

What Does the Department of Justice Defense of Marriage Act (DOMA) Announcement Mean for Immigration Cases?

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Note: This is a practice alert designed primarily to assist immigration attorneys in understanding recent developments in DOMA litigation. Nothing in this alert should be construed as legal advice. If you are not an attorney, you should not file any immigration papers without consulting a qualified attorney.

BACKGROUND

The Defense of Marriage Act

U.S. Citizenship and Immigration Services (USCIS) and the Board of Immigration Appeals (BIA) have longstanding rules that recognize marriages for immigration purposes, so long as they are valid in the jurisdiction where celebrated and the state of domicile or intended domicile. However, in 1996, Congress passed the Defense of Marriage Act (DOMA), which defines marriage for all federal purposes as the legal union between one man and one woman. As a result, applications for immigration benefits based on a marriage of two persons of the same sex have uniformly been denied.

The DOMA Challenges

Gay & Lesbian Advocates & Defenders (GLAD) – the Boston-based legal organization – has filed two law suits challenging DOMA. The case that is further along procedurally is *Gill v. OPM*, which challenges on equal protection grounds the denial of federal benefits to couples who married in Massachusetts.¹ The Massachusetts District Court applied the rational basis standard of review and found that DOMA could not withstand even this deferential test, and on July 8, 2010, the judge declared Section 3 of DOMA unconstitutional. In a companion case, *Massachusetts v. U.S. Dept. of Health & Human Services*, brought by the Massachusetts Attorney General, the same judge struck down Section 3 of DOMA as violative of the Tenth Amendment and Spending Clause.²

Despite pressure from lesbian, gay, bisexual, and transgender (LGBT) rights activists, the Department of Justice (DOJ) appealed the district court decisions in *Gill* and *Commonwealth*. The two appeals were consolidated and are currently pending in the First Circuit Court of Appeals. The district court decisions have been stayed pending appeal.

Subsequent to the *Gill* decision, GLAD filed another DOMA challenge on behalf of couples married in Connecticut, Vermont, and New Hampshire in the District Court of Connecticut. The American Civil Liberties Union (ACLU) also filed its own DOMA challenge in New York on behalf of a widow whose deceased spouse was also a woman. Both cases were filed in November 2010, and any appeals will be heard by the Second Circuit Court of Appeals.

There has also been ongoing litigation in California over Proposition 8, which amended the state constitution to forbid marriages between same-sex couples. The California case, *Perry v. Brown*, is a

¹ *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010).

² *Massachusetts v. U.S. Dept. of Health & Human Services*, 698 F. Supp. 2d 234 (D. Mass. 2010).

right-to-marry case seeking to end a state law ban on marriage and is not a DOMA case challenging Congress' refusal to recognize existing state-licensed marriages.³ The plaintiffs claim that the state's denial of marriage violates both the equal protection and due process clauses of the Fourteenth Amendment. In *Perry*, the district court found that it is unconstitutional to limit marriage to opposite sex couples. That case was appealed to the Ninth Circuit, which punted the case back to the California Supreme Court to address an issue of standing. Significantly in *Perry*, both the California governor and attorney general decided not to defend Proposition 8, and thus the only defendants in the case were private organization interveners who oppose marriage recognition.

DOJ's February 23, 2011, Announcement

As required by law, when the President concludes that a law is unconstitutional, the Attorney General notifies Congress by letter of the President's decision and invites Congress to step in and defend DOMA. On February 23, 2011, [Attorney General Eric Holder sent a letter](#) to the Speaker of the House stating that DOJ would not defend DOMA in the Connecticut and New York cases (AILA Doc. No. 11032830).⁴ DOJ reasoned that it was justified in defending DOMA in the First Circuit because, in its view, there was binding precedent in that Circuit, which stated that sexual orientation cases should receive rational basis review.⁵ Attorney General Holder went on to explain that there is no precedent in the Second Circuit regarding the appropriate standard of review, and that DOJ had determined that sexual orientation-based cases should receive "heightened scrutiny," rather than rational basis review. The Attorney General stated that DOMA would not survive heightened scrutiny, and that DOJ, therefore, could not defend the Second Circuit cases. Although briefing was due in *Gill* and *Commonwealth* on March 1, 2011, DOJ subsequently announced that it would also not defend those cases, at least to the extent that the court determines that heightened scrutiny applies.⁶

The importance of the President's and Attorney General's announcement that Section 3 of DOMA is unconstitutional cannot be overstated. At the same time, however, it is important to bear in mind that the decision on what standard of review applies in sexual orientation cases and whether DOMA can withstand constitutional scrutiny is ultimately a decision for the courts.⁷

Probable DOMA Defense by Congress

It is very likely that the House of Representatives will step forward to defend DOMA. In fact, House Speaker John Boehner and House Majority Leader Eric Cantor recently announced that the House would probably intervene and defend DOMA's constitutionality.⁸

IMPACT ON IMMIGRATION CASES

³ *Perry v. Brown*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

⁴ See AILA Doc. No. 11032830, <http://www.aila.org/content/default.aspx?docid=34956>

⁵ See *Cook v. Gates*, 528 F.3d 42, 60 (1st Cir. 2008).

⁶ See <http://www.glad.org/uploads/docs/cases/gill-v-office-of-personnel-management/doj-letter-re-ma-doma-cases-02-2011.pdf>

⁷ For more information on the DOMA challenges, see <http://www.glad.org/uploads/docs/publications/doma-doj-faq.pdf>.

⁸ See <http://www.politico.com/news/stories/0311/50682.html>

DOMA Will Still Be Enforced

The Attorney General's letter explained in no uncertain terms that, pending either legislative repeal of DOMA or a "final judicial decision," DOMA is still the law of the land and will still be enforced. Thus, until we hear otherwise, we must assume that U.S. citizens (USCs) and lawful permanent residents (LPRs) who file I-130s on behalf of their foreign same-sex spouses will still see the I-130s denied. Likewise, we must assume that applications for cancellation of removal, fiancé/ee visas, and waivers dependent upon a spousal relationship will be denied.

In the Extremely Unlikely Scenario that No One Intervenes in the *Gill* Appeal

While it seems extremely likely that someone will step in to defend *Gill*, DOJ has stated that it will remain in the case and defend the named defendants. If the *Gill* and *Commonwealth* appeals succeed in Massachusetts, there will likely be Supreme Court review, resulting in a nationwide ruling on the constitutionality of DOMA's marriage definition.

The Possibility of "Abeyance"

In late March, there were [reports](#) that USCIS was holding marriage-based cases for lesbian and gay couples in abeyance (AILA Doc. No. 11032842).⁹ Unfortunately, by March 30, 2011, USCIS changed course and announced that applications were no longer on hold.¹⁰ While immigration advocates continue to push the Administration for a broad abeyance policy, as of March 30, 2011, we must assume that I-130s filed by same-sex spouses will be denied.

Who Should Marry Now?

An analysis of the possible benefits, as compared to the possible risks, that could be derived from marriage between a USC or LPR and a foreign national is necessary.

It is important to remember that any possible federal benefits from marrying still remain theoretical. For example, no one to date has received a U.S. immigration benefit based on a marriage to a lesbian or gay partner, and neither DHS nor DOJ has announced any change in their current policies of non-recognition of such marriages.

Before the Executive branch's shift on DOMA, it seemed unlikely that bi-national couples would derive a tangible benefit from entering into a state-sanctioned marriage. With DOJ taking a public stance that Section 3 of DOMA is unconstitutional, it is easier to envision successful arguments that marriages should be recognized in the immigration context.

While it remains to be seen whether DOMA will be repealed or struck down, this sea change in DOJ's position on DOMA means, for many couples, that the potential benefits of being married to a USC or LPR are greater than the potential detriments.

These are examples of how marriage could be beneficial now in an immigration context:

⁹ See AILA Doc. No. 11032842, <http://www.aila.org/content/default.aspx?docid=34968>, and *Federal agency halts green-card decisions for some gay immigrants*, Washington Post, http://www.washingtonpost.com/politics/federal-agency-halts-green-card-decisions-for-some-gay-immigrants/2011/03/28/AFcClErB_story.html?hpid=z2

¹⁰ See *Immigration Official: "The Hold Is Over," Metro Weekly*, <http://metroweekly.com/poliglot/2011/03/immigration-official-the-hold.html>

- *Removal Proceedings*: If a foreign national is in removal proceedings, the existence of a USC spouse may support an argument for prosecutorial discretion to administratively close the case or an argument for a long continuance until federal courts decide the DOMA question. Please note, however, that if the couple marries while in removal proceedings, the burden of proof on the bona fides of the marriage is greater.
- *Asylum Seekers*: Marriage to a lesbian or gay spouse could be an important piece of evidence of an applicant's sexual orientation.
- *Undocumented Individuals*: If a foreign partner is undocumented, there is nothing to lose by marrying a USC or LPR partner. If the laws change, marriage may provide a future defense should removal proceedings be instituted, such as cancellation of removal, and would not add any risk to the situation the undocumented person is already in, provided no steps are taken to disclose the marriage to federal agents.

These are examples of how marrying now could be beneficial in the future in an immigration context:

- *Marriage Recognition through the End of DOMA*: If DOMA is struck down by the Supreme Court or repealed by Congress, married couples (at least in marriage recognition states) will be able to apply for immigration benefits. Since the foreign spouse who is married to a USC for less than two years is granted only conditional resident status and must later apply to have the conditions removed, there may be an advantage to marrying sooner rather than later.¹¹
- *DOJ and/or DHS Change Their Current Position on Enforcing DOMA*: Advocacy efforts are underway to encourage DOJ and DHS to hold in abeyance, that is to neither approve nor deny, marriage-based petitions by same-sex couples, until there is a final resolution of the DOMA challenges. At this point, there is no indication that DOJ or DHS will change their positions and agree to long-term abeyance, but if they do, there could be an immediate benefit to couples who marry.
- *Passage of the Uniting American Families Act (UAFSA)*: UAFSA would amend the Immigration and Nationality Act to include the term "permanent partner" in most places where the term "spouse" now appears and would thus allow Americans to sponsor same-sex partners in much the same way as opposite-sex married couples currently do. Although there is no requirement in UAFSA that couples be married, they do have to prove the bona fides of the relationship, and a marriage certificate could help with this evidence.

Who Should Not Marry?

While the potential benefits of marriage remain theoretical, there are still some risks involved in marrying:

- *Nonimmigrants Who Must Demonstrate a Lack of "Immigrant Intent"*: The primary reason to advise a couple not to marry is that if the marriage to a USC or LPR becomes known, the marriage can be taken as evidence of a lack of intent to return to the nonimmigrant's home country upon conclusion of a temporary stay, which could lead to a denial of a nonimmigrant visa or entry into the U.S. This is particularly an issue for applicants for tourist or student visas and for entrants under the Visa Waiver Program. Neither DHS nor DOS has issued guidance as to whether a foreign national, who is legally married to someone of the same sex in a state or a country with marriage recognition under that jurisdiction's laws, should indicate that she is "married" or "single" on the visa application form.

¹¹ It is not clear when the clock would start ticking on a marriage that is recognized by a state but not the federal government.

Most Couples Should Not File an I-130

The Attorney General's letter stated clearly that until DOMA is repealed or until there is a final court decision, it is the obligation of the Executive branch to comply with and enforce the law. Recent statements by DHS re-iterate this enforcement message; therefore, if a USC or LPR files an I-130 immigrant visa petition on behalf of his or her partner, it will be denied.

As discussed above, the theoretical benefits of marriage seem to outweigh the theoretical risks for many, if not most, bi-national couples. The same, however, cannot be said for the filing of an I-130 in several situations. For example:

- *A USC/LPR Should Generally Not File an I-130 on Behalf of an Undocumented Spouse:* An undocumented foreign national whose spouse files an I-130 on his or her behalf may be placed in removal proceedings. This moves the individual out from "under the radar" and puts them at greater risk of physical removal from the U.S.
- *A USC/LPR Should Generally Not File an I-130 on Behalf of a Spouse Who Has a Valid Tourist or Student Visa and Intends to Continue Using It:* The filing of an I-130 on behalf of a spouse is generally seen as an indication of the spouse's intent to remain in the U.S. permanently. Doing so will likely make it very difficult for the foreign spouse to enter the U.S. in the future as a tourist or a student.
- *A USC Should Generally Not File a Fiancé/ee Petition on Behalf of an Exiled Partner:* Since a fiancé/ee visa filed today will almost certainly be denied and may be evidence of immigrant intent, such a filing will likely lead to the denial of any future tourist or student visa application.

On the other hand, if the spouse of a USC or LPR is in removal proceedings and has nothing to lose by having his or her partner file an I-130, there is generally no reason not to file it. A pending I-130, or a pending appeal of a denied I-130, could form the basis for a request for prosecutorial discretion or administrative closure of the removal case.

Practitioners Should Not Race Into Court to File DOMA Challenges

It is important to understand that the February 23, 2011, DOJ announcement did not occur in a vacuum. The LGBT legal rights movement has been very strategic in the DOMA challenges it has brought. The success of the fight for federal recognition of existing marriages has been a direct result of careful planning. In the process, many potential plaintiffs have been turned away, and an enormous amount of resources has been committed by non-profit organizations and through the pro bono work of large firms.

Bad litigation makes bad law, which hurts everyone; no one should consider bringing a DOMA challenge without speaking to the lawyers (at GLAD, Lambda Legal, National Center for Lesbian Rights, and the ACLU) who have gotten us this far.

Possible Scenarios for the End of Discrimination Against Same-Sex Bi-National Couples

There are several different scenarios as to what could happen in the future, both on the litigation and legislative fronts, which would have different results for bi-national couples, at least in the short-term.

In general, when a USC or LPR files an I-130 petition on behalf of his or her foreign spouse, USCIS must answer three questions to determine whether the marriage is valid for immigration purposes:¹²

- 1) Was the marriage valid in the place of celebration?;
- 2) Is there a strong public policy against this type of marriage in the state of domicile or (for couples who marry abroad) the state of intended domicile?,¹³ and
- 3) Is the marriage bona fide as defined by immigration law?

Beginning with these questions, different scenarios could lead to different outcomes depending on the geography of the applicant.

- *If the Gill and Commonwealth Cases Reach the Supreme Court and Win: Gill* is an “as applied” challenge dealing with specific federal programs. The *Commonwealth* case argues that the federal government has impermissibly intruded into a realm of governance reserved to the states. The reach of the Supreme Court ruling would depend in large part on the language of the decision. The Court could rule broadly that it is unconstitutional to discriminate against married couples based on their sexual orientation, or it could rule more narrowly in favor of the rights of states to define marriage. Thus, a favorable decision could lead to the complete demise of Section 3 of DOMA, or it could lead to a more limited ruling where the federal government recognizes marriages for couples domiciled in marriage recognition states but does not recognize marriages of couples domiciled in states with explicit mini-DOMAs.¹⁴
- *If DOMA Is Repealed through Legislation:* If legislation merely removes the existing DOMA, marriage recognition for federal purposes would be based on whether the marriage is considered valid at the state level. However, most Board of Immigration Appeals cases, which have found a strong state public policy ground for denying marriage recognition, have involved criminal sanctions against the marriage, such as in the context of polygamy.¹⁵ Therefore, the fact that some states have mini-DOMAs may not be sufficient to overcome the strong presumption in favor of federal marriage recognition if marriages are valid where celebrated. Moreover, if the DOMA repeal language states explicitly that there is a right to marry which cannot be denied by states, the legislation could lead to the fall of the mini-DOMAs. If legislation with this language passes, it would not matter in which state the couple resides for purposes of immigration.
- *If UAFA Passes:* If UAFA passes, USCs and LPRs who can prove they are in committed relationships with their foreign partners could file for permanent residence on their behalf without regard to where they live.

¹² For a comprehensive analysis of BIA cases that discuss marriage recognition in the immigration context, see Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in A World Without DOMA*, 16 Wm. & Mary J. Women & L. 537 (2010).

¹³ Until DOMA is repealed or overturned, it is this federal policy against marriage recognition which prevents I-130s from being approved.

¹⁴ See <http://www.freedomtomarry.org/states/> for a map of states which have marriage recognition for LGBT families and which prohibit marriage recognition. Note that it is not uncommon under current immigration law for USCIS recognition of a marriage to be dependent on the state of domicile of the couple. Under current law, a marriage involving a transgender woman who has had her birth certificate amended and a biologically born man would be recognized by USCIS if the couple marries and resides in North Carolina, but not if the couple marries and resides in Florida.

¹⁵ See Titshaw, *supra*.

What Happens Next?

The President's position and Attorney General's announcement are so new that the broader implications are still being reviewed and analyzed. This is the first time that the White House and DOJ have announced that Section 3 of DOMA is unconstitutional, and we hope that this announcement will soon pave the way to immigration recognition for bi-national couples.

In the meantime, if you have further questions about the effects of the DOJ announcement and would like guidance on how to proceed on a particular case, please contact Immigration Equality www.immigrationequality.org or e-mail vneilson@immigrationequality.org.

We are investigating every option and will have more to say soon.