

Financial Issues in Family Law

Defense of Marriage Act: Ability of the Federal Government to Deny Access to Benefits to Spouses in Same-Sex Marriages

Gill v. Office of Pers. Mgmt., No. 1:09-cv-10309-JLT (D. Mass. filed Mar. 3, 2009); *Massachusetts v. U.S. Dept. Health & Human Servs.*, No. 1:09-cv-11156-JLT (D. Mass. filed July 8, 2009)

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Section 3 of the Defense of Marriage Act (DOMA) limits the definition of marriage to the legal union between a man and a woman.¹ On March 3, 2009, the Gay & Lesbian Advocates & Defenders (GLAD) filed suit in *Gill v. Office of Pers. Mgmt.* in the U.S. District Court of Massachusetts challenging Section 3 of DOMA as violating the right of equal protection in the Fifth Amendment.² On July 8, 2009, the Commonwealth of Massachusetts brought an action, also in the U.S. District Court of Massachusetts, seeking declaratory relief that Section 3 of DOMA violates the Tenth Amendment prohibition of federal intrusion into areas of state authority and the Spending Clause of U.S. Constitution.³ How the court ultimately rules on these matters could significantly

¹ 28 U.S.C. § 1738C (2010).

² Complaint, *Gill v. Office of Pers. Mgmt.*, No. 1:09-cv-10309-JLT (D. Mass. filed Mar. 3, 2009) [hereinafter *Gill* Complaint]. GLAD was involved in the Massachusetts case which led to the state recognizing same-sex marriage, *Goodridge v. Dept. Public Health*, 440 Mass. 309 (2003).

³ Complaint, *Massachusetts v. U.S. Dept. Health & Human Servs.*, No. 1:09-cv-11156-JLT (D. Mass. filed July 8, 2009) [hereinafter *Massachusetts* Complaint]; see also U.S. CONST. art. 1, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes,

affect over 16,000 married same-sex couples in Massachusetts, and if successful, may signify a method through which other jurisdictions allowing same-sex marriage may extend the same rights and benefits enjoyed by opposite-sex married couples.⁴

The *Gill* suit challenges Section 3 of DOMA as a violation of equal protection guaranteed through the Fifth Amendment.⁵ Plaintiffs are a group of Massachusetts citizens that are or were in same-sex marriages and had been denied benefits afforded to individuals in opposite-sex marriages on account that they were married to someone of the same sex.⁶ Their complaint alleges that DOMA “creates a classification that treats similarly-situated individuals differently without justification” in violation of the Fifth

Duties, Imposts and Excise, to pay the Debts and provide for the common Defence and general Welfare of the United States”).

⁴ See Marcia Coyle, *Massachusetts case may be key in gay marriage fight*, Nat’l L. J., Aug. 31, 2009,

<http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202433430922&hbxlogin=1>.

“Attorney General Coakley’s suit – *Commonwealth v. U.S. Dept. of Health & Human Services* – complements the GLAD equal protection suit [*Gill*], according to scholars, by giving the courts an additional ground to strike down Section 3.” *Id.*

⁵ See *Gill* Complaint at 66, 68, 69, 70, 72, 75, 76, 78, 80, 82, 83, 85, 86, 87, 88, 90 (claiming violations of Fifth Amendment’s right of equal protection in all thirteen counts). Although the text of the Fifth Amendment does not have an equal protection clause, the Supreme Court has held that the Fifth Amendment imposes the same restrictions on the federal government regarding equal protection as the Fourteenth Amendment imposes on the states. *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954).

⁶ Plaintiff Nancy Gill receives “Self and Family” health insurance coverage through her employment with the U.S. Post Office for herself and the two children that she has with her spouse, plaintiff Marcelle Letourneau. See *Gill* Complaint at 3. Plaintiff Dean Hara is the surviving spouse of Gerry Studds, a retired member of Congress. See *id.* Hara has been denied health insurance and survivor annuity available to surviving spouses of opposite-sex marriages. See *id.* Two same-sex married couples wished to file their federal income tax returns as “married filing jointly.” See *id.* at 3-4. Another plaintiff, Mary Ritchie, wishes to contribute funds to a “spousal IRA” for her spouse, Kathleen Bush. See *id.* at 4. Plaintiffs Randell Lewis-Kendell, Herbert Burtis, and Dean Hara, all widowers of same-sex marriages, wish to receive the “One-Time Lump-Sum Death Benefit” available at the death of their respective spouses. See *id.* Plaintiff Keith Toney seeks a passport with his correct name, which he had changed after his same-sex marriage. See *id.* at 5. All of these individuals, as the complaint alleges, would have been eligible for the benefits sought if they were in opposite sex marriages.

Amendment's right to equal protection.⁷ The Plaintiffs in *Gill* are seeking a declaration that DOMA is unconstitutional and the amounts that each would have received had their particular benefits been granted.⁸

The *Massachusetts* case challenges Section 3 of DOMA as a violation of the Tenth Amendment and Congress's spending authority under Article I of the Constitution.⁹ Attorney General Martha Coakley brought the action on behalf of Massachusetts in its capacity as a sovereign state, seeking to maintain authority to define the marital status of citizens, as well as its interest in treating Massachusetts's citizens equally.¹⁰ The Commonwealth argues that laws regarding marriage have traditionally been reserved to the states, and DOMA was the first attempt of the federal government to limit the definition of marriage.¹¹ The Commonwealth further argues that the Spending Clause in the Constitution prohibits Congress from inducing a state to violate the constitutional rights of citizens through its spending powers.¹²

⁷ See *Gill* Complaint at 66, 68, 69, 70, 72, 75, 76, 78, 80, 82, 83, 85, 86, 87, 88, 90 (claiming Fifth Amendment violations).

⁸ See *Gill* Complaint at 90-91.

⁹ See *Massachusetts* Complaint at 3, 22, 23.

¹⁰ See *Massachusetts* Complaint at 4.

¹¹ "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." See Motion for Summary Judgment at 1, *Massachusetts v. U.S. Dept. Health & Human Servs.*, No. 1:09-cv-11156-JLT (D. Mass. Feb 18, 2010) (quoting *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890)) [hereinafter *Massachusetts* Motion for Summary Judgment]. Before the passage of DOMA in 1996, there was no federal uniformity in defining or limiting marriage as state laws retained exclusive authority. See *id.* at 5.

¹² See *Massachusetts* Complaint at 23; see also U.S. CONST. art. I, § 8. The text of the Spending Clause reads:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the 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;

Id.

In 1993, the Supreme Court of Hawaii decided *Baehr v. Lewin*,¹³ which held that the state had to show a “compelling state interest” for denying marriage licenses to same-sex couples. The court did not, however, order the state to begin issuing marriage licenses to same-sex couples.¹⁴ In response, voters approved a constitutional amendment making the holding in *Baehr* moot as it gave the Hawaii State Legislature the authority to limit the definition of marriage to between a man and a woman.¹⁵

Similarly seeking to limit the definition of marriage, Congress passed the Defense of Marriage Act (DOMA) in 1996.¹⁶ DOMA was enacted as two statutes; one stating that no state or territory would have to recognize relationships of people of the same sex that are treated as a marriage under another state or territory (commonly referred to as Section

¹³ 74 Haw. 530 (1993). Plaintiffs, a group of individuals who wished to marry their same-sex partners, brought suit seeking declaration that Hawaii marriage statute was unconstitutional as applied by refusing to issue marriage licenses on sole basis that a couple was on the same sex, and injunctions prohibiting future withholding of marriage licenses on that basis. *Id.* at 536-37.

¹⁴ *Id.* at 582 (remanding case and instructing that state has burden of showing that denying same-sex couples right to marry furthers compelling state interest).

¹⁵ HAW. CONST. art. 1, § 23 (2010) (“The legislature shall have the power to reserve marriage to opposite-sex couples”).

¹⁶ Defense of Marriage Act, Pub. L. No. 104-100, 110 Stat. 2419 (codified as 1 U.S.C. § 7 and 28 U.S.C. § 1738C) (2010)). DOMA’s author and sponsor, Rep. Bob Barr (R-Ga.) has since changed his stance and supports passage of the Respect for Marriage Act, H.R. 3567, 111th Cong. (2009), which would repeal the DOMA. Press Release, The Respect for Marriage Act Garners Support of President Clinton and Former Rep. Bob Barr, DOMA’s Original Author (Sept. 15, 2009), *available at* http://www.house.gov/apps/list/press/ny08_nadler/DOMA20090915.html. President Clinton, who signed the DOMA into law, also supports passage of the Respect for Marriage Act. *Id.* Currently, the Respect for Marriage Act is in the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties. *See H.R. 3567*, THOMAS, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h.r.03567>: (last visited Apr. 3, 2010).

2 of DOMA),¹⁷ and the other limiting the definition of “marriage” and “spouse” to opposite -sex couples (commonly referred to as Section 3 of DOMA).¹⁸ Some of the congressional debate leading up to DOMA’s passage reveals a palpable enmity towards homosexuals from some of DOMA’s supporters.¹⁹ At the time, same-sex marriage did not exist in any jurisdiction in the United States, but this had the legal effect of limiting how federal law would treat same-sex marriages if and when a jurisdiction legally

¹⁷ 28 U.S.C. § 1738C. The statute reads:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Id. This statute eliminated the fear that one state or territory legalizing same-sex marriage would require other states and territories to honor those unions because of the Full Faith and Credit Clause. Gabe Vick, *Pitfalls and Promises: Cohabitation, Marriage and Domestic Partnerships*, 22 J. AM. ACAD. MATRIMONIAL LAW. 105, 105 (2009).

¹⁸ 1 U.S.C. § 7 (2010). The statute reads:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

Id.

¹⁹ *See, e.g.*, 142 CONG. REC. H7482, available at <http://frwebgate4.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=131870113084+0+2+0&WAISaction=retrieve> (daily ed. July 12, 1996) (“The very foundations of our society are in danger of being burned. The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society: the family unit.”) (statement of Rep. Bob Barr); 142 CONG. REC. S10068, available at <http://frwebgate1.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=13177881335+0+2+0&WAISaction=retrieve> (daily ed. Sept. 9, 1996) (“Indeed, Mr. President, the pending bill—the Defense of Marriage Act—will safeguard the sacred institutions of marriage and the family from those who seek to destroy them and who are willing to tear apart America’s moral fabric in the process.”).

allowed them.²⁰

In 2003, the Supreme Judicial Court of Massachusetts ruled in *Goodridge v. Dept. of Public Health* that denying same-sex couples the right to marry was in violation of the Massachusetts state constitution.²¹ Since then, four other states have begun to allow for same-sex marriage.²² Although legally valid in their respective jurisdictions, DOMA denies these same-sex married couples from enjoying a wide scope of benefits that their opposite-sex counterparts enjoy.²³

There are 1,138 federal statutory provisions in which marital status is a factor in determining or receiving benefits.²⁴ In jurisdictions that allow for same-sex marriages,

²⁰ See WILLIAM L. REYNOLDS & WILLIAM M. RICHMAN, *THE FULL FAITH AND CREDIT CLAUSE: A REFERENCE GUIDE TO THE UNITED STATES* 125 (2005) (stating DOMA was enacted in reaction to the possibility of Hawaii legalizing same-sex marriage, and the Full Faith and Credit Clause requiring other states to recognize same-sex marriages performed in Hawaii).

²¹ 440 Mass. 309 (2003). The Supreme Judicial Court went one step further in their advisory opinion to the Massachusetts State Legislature that civil unions were insufficient under the state constitution, and same-sex couples had a constitutional right to marry in the Commonwealth. *In re Opinions of the Justices to the Senate*, 440 Mass. 1201 (Feb. 3, 2004).

²² Only Massachusetts, Iowa, Connecticut, New Hampshire, Vermont, and the District of Columbia issue marriage licenses to same-sex couples. Ian Urbina, *Gay Marriage is Legal in U.S. Capitol*, N.Y. TIMES, Mar 4, 2010 at A20, available at <http://www.nytimes.com/2010/03/04/us/04marriage.html>. California briefly allowed for same-sex marriage starting in 2008. See *In re Marriage Cases*, 43 Cal.4th 757 (2008). However, a state-wide ballot initiative overturned the ruling in the California case, and the state no longer allows for same-sex marriages. *State Constitutional Law – California Supreme Court Declares Prohibition of Same-Sex Marriages Unconstitutional – In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), 122 HARV. L. REV. 1557, 1557-58 (2009). Additionally, New York recognizes same-sex marriages performed in other states, but does not allow for same-sex marriages to be performed in New York. See *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (2008).

²³ See Jacki Gardina, *The Tipping Point: Legal Epidemics, Constitutional Doctrine, and the Defense of Marriage Act*, 34 VT. L. REV. 291, 291 (2009).

²⁴ Letter from Dayna K. Shah, Associate General Counsel, U.S. General Accounting Office, to Sen. Bill Frist, Majority Leader, U.S. Senate (Jan. 24, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

DOMA affects the legal rights of same-sex married couples differently than their opposite-sex counterparts in such areas as “bankruptcy,²⁵ burial rights,²⁶ civil service,²⁷ consumer credit,²⁸ copyright,²⁹ education,³⁰ federal lands and resources,³¹ health,³² housing programs,³³ . . . inheritance,³⁴ the judiciary,³⁵ the military,³⁶ social security,³⁷ tax,³⁸ veterans benefits³⁹ and welfare⁴⁰.”⁴¹

²⁵ *See, e.g.*, 11 U.S.C. § 507(a)(7) (1994) (prioritizing a spouse or former spouse’s claim on a debtor’s assets).

²⁶ *See, e.g.*, 38 U.S.C. § 2402(5) (1994) (stating that if a person is eligible to be buried in a national cemetery, his or her spouse is also automatically eligible).

²⁷ *See, e.g.*, 5 U.S.C. § 8339(j) (1994) (providing pension benefits for spouses and former spouses of civil servants).

²⁸ *See, e.g.*, 15 U.S.C. § 1673(b)(2)(A) (1994) (restricting the garnishment of wages when a worker is supporting a spouse).

²⁹ *See, e.g.*, 17 U.S.C. §§ 101, 304(c)(2) (1994) (granting surviving spouses of copyright holders the ability to retain and renew copyright).

³⁰ *See, e.g.*, 20 U.S.C. § 1087nn(b)(1)(A), 1087pp (1994) (basing government-backed education loans on attributed income of borrower’s spouse).

³¹ *See, e.g.*, 16 U.S.C. § 460u-5 (1994) (providing use rights and occupancy of certain national lands are retained by spouse upon death of owner of record).

³² *See, e.g.*, 42 U.S.C. § 1396r(c)(3)(B) (1994) (granting family members privileged access and visitation rights in federally-funded nursing facilities).

³³ *See, e.g.*, 38 U.S.C. § 3712(a)(4)(A)(vi)(III), 3712(a)(4)(C) (1994) (stating that if a veteran is eligible for housing benefits, his or her surviving spouse may continue to receive such benefits if the veteran dies).

³⁴ *See, e.g.*, I.R.C. § 2056 (exempting bequests to a spouse from federal estate tax).

³⁵ *See, e.g.*, *Trammel v. United States*, 445 U.S. 40 (1980) (holding that Rule 501 of Federal Rules of Evidence incorporates evidentiary privilege for confidential spousal communications).

³⁶ *See, e.g.*, 10 U.S.C.A. § 1784 (West. Supp. 1996) (authorizing the President to order measures creating certain employment opportunities for military spouses); 37 U.S.C. § 427 (1994) (uniformed service members placed on permanent duty in Alaska or outside the United States can receive an allowance if separated from a dependent spouse).

³⁷ *See, e.g.*, 42 U.S.C. § 402(b), (c), (e), (f) (1994) (granting old age and death benefits to nonworking spouses based on employment history of their working spouse).

³⁸ *See, e.g.*, I.R.C. § 1(a) (providing for joint married income tax returns); I.R.C. §§ 1041, 2524 (exempting property transfers between spouses from federal gift tax).

³⁹ *See, e.g.*, 38 U.S.C. §§ 3501, 3511 (1994) (giving surviving spouses of veterans up to forty-five months of financial assistance for educational programs).

⁴⁰ *See, e.g.*, 42 U.S.C. § 1382(b) (determining benefits for married couples).

DOMA's preclusion of same-sex married couples from access to federal benefits has been criticized not only for its discriminatory nature, but also as contrary to many of the purposes for which the federal programs were enacted.⁴² Many property transfers between opposite-sex married couples that are tax-free are subject to federal tax between same-sex married couples, and same-sex married couples are not permitted to file joint federal income tax returns, both of which have been criticized as bad policy.⁴³ Similarly,

⁴¹ Scott Ruskay-Kidd, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435, 1467-68 (1997). The author would like to expressly state that the preceding footnotes, *supra* notes 25-40, are reproduced from the quoted text contained in the Ruskay-Kidd article.

⁴² See generally Mary Banauto, *Ending Marriage Discrimination: A Work in Progress*, 40 SUFFOLK U. L. REV. 813 (2007). The lead counsel for the plaintiffs in the *Goodridge* case, Mary Banauto, has been a leading critic of DOMA:

In effect, the federal discrimination portion of the law places off limits all of the 1,138 federal statutes in which marital status is a factor. All same-sex married couples in Massachusetts are currently denied the protections provided by the federal government to opposite-sex married couples. The result of the law is that same-sex couples may not file joint income tax returns, which for many families allows them to pool deductions and pay less of their income in taxes. This law strips these families of protection under the Family and Medical Leave Act which helps workers balance their competing workplace and familial demands by permitting time off to care for a seriously ill spouse. Married couples who are gay or lesbian and who have paid into social security their entire lives cannot rely on their work credits to support a lower-earning spouse after the worker's retirement or death. Those with spouses who end up in a nursing home have to fear foreclosure on the "Medicaid lien," which would force them from their homes. Gay people who have served in wars, from WWII to Iraqi Freedom, cannot even be buried next to their spouses in federal cemeteries as other military veterans can.

Id. at 828 (citations omitted).

⁴³ See William P. Kratzke, *The Defense of Marriage Act (DOMA) is Bad Income Tax Policy*, 35 U. MEM. L. REV. 399, 445 (2005).

The Internal Revenue Service is not going to construe the Internal Revenue Code contrary to DOMA. In the absence of DOMA, the IRS would defer to state law to define relationships and property rights from which tax consequences flow. Until DOMA is removed from the landscape, the Tax Code will not serve the purposes for which it was intended. It will not preserve scarce government resources and will cause

same-sex married couples may not jointly file for bankruptcy.⁴⁴ Because marriage can only be between a man and a woman under federal law, same-sex couples validly married in jurisdictions that allow for it are not able to avail themselves to spousal privilege and confidential marital communications in a courtroom.⁴⁵

The government has defended the constitutionality of DOMA in both *Gill* and *Massachusetts*, while still acknowledging that the administration opposes its policy.⁴⁶

the federal government to forego tax revenue. It will work to defeat congressional policies that encourage taxpayers, usually acting with their employers, to procure particular benefits that are part of a social safety net. It will impede pursuit of policies that benefit market competitors when they act as employers. It will defeat the policy of Code provisions that preclude taxpayers from abusing provisions governing the tax consequences of transactions--probably to the horizontal inequity of heterosexual married couples. In short, DOMA is bad income tax policy.

Id. Certain estate tax consequences can also affect widowers of same-sex marriages differently than opposite-sex marriages. *See supra* note 34.

⁴⁴ *See* Robert B. Chapmen, *Profoundly Unwise and Even Irresponsible Uncertainty: Some Questions as to the Effect of the Defense of Marriage Act on Marital Status in Bankruptcy for Same-Sex Couples Validly Married under State Law*, 14 J. BANK. L. & PRAC. 1 Art. 1 (2005).

DOMA was neither carefully considered nor carefully drafted. There are important but as of yet unanswered questions as to how the inconsistent state laws regarding same-sex marriages will affect the rights and obligations of debtors and creditors in bankruptcy cases in which there is a same-sex marriage. Although the legislative history of DOMA justifies the law as necessary to eliminate uncertainty, DOMA not only fails to provide certainty, it also contributes to even more uncertainty in the context of bankruptcy.

Id.

⁴⁵ *See* Bradley J. Betlach, *The Unconstitutionality of the Minnesota Defense of Marriage Act: Ignoring Judgments, Restricting Travel and Purposeful Discrimination*, 24 WM. MITCHELL L. REV. 417, 445 n. 230 (1998).

⁴⁶ The federal government conceded

“As the President has previously stated, this Administration does not support DOMA as a matter of policy, believes that it is discriminatory, and supports its repeal. Consistent with the rule of law, however, the Department of Justice has long followed the practice of defending federal statutes as long as reasonable arguments can be made in support of their

Before filing a motion to dismiss in *Gill*, the Department of State amended a policy prohibiting the issuing of passports with a name changed pursuant to a same-sex marriage, which granted the relief sought to one of the plaintiffs.⁴⁷ With respect to the remaining claims for relief, the federal government argues that the issue at stake is not whether same-sex couples have a constitutional right to marry, but rather whether same-sex couples have a right to receive federal benefits.⁴⁸ It asserts that there is “no fundamental right to marriage-based federal benefits.”⁴⁹

The federal government further claims that the First Circuit has held that sexual orientation is not a suspect classification, so DOMA should be analyzed using the rational basis test for the Fifth Amendment challenge in *Gill*.⁵⁰ The federal government argues

constitutionality, even if the Department disagrees with a particular statute as a policy matter, as it does here.”
Motion to Dismiss at 1, *Gill v. Office of Pers. Mgmt.*, No. 1:09-cv-10309-JLT (D. Mass. Sept. 18, 2009) (citation omitted) [hereinafter *Gill* Motion to Dismiss]. This exact language is repeated verbatim in the federal government’s motion to dismiss in the *Massachusetts* case as well. Motion to Dismiss at 1, *Massachusetts v. U.S. Dept. Health & Human Servs.*, No. 1:09-cv-11156-JLT (D. Mass. Oct. 30, 2009) (citation omitted) [hereinafter *Massachusetts* Motion to Dismiss].

⁴⁷ See *Gill* Complaint at 5 (alleging discriminatory passport name policy); Letter from W. Scott Simpson, U.S. Department of Justice, to Amy Senier et al., Foley Hoag LLP (June 15, 2009), available at <http://www.glad.org/uploads/docs/cases/doma-letter-passport-signed-red.pdf> (informing Plaintiff’s counsel of change in policy).

⁴⁸ See *Gill* Motion to Dismiss at 3.

⁴⁹ See *Gill* Motion to Dismiss at 15. The Due Process Clause “generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.” *Id.* (quoting *DeShaney v. Winnebago County Dep’t of Soc Servs.*, 489 U.S. 189, 196 (1989)).

⁵⁰ *Id.* “[DOMA] does not rely on any classifications a federal court has recognized as suspect under existing precedent. Nor have federal courts found a fundamental right to the marriage-based federal benefits it restricts.” *Id.* at 2. Under the Rational Basis Test, the court would have to uphold DOMA “so long as there is any reasonably conceivable set of facts that could provide a rational basis for [the statute], including ones that Congress itself did not advance or consider.” *Id.* at 3. The First Circuit, binding authority in both the *Gill* and *Massachusetts* cases, has held that sexual orientation does

that DOMA does not prevent states from allowing same-sex couples to marry.⁵¹

Congress can choose to provide benefits only to people who have historically been allowed to marry without extending the same to those who have only recently been allowed to.⁵²

The federal government defends DOMA in limiting some of its programs to opposite-sex couples by arguing that the plaintiffs in *Gill* cannot overcome the strong “presumption of constitutionality” given to statutes providing for payments of monetary benefits.⁵³ In their motion to dismiss the *Gill* case, the federal government cited a list of cases that previously brought unsuccessful challenges to DOMA.⁵⁴ It argues that DOMA

not constitute a suspect classification under the Fifth Amendment. *See Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008).

⁵¹ *See id.* at 2.

⁵² *See id.* at 3.

⁵³ *Gill* Motion to Dismiss at 13 (quoting *Califano v. Gautier Torres*, 435 U.S. 1, 5 (1978)).

⁵⁴ *See Gill* Motion to Dismiss at 13, n.6:

See, e.g., Smelt v. County of Orange, 374 F. Supp. 2d 861 (C.D. Cal. 2005) (Section 3), *vacated on other grounds*, 447 F.3d 673 (9th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005) (Section 2 and Section 3); *In re Kandu*, 315 B.R. 123 (Bankr. W. D. Wash. 2004) (Section 3), *appeal dismissed* *Kandu v. United States Trustee*, Case No. 3:04-cv-05544- FDB (W.D. Wash.); *see also Bishop v. Oklahoma*, 447 F. Supp. 2d 1239 (N.D. Okla. 2006) (rejecting certain constitutional challenges but deferring others pending further development). *But cf. In re Levenson*, 560 F.3d 1145, 1149 (9th Cir. Jud. Council 2009) (Reinhardt, J.) (suggesting, in his capacity as designee of the Chair of the Ninth Circuit’s Standing Committee on Federal Public Defenders, that DOMA should be subject to heightened scrutiny, and finding that its denial of federal benefits to the same-sex spouse of federal employee had “no rational basis” and therefore “contravene[d] the Fifth Amendment”).

Id. The *Kandu* case cited was a case of first impression where petitioners, a same-sex couple validly married in Canada, wished to jointly file for bankruptcy. *In re Kandu*, 315 B.R. 123 (Bankr. W. D. Wash. 2004). Petitioners challenged DOMA as violating the Tenth Amendment. *Id.* at 131. The court ruled that DOMA was not binding on the states, and therefore did not violate the Tenth Amendment. *Id.* at 132. Petitioners also argued that DOMA violated the Fifth Amendment’s right to equal protection. *Id.* at 141-

maintained the status quo at the time of enactment, when no state allowed for same-sex marriage, but allows states the flexibility to expand the definition of marriage to include same-sex couples.⁵⁵

In defending the Tenth Amendment challenge in *Massachusetts*, the federal government denies that DOMA unconstitutionally infringes on states' rights.⁵⁶ DOMA, it claims, "does not present an 'unavoidable command' to state governments 'to implement legislation enacted by Congress.'"⁵⁷ It points out that in enacting MassHealth, Massachusetts has chosen to provide benefits to same-sex spouses unavailable through Medicaid.⁵⁸ In other words, DOMA does not prevent the states from providing the same type of benefits to same-sex spouses that DOMA denies.⁵⁹ The federal government argues that DOMA is only applicable to federal law, and reserves regulation as to who may marry to the states.⁶⁰

42. The court again denied relief, stating that homosexuals do not constitute a suspect or quasi-suspect class for equal protection analysis, and under rational basis review DOMA does not violate the Fifth Amendment. *Id.* at 143-46.

⁵⁵ In its motion to dismiss the *Gill* case, the federal government points out that while six states (at the time of the motion—Maine has since repealed same-sex marriage through referendum) had legalized same-sex marriages, twenty-nine states had promulgated constitutional amendments prohibiting same-sex marriages, and eleven states had passed laws limiting marriage to opposite-sex couples. *Gill* Motion to Dismiss at 17-18.

⁵⁶ See generally *Massachusetts* Motion to Dismiss.

⁵⁷ *Gill* Motion to Dismiss at 11 (quoting *New York v. United States*, 505 U.S. 144, 176, 185 (1992)).

⁵⁸ *Gill* Motion to Dismiss at 12.

⁵⁹ See *id.*

⁶⁰ See *Gill* Motion to Dismiss at 11. See also Mark D. Rosen, *Why the Defense of Marriage Act is Not (Yet) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors that Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 940 (2006). "What DOMA does regulate, however, is a quintessentially federal function, and for that reason the statute does not implicate Tenth Amendment considerations." *Id.*

It is unlikely that the Tenth Amendment challenge in *Massachusetts* will prevail. DOMA does not command that state law refuse to recognize same-sex marriages or prohibit same-sex couples from getting married.⁶¹ The extent of DOMA's reach is limited to federal spending benefits, and it will be difficult for the Commonwealth to overcome the "presumption of constitutionality."⁶² Similarly, the federal government will probably be able to meet the lowered rational basis standard in the Fifth Amendment challenge in *Gill*. If full federal benefits are to be extended to same-sex married couples, the most likely and effective method to accomplish this would be to repeal DOMA.⁶³

⁶¹ *Kandu*, 315 B.R. at 132. "The Tenth Amendment is not implicated because the definition of marriage in DOMA is not binding on states and, therefore, there is no federal infringement on state sovereignty. States retain the power to decide for themselves the proper definition of the term marriage." *Id.* See also *supra* note 54 and accompanying text.

⁶² See *Gill* Motion to Dismiss, *supra* note 53 and accompanying text.

⁶³ See H.R. 3567, *supra* note 16 (discussing The Respect for Marriage Act).