is not a right-to-marry case, since it involves people who are already married. The Commonwealth’s case involves federal interference with Massachusetts’ determination of the marital status of married gay people. 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.

Why were there two judgments, one on August 12 and one on August 18, 2010?

Knowing that a Judgment needed to enter following the court’s decision on July 8th, GLAD negotiated a Judgment and Stay package with the government that best served the interests of our clients. We were concluding those negotiations literally just as the court issued its judgment of August 12, 2010. Because our negotiated Judgment and Stay package was more comprehensive, we found it beneficial to ask the court to consider and approve what the parties had worked out. The court did that on August 18, 2010

Why did GLAD agree to a stay?

We agreed to a stay for two reasons. First and foremost, it is in our clients’ best interest. They want the certainty of knowing that their awarded Social Security payments, health insurance costs, or tax refunds are not potentially subject to repayment to the government. Only a final victory ensures that.

Secondly, we think the stay actually provides clarity for married couples around the country who are looking at their own situations and wondering whether the *Gill* decision allows them to

apply for Social Security benefits, for example, or sponsor their spouse for citizenship. The answer, even without a stay in *Gill*, is: no, not yet.

What do the appeals filed by the DOJ on October 12, 2010 mean?

As was stated above, the appeals leave in place the stays that Judge Tauro ordered, and so unfortunately DOMA Section 3 remains in force until the appeals process is concluded or until Congress repeals this law. These cases are now before the United States Court of Appeals for the First Circuit. This 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.

The next step will be for the government to file its briefs to the First Circuit Court of Appeals arguing that Judge Tauro's ruling was wrong. GLAD and the Commonwealth of Massachusetts will then file our briefs in opposition to the government, and finally the government will file reply briefs. At that point, the appeals will be scheduled for oral argument. Briefing could be concluded by the spring of 2011 with oral argument to follow by the fall of 2011.

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

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.

It is also important to remember that 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.

Issues for Couples

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

No. DOMA Section 3 remains in effect until the appeal process is concluded. Assuming that either or both 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 for developments as these cases proceed.

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 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 at 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 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.

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.

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 thoroughly addressed *all* of the rationales (and permutations of the rationales) Congress advanced in support of DOMA in 1996, whether DOJ presented them or not. DOJ acknowledged some of those rationales as discriminatory and did not attempt to defend on those grounds. DOJ did advance new rationales for DOMA in the course of 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://bit.ly/9IzIS6>
Adam Bonin, “Federal Court holds DOMA Unconstitutional,” *Daily Kos*, <http://bit.ly/cI6SHW>

The Obama administration expressly disavowed the “responsible procreation” argument, for good reason: 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 as to the creation of marital status. This is a limited and non-controversial claim: 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, and Staff Attorney Janson Wu. 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 www.glad.org