

August 18, 2011

IMMIGRATION AND THE DEFENSE OF MARRIAGE ACT (DOMA)* *A Question and Answer Fact Check*

Q: What is the Defense of Marriage Act?

A: In 1996, Congress passed the Defense of Marriage Act (DOMA). Section 3 of DOMA defines marriage as a legal union between one man and one woman.¹ At the time DOMA was enacted, no state permitted same-sex marriages. Today, six states and the District of Columbia permit same-sex marriages; several other states honor out-of-state marriages and/or recognize civil unions.²

Q: How does DOMA affect immigration cases?

A: There are approximately 36,000 same-sex binational couples living in the United States, and approximately half of these couples are raising children.³

Because immigration law is federal, the immigration agencies apply DOMA's definition of marriage.⁴ This means that even gay and lesbian couples who are lawfully married are not considered married for immigration purposes. As a result, gay and lesbian U.S. citizens and permanent residents cannot successfully petition for their spouses; same-sex spouses cannot accompany their American spouse who receives a family or employment-based visa; and lesbian and gay noncitizens cannot obtain a waiver or relief from removal based on their marriage. Essentially, DOMA prevents same-sex couples from receiving the same immigration benefits that different-sex couples receive.

Q: Are there efforts underway to challenge DOMA?

A: Yes. Senator Feinstein and Representative Nadler have introduced the Respect for Marriage Act in the Senate and House, which, if enacted, would repeal DOMA.⁵ Also, numerous lawsuits challenging the constitutionality of DOMA have been filed in federal courts. In *Gill v. Office of Pers. Mgmt.* the district court in Massachusetts ruled that DOMA is unconstitutional, and the case is now pending in the First Circuit.⁶ There are other pending cases in the district courts in Connecticut, New York, and California.⁷ It is likely that the Supreme Court will ultimately decide one of these cases.

Q: What is the Obama Administration’s position on DOMA?

A: In February 2011, Attorney General Eric Holder announced that the Obama Administration had determined that Section 3 of DOMA was unconstitutional and would no longer defend it in federal court challenges.⁸ The Department of Justice (DOJ) has filed a brief in one of the pending lawsuits challenging DOMA, *Golinski*, arguing that DOMA is unconstitutional and that the primary motivation for its passage was homophobic animus.

Nonetheless, the Attorney General said that the Department of Justice would still “enforce” DOMA pending a legislative repeal of the law or a “final judicial decision.” Numerous organizations, including the American Immigration Council and Immigration Equality, as well as 12 Senators and 48 Members of the House of Representatives have written to the Department of Justice and the Department of Homeland Security, calling upon them to hold applications in abeyance, and maintain the status quo until the constitutionality of DOMA is finally determined.

Q: Have there been any immigration decisions regarding lesbian or gay couples?

A: Following the February 2011 announcement, the Attorney General has issued one decision in an immigration case that may implicate DOMA. In *Matter of Dorman*, an immigrant partner of a U.S. citizen was found removable because he overstayed his visa.⁹ The immigration judge found him ineligible for a form of relief from removal called “cancellation of removal” because his U.S. citizen partner was not considered to be a spouse, despite the fact that they had entered into a New Jersey civil union. While the case was on appeal before the Third Circuit Court of Appeals, the Attorney General vacated the underlying removal order and sent the case back to the Board of Immigration Appeals (BIA) to answer questions regarding the definition of spouse and marriage, and the impact on immigration cases. It may be over a year before the BIA issues a decision, but that decision is likely to have a significant impact on how immigration agencies handle same-sex marriage cases.

Also, in June 2011, Immigration and Customs Enforcement issued a memorandum discussing its enforcement priorities and describing when it is appropriate to exercise prosecutorial discretion (i.e., decide whether and to what degree to enforce the law in a particular case). Although the memo did not specifically mention lesbian and gay families, it did say that family ties are a favorable factor. After the memo was issued, several high profile cases involving lesbian and gay families have been administratively closed or granted long continuances.

Q: What’s next?

A: It is, of course, impossible to answer this question. The Administration is now in the difficult position of stating its intention to continue to enforce a law that it has determined to be motivated by animus and to be unconstitutional. While the courts and the legislative process proceed slowly forward, real families continue to suffer the consequences of this real discrimination.

Endnotes

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¹ Pub. L. 104-199, 110 Stat. 2019, 1 U.S.C. § 7.

² See <http://www.freedomtomarry.org/states/>.

³ “Addressing Inequality in the Law for Permanent Partners.” Victoria F. Neilson, Legal Director, Immigration Equality. Testimony submitted to the U.S. Senate Committee on the Judiciary, “S.598 The Respect for Marriage Act: Assessing the Impact of DOMA on American Families,” July 20, 2011.

⁴ See U.S. Citizenship and Immigration Service’s Adjudicator’s Field Manual § 21.3(a)(2)(I) (DOMA governs); *Matter of Lovo-Lara*, 23 I&N Dec. 746 (BIA 2005).

⁵ See Respect for Marriage Act, H.R. 1116, 112th Cong. (2011); Respect for Marriage Act of 2011, S. 598, 112th Cong. (2011).

⁶ 699 F. Supp. 2d 374 (D. Mass. 2010), *appeal docketed*, No. 10-2207 (1st Cir. filed Oct. 18, 2010).

⁷ See *Pedersen v. Office of Pers. Mgmt.*, No. 10-1750 (D. Conn. filed Nov. 9, 2010); *Windsor v. United States*, No. 10-8435 (S.D.N.Y. filed Nov. 9, 2010); *Golinski v. Office of Pers. Mgmt.*, No. 10-257 (N.D. Cal. filed Jan. 20, 2010); *Dragovich v. United States Dep’t of the Treasury*, No. 10-1564 (N.D. Cal. motion to dismiss denied Jan. 18, 2011).

⁸ See Letter from Eric H. Holder, Jr., Attorney General, to John H. Boehner, Speaker, U.S. House of Representative, Re: Defense of Marriage Act (Feb. 23, 2011) *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

⁹ See 25 I&N Dec. 485 (A.G. 2011).