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3-6-2012

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#### Recommended Citation

Joanna L. Grossman, *Is the Defense of Marriage Act (DOMA) Indefensible? A Federal Court Says Yes, in Golinski v. OPM* Verdict (2012)

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# Verdict

March 6, 2012

[Joanna L. Grossman](#)

## Is the Defense of Marriage Act (DOMA) Indefensible? A Federal Court Says Yes, in *Golinski v. OPM*



During the brief window in 2008 when the state of California permitted same-sex couples to marry, Karen Golinski and her longtime partner, Amy Cunninghis, were wed. Golinski, a staff attorney for the United States Court of Appeals for the Ninth Circuit, then sought, as most newly-married employees would, to add her new spouse to the health insurance plan. (The couple's minor adopted child was already covered under Golinski's "family" benefits.) The federal administrative office in charge of such matters refused the request, however, because of Section 3 of the Defense of Marriage Act (DOMA). Section 3 provides that, for any federal law purpose, only a union between one man and one woman can be treated as a "marriage."

Golinski sued, alleging that this provision of DOMA is unconstitutional. The federal district court that heard the case just ruled in her favor, in *Golinski v. OPM* (<http://docs.justia.com/cases/federal/district-courts/california/candce/3:2010cv00257/231978/186/>). The court ruled, importantly, that statutory classifications that are made on the basis of sexual orientation—for example, a statutory rule that heterosexuals can marry but homosexuals can't—deserve heightened judicial scrutiny. And, the court reasoned, the federal government's refusal to recognize same-sex marriages cannot survive such scrutiny.

### Some Background on DOMA, the Defense of Marriage Act

As I have explained in greater detail in prior columns ([here \(http://verdict.justia.com/2011/07/26/respect-or-defend-marriage-the-senate-considers-a-bill-to-repeal-the-defense-of-marriage-act-of-1996-doma\)](http://verdict.justia.com/2011/07/26/respect-or-defend-marriage-the-senate-considers-a-bill-to-repeal-the-defense-of-marriage-act-of-1996-doma) and [here \(http://verdict.justia.com/2011/08/09/respect-or-defend-marriage-the-senate-considers-a-bill-to-repeal-the-defense-of-marriage-act-of-1996-doma-2\)](http://verdict.justia.com/2011/08/09/respect-or-defend-marriage-the-senate-considers-a-bill-to-repeal-the-defense-of-marriage-act-of-1996-doma-2)), Congress passed the Defense of Marriage Act (DOMA) in 1996, amid a growing fury over the possibility that Hawaii might legalize same-sex marriage, and that proponents would then somehow manage to foist it upon the rest of the country as well. DOMA was designed to prevent full faith and credit principles from being invoked to compel states to recognize same-sex marriages from other states, and also to protect the federal government from being compelled to recognize such marriages.

Section 2, which dealt with interstate marriage recognition, was at best a redundancy that purported to grant states a right they already had: the right to refuse recognition to marriages from sister states on grounds of public

policy. And for many years after DOMA was enacted, Section 3 lay dormant because no state actually authorized same-sex marriage.

Then, in 2004, the first U.S. gay marriages took place, in Massachusetts. Since then, additional states have legalized same-sex marriage, including, in the last month, the State of Washington. (I discussed that development [here \(http://verdict.justia.com/2012/02/07/the-beginning-of-the-end-of-the-anti-same-sex-marriage-movement\)](http://verdict.justia.com/2012/02/07/the-beginning-of-the-end-of-the-anti-same-sex-marriage-movement).) And in the last week, the State of Maryland, via [this bill \(http://mlis.state.md.us/2012rs/bills/sb/sb0241f.pdf\)](http://mlis.state.md.us/2012rs/bills/sb/sb0241f.pdf). Now, eight states and the District of Columbia have legalized same-sex marriage.

### **The Impact of—and the Challenges to—Section 3 of DOMA**

Section 3 of DOMA matters very much, now that several states, including very populous ones like New York, allow the celebration of same-sex marriages. Also, because states do not restrict marriage to residents, anyone in the U.S. who can travel to one of those eight states or the District of Columbia can contract a valid same-sex marriage. There are now thousands and thousands of same-sex marriages that are valid in some states, but not in others, and that—due to DOMA—are not valid for any federal law purpose.

That last point is highly significant, since marital status matters for a huge number of federal laws and programs—such as immigration, Social Security, estate and income tax liabilities, eligibility for Medicaid, and burial in military cemeteries, to name just the most obvious examples. A report by the General Accounting Office in 2004 concluded that 1,138 federal laws provided benefits, rights, protection, or responsibilities that turned in some way on marital status. For federal employees, the rule of non-recognition for same-sex marriages means that employees cannot take advantage of benefits like spousal health insurance, as happened to Karen Golinski.

As a general matter, federal statutes do not provide their own definition of marriage. Federal laws, instead, typically defer to state determinations of marital status, as they do to state definitions of parent-child relationships. DOMA thus represents a departure from the usual rules, one that means that a person's marital status may differ depending on why that status matters. As one might expect—but as Congress did not sufficiently anticipate—this presents a bureaucratic nightmare. It also is discriminatory, in that federal law picks and chooses among marriages based solely on the sex and sexual orientation of the parties involved, for little reason other than animosity towards the excluded group. Thus, not surprisingly, there have been several challenges to DOMA's validity.

In two companion cases, *Commonwealth of Massachusetts v. HHS* (<http://docs.justia.com/cases/federal/district-courts/massachusetts/madce/1:2009cv11156/123233/58/>) and *Gill v. Office of Personnel Management* (<http://docs.justia.com/cases/federal/district-courts/massachusetts/madce/1:2009cv10309/120672/70/>), which I analyzed in prior columns available [here \(http://writ.news.findlaw.com/grossman/20100719.html\)](http://writ.news.findlaw.com/grossman/20100719.html) and [here \(http://writ.news.findlaw.com/grossman/20100720.html\)](http://writ.news.findlaw.com/grossman/20100720.html), a federal district judge in Massachusetts invalidated Section 3 of DOMA on the grounds that it infringes on state sovereignty. An appeal in these cases is pending, as are similar federal court challenges, *Peterson v. OPM* and *Windsor v. United States*.

In addition to these pending challenges, Section 3 of DOMA has been attacked from both the legislative and executive branches of the federal government. A bill to repeal DOMA, the **Respect for Marriage Act** ([http://www.feinstein.senate.gov/public/index.cfm/files/serve?File\\_id=672adb4-c842-4e74-95f7-452a2e00151a](http://www.feinstein.senate.gov/public/index.cfm/files/serve?File_id=672adb4-c842-4e74-95f7-452a2e00151a)), is pending in the U.S. Senate. Moreover, the Obama Administration **declared** (<http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>) in the “Holder Memo,” in February 2011, that it will no longer defend Section 3 challenges in court, at least in jurisdictions where there is no binding precedent regarding the appropriate level of scrutiny for sexual-orientation classifications. The federal government has also weakened DOMA by allowing exceptions to be made in specific administrative situations, or in individual cases.

### **The Ruling in *Golinski v. OPM***

The *Golinski* case is important, in part because of the government's fractured role in it. The Department of Justice (DOJ) not only refused to defend Section 3, as it had promised in the Holder Memo, but it also took the anti-DOMA position one step further: It filed a brief arguing, affirmatively, that Section 3 is unconstitutional

because it discriminates against gays and lesbians.

Readers may wonder, since DOJ was not defending the law, who was? The answer is the Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG), which is comprised of certain members of Congress who support DOMA. BLAG was granted permission by the court to intervene in the case and to defend the challenged provision.

The case also began with a complicated set of procedural twists and turns. Golinski originally sued on the theory that the denial of insurance was a violation of her government employer's "employment dispute resolution" plan, which prohibited discrimination on the basis of sex and sexual orientation. Judge Alex Kozinski, a libertarian/conservative Ninth Circuit judge who was sitting as administrator over this plan, agreed with Golinski and ordered the judiciary to add her wife to the insurance plan. That order then set off a complicated back-and-forth with the federal Office of Personnel Management, which said that it could not follow the order because of DOMA. Eventually, Golinski's complaint was dismissed.

In an amended complaint, Golinski alleged that Section 3 of DOMA violates the equal protection component of the Fifth Amendment's Due Process Clause because it discriminates on the basis of sexual orientation by refusing recognition to same-sex marriages. (The Fourteenth Amendment's Equal Protection Clause was not invoked here, because it only applies to the states, not the federal government.)

### Same-Sex Marriage in California

Recall that Golinski and her wife married in 2008, during a brief window when same-sex marriages could be contracted in California. Here, in summary, is the history of same-sex marriage in that state:

In response to a series of early gay-marriage challenges in the 1970s, California, in 1977, added the phrase "between a man and a woman" to its definition of marriage, which had previously only defined marriage as a "personal relation arising out of a civil contract."

The California legislature then passed bills in 2005 and 2007 to grant same-sex couples the right to marry, but both were vetoed by then-Governor Arnold Schwarzenegger.

By referendum in a 2000 election, voters adopted Proposition 22, which amended the marriage statute to provide that "Only marriage between a man and a woman is valid or recognized in California." This provision created an additional obstacle for advocates of same-sex marriage: Because it was adopted by referendum, the legislature could not repeal it without voter approval.

The California ban on same-sex marriage was invalidated, however, by the California Supreme Court, in *In re Marriage Cases*. In that case, the court held, among other things, that the ban constituted unconstitutional discrimination on the basis of sexual orientation. Central to that holding was the court's conclusion that classifications on the basis of sexual orientation are "suspect" and therefore deserving of the highest form of judicial scrutiny.

For about six months after this ruling was issued, marriage licenses were issued to same-sex couples in California. About 14,000 gay marriages were solemnized. (These marriages are often referred to as the "interim marriages.")

Then came the infamous Proposition 8, in which California voters, in the November 2008 election, amended the California constitution to ban same-sex marriage. That was the end—at least for the time—of same-sex marriage in California. (Golinski and her partner married after the court's ruling, but before the passage of Prop 8. A later court ruling held that the marriages contracted during the window were valid.)

Prop 8 is the subject of its own litigation. A federal district court invalidated Prop 8 on federal constitutional grounds in *Perry v. Schwarzenegger*. A federal appeals court recently affirmed that decision in *Perry v. Brown* (<http://law.justia.com/cases/federal/appellate-courts/ca9/10-16696/10-16696-2012-02-07.html>), ruling that there was no rational reason to restrict marriage to heterosexuals. It's likely that the case will end up in the U.S. Supreme

Court, but will likely first be reviewed *en banc* by the Ninth Circuit. (En banc review is review by a panel of judges larger than the three-judge panel that rendered the initial appellate decision in the case. This extra level of review only occurs if the appellate court so decides.)

### What Level of Judicial Scrutiny is Warranted for Sexual-Orientation Classifications?

Under standard equal protection analysis (whether that analysis is conducted under the Fifth or the Fourteenth Amendment), a court must first identify the appropriate level of scrutiny, and then apply it to the challenged law. Classifications on the basis of race, national origin and religion are entitled to strict scrutiny (the highest form of judicial scrutiny); however, classifications on the basis of gender and illegitimacy are entitled to intermediate scrutiny, a lesser level of scrutiny. Finally, most statutory classifications are entitled only to rational basis review, a highly deferential standard that results most of the time in a win for the government.

The U.S. Supreme Court has never directly ruled on the level of scrutiny that is applicable to sexual-orientation classifications. In *Romer v. Evans* (<http://supreme.justia.com/cases/federal/us/517/620/>) (1996), the Court struck down a Colorado referendum that prohibited municipalities from adopting anti-discrimination provisions to protect gays and lesbians. The Court, however, did not rule on the level of scrutiny per se; rather, it held that a law borne only of animus towards a particular group could not survive even the lowest level of scrutiny. The Court took a similar approach in *Lawrence v. Texas* (<http://supreme.justia.com/cases/federal/us/539/558/>) (2003), in which it invalidated a Texas law banning same-sex sodomy without clearly articulating a heightened level of scrutiny.

Several of the cases challenging state bans on same-sex marriage have taken up the question of the proper level of scrutiny for sexual orientation classifications, but those challenges have all been brought under state law, rather than under the federal constitution. The federal court of appeals for the Ninth Circuit, however, has had the occasion to take up the scrutiny question in a gay marriage case that was brought under the federal constitution, but dodged the question.

The *Golinski* court proceeded through the traditional four-part test for heightened scrutiny: (1) existence of a history of invidious discrimination against those who have the characteristic at issue; (2) irrelevance of the characteristic to an individual's ability to contribute to society; (3) the immutability of the characteristic; and (4) the degree of political powerlessness of the group of those who possess the characteristic. On all four prongs, the court found justification for heightened scrutiny of laws classifying on the basis of homosexuality.

In so finding, the court distinguished a prior ruling of the Ninth Circuit, *High Tech Gays v. Defense Industrial Security Clearance Office* (<http://law.justia.com/cases/federal/appellate-courts/F2/895/563/46921/>), which held that homosexuals "lack the indicia of a suspect or quasi-suspect category." But, the *Golinski* court explained, the foundations for that 1990 decision have "sustained serious erosion by virtue of more recent decisions" of the U.S. Supreme Court, such that it has been "effectively overruled by such higher authority." The key shift was from *Bowers v. Hardwick* (<http://supreme.justia.com/cases/federal/us/478/186/>) (1986), in which the Supreme Court refused to find a violation of substantive due process in a Georgia law banning sodomy, and its ruling in *Lawrence v. Texas*, in which it did find such a violation.

With *High Tech Gays* out of the way, the district court noted the lack of any binding precedent on the question of what the appropriate level of scrutiny was. It thus applied the traditional test, and concluded that gay men and lesbians "have experienced a long history of discrimination"; that "sexual orientation has no relevance to a person's ability to contribute to society"; that whether or not sexual orientation is immutable, it is "so fundamental to one's identity that a person should not be required to abandon it"; and that although gays and lesbians are "not completely politically powerless," the "basic inability to bring about an end to discrimination and pervasive prejudice, to secure desired policy outcomes and to prevent undesirable outcomes on fundamental matters that directly impact their lives, is evidence of the relative political powerlessness of gay and lesbian individuals." Being forced to fight the consequences of an anti-same-sex-marriage law that the executive branch deems unconstitutional would seem to be at least some evidence of this last point.

### Why Section 3 of DOMA Failed Heightened Scrutiny

After establishing that sexual orientation classifications trigger some form of heightened scrutiny—the ruling does not specify whether strict or intermediate scrutiny is appropriate—the court proceeded to apply the test for intermediate scrutiny. To survive this level of scrutiny, the government (here, BLAG) must show that the classification is substantially related to an important governmental objective. Although Congress was clearly motivated by animus and moral disapproval of homosexuality, it identified four interests that were purportedly advanced by DOMA: (1) encouraging responsible procreation and child-rearing; (2) defending and nurturing the institution of traditional, heterosexual marriage; (3) defending traditional notions of morality; and (4) preserving scarce government resources.

These interests may have seemed novel in 1996, but after more than 16 years of litigation over the validity of state bans on same-sex marriage, they seem tired. Courts have hashed and re-hashed these same interests, in cases that have reached diametrically-opposed conclusions. (Compare, for example, the reasoning of the Iowa Supreme Court, discussed [here \(http://writ.lp.findlaw.com/grossman/20090409.html\)](http://writ.lp.findlaw.com/grossman/20090409.html), with that of an appellate court in New York, discussed [here \(http://writ.news.findlaw.com/grossman/20051213.html\)](http://writ.news.findlaw.com/grossman/20051213.html).) But here, the *Golinski* court found each of these interests to have little merit.

First, the court found that concerns about child-rearing provide no justification for DOMA. All available evidence shows that gays and lesbians are “equally capable at parenting” as heterosexual parents, the court noted. And even if they weren’t, the court added, excluding homosexuals from marriage would have no effect on whether they became parents or not.

Second, the court found that “tradition alone . . . cannot form an adequate justification for a law.” And, even if it could, Section 3 of DOMA has no effect on whether marriage remains “traditional” or not. States control the issuance of marriage licenses. DOMA merely makes life difficult for same-sex couples who avail themselves of that right in various states. It does nothing to encourage heterosexual marriage, nor, realistically, does it do anything to deter same-sex marriage.

Third, the court found that basing “legislation on moral disapproval of same-sex couples does not pass any level of scrutiny.” As the Supreme Court has articulated in cases like *Romer* and *Lawrence*, neither the desire to “harm a politically unpopular group,” nor mere moral objection, can justify a law for equal protection purposes.

Fourth, and finally, the *Golinski* court found that there was no evidence in the record to suggest that denying federal recognition to same-sex marriages “would adversely affect the government fisc.” Even if it did, moreover, the court reasoned that the preservation of government resources cannot justify a discriminatory law under any form of heightened scrutiny.

The court went on to conclude, as an alternate basis for its holding, that Section 3 of DOMA would fail rational basis scrutiny as well. “[N]either Congress’ claimed legislative justifications nor any of the proposed reasons proffered by BLAG constitute bases rationally related to any of the alleged governmental interests. . . . [T]he Court, having tried on its own, cannot conceive of any additional interests that DOMA might further.”

In the end, the court granted *Golinski*’s motion for summary judgment and permanently enjoined the judiciary, her employer, from “interfering with the enrollment of Ms. *Golinski*’s wife in her family health benefits plan.”

As I have argued in the past, DOMA is on its way out. Whether by repeal, by administrative undercut, or by judicial invalidation, it will disappear eventually, and most likely in the near future. The bottom line is that *Golinski* is a defensible ruling, while DOMA is not a defensible statute.



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