

Same Sex Marriage Update Summer, 2010

There has been substantial judicial movement on the issue of gay marriage from coast-to-coast this summer. In the wake of U.S. District Court Judge Tauro's July 2010 decision that the Defense of Marriage Act (DOMA) was unconstitutional in Massachusetts, U.S. District Court Judge Vaughn Walker overturned California's ban on gay marriage in early August 2010.

DOMA Ruled Unconstitutional in Massachusetts

In 1996, Congress adopted the Defense of Marriage Act, or "DOMA", which is a federal law that defines marriage as a legal union between one man and one woman. However, DOMA also reaffirms the power of the states to make their own decisions about marriage. In Massachusetts, both the Attorney General's office and Gay & Lesbian Advocates & Defenders (GLAD) successfully challenged DOMA as unconstitutional.

On July 8, 2010, Judge Joseph Tauro ruled that Section 3 of DOMA is unconstitutional, because this federal law violates both the Equal Protection Clause of the 14th and 10th Amendments of the U.S. Constitution. ⁱ

DOMA potentially affects the application of 1,138 federal statutory provisions in the U.S. Code in which marital status is a factor, including copyright protections, provisions relating to leave to care for a spouse under the Family and Medical Leave Act and testimonial privileges.

Under this latest court ruling, gay married couples are entitled to the same federal spousal benefits and protections as every other married couple.

As of February 12, 2010, Massachusetts had issued marriage licenses to at least 15,214 same-sex couples. But, as Section 3 of DOMA bars federal recognition of these marriages, Attorney General Martha Coakley argued in *Commonwealth of Massachusetts v. Health and Human Services*, DOMA has denied federal benefits to these couples. For example, the Department of Veterans Affairs informed the Commonwealth that the federal government is entitled to “recapture” almost \$19 million in federal grants if and when the Commonwealth opts to bury the same-sex spouse of a veteran in one of the state veterans cemeteries in Agawam or Winchendon. Here, DOMA is inducing the Commonwealth to violate the equal protection rights of its citizens. As DOMA imposes an unconstitutional condition on the receipt of federal funding, the court found that DOMA contravenes a well-established restriction on the exercise of Congress’ spending power.

DOMA also penalizes the state and its citizens in the context of healthcare. Under the MassHealth Equality Act, the Commonwealth is required to afford same-sex spouses the same benefits as heterosexual spouses. Yet the Health and Human Services Centers for Medicare & Medicaid Services states that the federal government will not provide federal funding participation for same-sex spouses because DOMA does not recognize the marriage of same-sex couples. Consequently, the Commonwealth has incurred over \$640,000 in additional costs and over \$2 million in lost federal funding. Additionally, the Commonwealth has incurred additional tax liability because the health benefits afforded to same-sex spouses of Commonwealth employees must be considered taxable income and the Commonwealth is required to pay Medicare tax for each

employee hired after April 1, 1986, in the amount of 1.45% of each employee's taxable income.

In the companion case to *Commonwealth of Massachusetts v. Health and Human Services*, GLAD asked Judge Tauro to consider whether DOMA violates the right of seven married same-sex couples and three widowers from Massachusetts to equal protection of the law in *Gill v. Office of Personnel Management*. The *Gill* case was filed by individual Massachusetts plaintiffs who sought to end the federal government's discriminatory refusal to acknowledge their existing marriages. Some have been denied social security protections, or job protections, typically available to married couples. They have also been forbidden from filing their federal income taxes jointly. GLAD argued that the federal government's different treatment of married heterosexual couples violates the plaintiffs' equal protection rights under the 5th Amendment. ⁱⁱ

Rather than declare homosexuals to be a "suspect class" and therefore subject DOMA to strict scrutiny review, the ruling said that was unnecessary because DOMA fails to even pass the more lenient "rational basis" test.

Proposition 8 Overturned in California

Proposition 8, also known as California's Marriage Protection Act, was a ballot proposition and constitutional amendment passed in November 2008 which provided that California only recognize marriage as between one man and one woman.

On August 4, 2010 U.S. District Court Judge Vaughn Walker in California concluded that Proposition 8 banning gay marriage violates both the Due Process Clause and the Equal Protection Clause of the 14th Amendment.ⁱⁱⁱ

Judge Walker determined that “Proposition 8 both unconstitutionally burdens the exercise of the fundamental right to marry and creates an irrational classification on the basis of sexual orientation.” Because the plaintiffs in *Perry v. Schwarzenegger* sought to exercise the fundamental right to marry, their claim was subject to strict scrutiny. However, as Judge Tauro did in the *Gill* case, Judge Walker noted higher standard of “strict scrutiny” is unnecessary because Proposition 8 fails to pass the more lenient “rational basis” test. Therefore, Proposition 8 cannot withstand any level of scrutiny under the Equal Protection Clause, because excluding same-sex couples from marriage is not rationally related to a legitimate state interest.

While the decisions from this summer symbolize great strides for gay marriage rights, many legal commentators foresee these cases being appealed to the U.S. Supreme Court. We will have to wait to see what the new season brings.

ⁱ The 14th Amendment “requires that all persons subjected to...legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed” and where “those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being treated alike, under like circumstances and conditions.” The 10th Amendment states that rights not explicitly granted to the federal government, or denied to the states, belong to the states. The Spending Clause declares that Congress “shall have Power to Lay and collect Taxes, Duties, Imposts and Excises, to pay Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”

ⁱⁱ Under the Due Process Clause of the 5th Amendment, the federal government shall not deprive any person of life, liberty, or property without due process of law. If the governmental action infringes on a fundamental right, the law or act must pass strict scrutiny review, meaning that it must be narrowly tailored to further a compelling government interest. If the government restriction does not implicate a fundamental right, it must survive rational basis review, meaning the law or act is rationally related to a legitimate government interest.

ⁱⁱⁱ The Due Process Clause of the 14th Amendment provides that states shall not “make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law.”

Marcia Mavrides with research and contribution by Anne O’Connell