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Verdict

August 7, 2012

[Joanna L. Grossman](#)

The Defense of Marriage Act (DOMA) Takes Another Bullet: How Can It Survive?



Another federal judge has now ruled that the provision of the Defense of Marriage Act (DOMA) that precludes recognition of same-sex marriage for any federal-law purpose is unconstitutional. This provision of DOMA has taken several bullets in the last year, but the ruling in *Pedersen v. OPM* (<http://docs.justia.com/cases/federal/district-courts/connecticut/ctdce/3:2010cv01750/91185/116/>) is even more damaging, as it carefully refutes every conceivable argument made in defense of the law, and identifies multiple theories on which it could be invalidated.

The Beginning of DOMA

Congress enacted DOMA in 1996, with little deliberation, in anticipation that Hawaii, and perhaps other states, would soon legalize same-sex marriage. DOMA passed both houses of Congress by a wide margin—342-to-67 in the House, and 85-to-14 in the Senate. President Bill Clinton signed it into law.

DOMA does two things. Section Two of the Act purports to give states the right to refuse recognition to same-sex marriages that have been celebrated in other states. And, Section Three, which is the subject of *Pedersen* and several other recent rulings, provides that, for any federal-law purpose, the word “marriage” means only a legal union between one man and one woman, and a “spouse” refers only to someone of the opposite sex.

DOMA was thus an effort to “defend” traditional marriage against the potential legalization of gay marriage in Hawaii, and in any other state that might see fit to legalize it. The defense was two-fold: (1) DOMA allowed states to avoid compelled recognition of same-sex marriages celebrated in other states (as set forth in Section Two); and (2) DOMA allowed the federal government to ignore same-sex marriages celebrated in any American state, or anywhere abroad (as set forth in Section Three).

The Havoc DOMA Wrought

Hawaii, the catalyst for DOMA, never did legalize same-sex marriage. But Massachusetts did, in 2004, and it was then followed by several other states over the subsequent eight years leading up to the present. And, once some states and foreign jurisdictions began to authorize same-sex marriage, the federal-law provision of DOMA began to do its dirty work.

Section Three means that the members of a same-sex couple, despite being legally married in the state or country where they were wed, are not deemed married for purposes of Social Security, federal estate and income taxation, immigration, Medicaid, veteran's benefits, and so on. Section Three thus puts these couples in an unusual conundrum where their family status differs in a crucial way depending on the context. It is unusual because Congress typically defers to state-law definitions of family status when crafting and enforcing federal laws, rather than adopting its own.

DOMA has an incredibly broad sweep because of the many federal laws that turn on marital status. In *Pedersen v. OPM*, for example, the plaintiffs were same-sex couples who had legally married in Connecticut, New Hampshire, or Vermont and were denied benefits under five different federal statutes and regulatory schemes. The benefits of which DOMA deprived them related to family leave, health insurance, Social Security benefits, retirement, and death. And those five benefit schemes, the *Pedersen* court noted, represent “merely a brief sampling of the myriad federal laws and regulations impacted by DOMA.”

The Beginning of the End of DOMA

As more couples began to encounter problems created by Section Three of DOMA, many lawsuits were filed. Several of these lawsuits have resulted in a federal-court ruling that DOMA's Section Three is unconstitutional, and several more such suits are pending. In addition to the flurry of litigation over this provision, Section Three—and DOMA as a whole—have also been attacked from the legislative and executive branches of the federal government as well.

A bill to repeal DOMA, the **Respect for Marriage Act** (http://www.feinstein.senate.gov/public/index.cfm/files/serve?File_id=672adbf4-c842-4e74-95f7-452a2e00151a), is pending in the U.S. Senate. (I have discussed this proposed legislation [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>) 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>).

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 Three challenges in court, at least in jurisdictions where there is no binding precedent regarding the appropriate level of scrutiny for sexual-orientation classifications. (In most pending DOMA challenges, including *Pedersen*, the law is now defended by the Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG), which is comprised of certain members of Congress who support DOMA.) The federal government has also weakened DOMA by allowing exceptions to the law to be made in specific administrative situations, or in individual cases.

In just the past six months, four federal courts have ruled that Section Three of DOMA is unconstitutional. In *Golinski v. OPM*, the plaintiff sued because her employer, the federal government, refused to add her new wife to the health insurance plan, which generally covered spouses. This litigation was notable because not only did the Department of Justice refuse to defend DOMA, just as it had promised in the Holder Memo, but it also filed a brief arguing affirmatively that Section Three is unconstitutional because it discriminates against gays and lesbians.

A federal district court in California agreed, ruling in March 2012 that sexual orientation classifications merit heightened scrutiny under the equal protection component of the Fifth Amendment's Due Process Clause. (Because DOMA is a federal, rather than a state, law, the Fifth, rather than the Fourteenth, Amendment is the applicable constitutional provision for both equal protection and due process challenges.) The California-based federal district court found the traditional test for heightened scrutiny to have been easily met, and then went on to conclude that the government's justifications for the law were insufficient under heightened scrutiny. The court also concluded that heightened scrutiny wasn't necessary—Section Three, it reasoned, would fail even the lowest level of judicial scrutiny, rational basis review. (I discuss this ruling in detail [here](#) (<http://verdict.justia.com/2012/03/06/is-the-defense-of-marriage-act-doma-indefensible>).

Just a few months later, two more federal courts ruled similarly in Section Three cases. In *Windsor v. U.S.*, a

federal district court in New York invalidated the application of DOMA to an estate tax return. (Spousal transfers are tax-free; most other transfers are not.) The judge declined to adopt heightened scrutiny for sexual orientation classifications, but applied a toothier version of rational basis review when examining the government's proffered justifications. Noting the utter lack of connection between any legitimate federal interest and a law that singles out same-sex couples for adverse treatment, the judge invalidated the law and ordered a \$350,000 refund of estate taxes.

In *Commonwealth v. U.S. Dep't of Health and Human Services*, the U.S. Court of Appeals for the First Circuit also held that Section Three runs afoul of equal protection principles. (I discuss the rulings in *Windsor* and *Commonwealth* in detail [here \(http://verdict.justia.com/2012/06/12/two-more-nails-in-domas-coffin\)](http://verdict.justia.com/2012/06/12/two-more-nails-in-domas-coffin).) This case involved the consolidated appeal of two cases in which a lower federal court had invalidated Section Three of DOMA. In the appellate ruling, the court did not, despite the plaintiff's urging, apply heightened scrutiny given that the U.S. Supreme Court has not yet taken that step (despite having had opportunities to do so.) As in *Windsor*, the court in *Commonwealth* applied a strict form of rational basis review, in which it required that "the federal government interest in intervention be shown with special clarity," and that the justifications offset the burdens imposed. Under this somewhat unconventional test, the appellate court ruled that Section Three was unconstitutional.

The Endgame: How *Pedersen v. OPM* Advances the Ball

Last week, on July 31, 2012, a federal district court in Connecticut joined the growing chorus trumpeting DOMA's unconstitutionality. Notably, the judge, Vanessa Bryant, is a George W. Bush appointee. *Pedersen* advances the endgame not only by ruling, as several courts now have, that Section Three violates equal protection doctrine, but also by suggesting that it might violate due process protection for the fundamental right to marry as well.

In its discussion of the appropriate level of judicial scrutiny that ought to be applied to DOMA, the *Pedersen* court gives BLAG a thrashing. It rejects and finds unpersuasive virtually every aspect of every argument made in defense of DOMA. It chastises BLAG for relying on out-of-date authority, for taking historical conclusions out of context, and for ignoring or underplaying the very significant history of discrimination suffered by gays and lesbians in this country. It ultimately concludes that "homosexuals display all the traditional indicia of suspectness and therefore statutory classifications based on sexual orientation are entitled to a heightened form of judicial scrutiny."

Despite this conclusion, however, the court, like the court in *Golinski*, also held that Section Three could not survive even the most lenient form of scrutiny. Even rational basis review, the court explained, is not "indiscriminately deferential" and still requires a showing of some reasonable connection "between the classification adopted and the objective to be attained." Careful to refrain from scrutinizing "the wisdom, fairness, or logic of legislative choices," the court simply found it to be irrational for Congress to believe that denying federal recognition to already-legalized same-sex marriages would do anything to promote any of its proffered justifications—to "employ caution in the face of a proposed redefinition of the centuries-old definition of marriage;" "to protect the public fisc;" "to maintain consistency and uniformity with regard to eligibility for federal benefits;" "to avoid creating a social understanding of bearing, begetting, and rearing children separate from marriage;" and "to recognize an institution designed to ensure that children have parents of both sexes." How does Section Three serve any of these objectives? The court concluded that it doesn't, and thus further concluded that the law fails to pass constitutional muster even under the most deferential form of review.

In the midst of its equal protection analysis, the *Pedersen* court notes in a footnote that it does not reach the question whether Section Three violates due process protection for the right to marry, because the court invalidates the provision on other grounds. However, it notes, "the Supreme Court has recognized the existence of a fundamental right to marry" and the analysis of it "has not depended upon the characteristics of the spouse." Most damning to Section Three, the court further observes that

the Supreme Court's recognition in [*Lawrence v. Texas*] that the 'right of homosexual adults to engage in intimate, consensual conduct' is also an essential part of the liberty protected by the

Constitution like the right to marry suggests that the liberty interest in marriage should not be restricted by sexual orientation. Although not the subject of this Court's opinion nor the Parties' briefing, this Court notes that this line of reasoning could serve as an alternative basis for the application of heightened scrutiny to classifications based on sexual orientation.

None of the DOMA rulings so far rest on this basis, but it may well be the most appealing argument that is raised when/if the issue reaches the U.S. Supreme Court. The Court has avoided holding that sexual-orientation classifications merit heightened scrutiny, even in cases in which it ultimately struck down such classifications as unconstitutional. But it has reached out more broadly, under the Due Process Clause, to find protection for same-sex relationships, most notably in *Lawrence v. Texas*.

The End of DOMA?

There is, of course, no crystal ball we can consult to divine DOMA's fate, but it's hard to predict any future other than one in which DOMA will disappear—sooner, rather than later. Perhaps Congress will repeal DOMA through the Respect for Marriage Act. Perhaps the Executive Branch will stop enforcing it altogether. Perhaps the Supreme Court will ratify the growing consensus among lower federal courts that Section Three simply cannot survive constitutional scrutiny under equal protection principles, due process principles, or both. In the meantime, however, the tens of thousands of same-sex married couples are still being harmed by the inconsistent legal treatment of their unions, an insult and inconvenience that they should not have to endure as part of legally authorized family units.



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