



## Defense of Marriage Act Constitutional Challenges Frequently Asked Questions

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### What did the Justice Department do?

On February 23d, Attorney General Holder announced that the Department of Justice (DOJ) would no longer defend the Defense of Marriage Act (DOMA) in cases challenging its constitutionality. He also sent a letter, pursuant to a requirement under federal law, to House and Senate leaders describing the Department's reasons for ceasing its defense of DOMA and affording Congress the opportunity to step in and defend the law if it so chooses. The Justice Department also informed the several federal courts currently hearing DOMA challenges of its new position in those cases, namely that the provision of the law barring federal recognition of lawful marriages between same-sex couples (Section 3) is unconstitutional.

### Why did the Department of Justice change its position now?

DOJ had been actively defending the constitutionality of DOMA in challenges filed in federal district courts in the First and Ninth Circuits, both of which have standing precedent that courts should review laws that discriminate against gays and lesbians under the most deferential standard, known as rational basis. The Department, until now, had simply argued that those precedents were controlling and did not weigh in as to whether that standard was appropriate. However, DOJ was about to face, for the first time, affirmatively addressing the standard of review question in cases filed in New York and Connecticut, both of which are part of the Second Circuit, which has no precedent on the issue.

Arguing for rational basis, and thus against the more rigorous scrutiny that courts have applied to characteristics like race, sex and national origin, would have required DOJ to make arguments that are contrary to the administration's policy positions about the LGBT community. Namely, the Department would have had to argue in its briefs that gays and lesbians have not been subject to a history of discrimination and that sexual orientation is relevant to a person's ability to contribute to society.

The Attorney General concluded that he could not make those arguments, that courts should apply heightened scrutiny to laws (like Section 3 of DOMA) that discriminate based on sexual orientation, and that there was no defense of the law that could survive that more rigorous review.

## Will the government still enforce the Defense of Marriage Act?

Yes, the Attorney General was clear in his announcement that the government will continue to enforce DOMA until either a definitive ruling from the courts that it is unconstitutional, or repeal of the law by Congress. Until then, lawfully married same-sex couples will continue to be denied federal recognition and the associated rights, benefits and obligations.

## What and where are the current court challenges to DOMA?

There are currently at least six cases in multiple jurisdictions across the country challenging the denial of specific federal rights and benefits to lawfully-married same-sex couples under Section 3 of DOMA:

- ***Gill v. Office of Personnel Management***. This case was brought by Gay & Lesbian Advocates & Defenders (GLAD) on behalf of a group of lawfully married same-sex couples in Massachusetts who have been denied benefits like federal employee health insurance, joint federal income tax filing, and Social Security benefits. In July 2010, a federal district judge ruled in their favor. The case is currently on appeal to the U.S. Court of Appeals for the First Circuit.
- ***Commonwealth of Massachusetts v. Department of Health and Human Services***. This case was brought by Massachusetts Attorney General Martha Coakley on behalf of the state itself, which is required to discriminate against its own married same-sex couples in administering two federally-funded programs – Medicaid and veterans' cemeteries. In July 2010, the same federal district judge ruled for the Commonwealth, and the case is now on appeal, together with the *Gill* case, to the First Circuit.
- ***Golinski v. Office of Personnel Management***. This case was brought by Lambda Legal on behalf of an employee of the Ninth Circuit whose same-sex spouse was denied federal health benefits. As part of an internal HR adjudication process, Chief Judge Alex Kozinski ruled that denying the benefits violated the court's EEO policy and ordered that they be provided to the employee's wife. The Office of Personnel Management, which administers federal employee health benefits, refused to comply and the employee filed suit in federal district court in California.
- ***Dragovich v. Department of the Treasury***. In this case, three couples enrolled in California's public employee retirement system (CalPERS) filed suit because DOMA and federal tax law prohibit CalPERS from permitting them to enroll their same-sex spouses in its long-term care insurance program.
- ***Windsor v. United States***. This case was brought by the ACLU on behalf of a New York widow who is subject to a significant estate tax burden that would not apply if her deceased spouse had been male.
- ***Pederson v. Office of Personnel Management***. This case, similar to *Gill*, was also brought by GLAD on behalf of a group of Connecticut, Vermont and New Hampshire married same-sex couples who have been denied specific federal benefits. The case is currently in federal district court in Connecticut.

## **What impact will this have on DOMA litigation?**

The Justice Department will remain a party to the cases and continue to represent the interests of the United States, but will inform the courts that it believes that Section 3 is unconstitutional. DOJ lawyers have already informed the courts in the six current DOMA challenges of this new position and some of those courts have already issued orders altering briefing schedules and seeking additional information. And, as described below, Congress now has the opportunity to intervene in these cases.

## **What will Congress do now?**

Federal law lays out a path by which the House, Senate or both can step in to defend a law that the Department of Justice will not. The statute requiring DOJ to notify Congress contemplates that the House and Senate may intervene “separately or jointly.” Laws governing the Senate Legal Counsel’s office require the Senate to pass a resolution directing the Counsel to intervene or appear as *amicus curiae* (“friend of the court”) on behalf of the Senate or its officers. The Counsel must notify Senate leadership if he believes intervention is in the interest of the Senate and that notice must be published in the Congressional Record.

There is no law, however, requiring the House to pass a resolution authorizing intervention or laying out any other formal steps. Under the House Rules, the Speaker must consult with the Bipartisan Legal Advisory Group (consisting of himself, the Majority Leader and Whip and the Minority Leader and Whip) regarding whether the House should take legal action.

According to recent press reports, Speaker Boehner and Majority Leader Cantor anticipate that the House will intervene to defend DOMA. It remains unclear, however, if a vote of the full House on the issue will be held. (As noted above, such an action is not required for the House General Counsel to intervene in litigation.) In the Senate, while Majority Leader Reid is unlikely to bring forward a resolution authorizing the defense of DOMA, Senate Republicans may attempt to offer such a resolution as an amendment to a moving vehicle and force a vote.

## **Can other groups intervene to defend DOMA?**

Possibly. If Congress chooses not to intervene to defend the law, or even if it does, right-wing groups may also seek to intervene in the DOMA challenges. However, while Congress would appear to have an interest in the litigation and federal courts are quite likely to permit the House and/or Senate to step in, it is less likely that a third-party group would be allowed to become a party to the cases. Parties to a federal lawsuit must have standing to sue, that is, they must have suffered a concrete, particularized injury. It would be difficult for a group such as Alliance Defense Fund or the National Organization for Marriage, for example, to demonstrate that they meet that standing threshold.

## **Is there precedent for the Department of Justice not to defend a federal law?**

As a matter of policy, the Justice Department defends Acts of Congress, even if the administration disagrees with them, so long as reasonable arguments can be made in their defense. However, there have been many instances in the Department’s history where it has determined that a law is unconstitutional and it cannot defend it. A federal law requires the Attorney General to notify Congress of its decision in ample time for the House and/or Senate to take up the defense of the law.

Such notifications have occurred at least 15 times since 2004, and there have been numerous examples over the years of the Justice Department refusing to defend duly-enacted laws. For example:

- In 1976, Nixon Solicitor General Robert Bork argued in *Buckley v. Valeo* that the provision of the Fair Election Campaign Act (FECA) that allowed the President and Congress to each appoint members of the Federal Election Commission (FEC) was unconstitutional, leaving the FEC to defend itself on that point. But he also jointly filed a brief with the FEC defending other parts of FECA. (The Supreme Court agreed with his opinion about the appointment of FEC members.)
- In 1983, Reagan Solicitor General Rex Lee argued in *INS v. Chadha* against the constitutionality of Congress's grant to itself of a "legislative veto," specifically regarding Justice Department decisions to delay deportations. (The Supreme Court agreed with him.)
- In 1990, stepping in for George H.W. Bush's Solicitor General Ken Starr (who had recused himself), then-Deputy SG John Roberts refused to defend FCC policies, backed by Congress, providing minority broadcasters preference in obtaining licenses, in *Metro Broadcasting v. FCC*. (The FCC defended itself, however, and the Supreme Court upheld the preferences.)
- In 2004, Solicitor General Paul Clement refused to defend a federal law prohibiting mass transit agencies that receive federal funds from permitting ads on buses and subways supporting medical marijuana. Clement concluded that the law violated the First Amendment and that the government had "no viable argument to advance."