

## *What's Next for*



# DOMIA?

When the Department of Justice decided it would not defend a key part of the **Defense of Marriage Act**, the announcement triggered excitement *and* confusion. Three Lambda Legal attorneys—Camilla Taylor, Susan Sommer and Tara Borelli—weigh in on what DOMA's status means in the courts, in Congress and on the ground.

**IMPACT:** Let's start by talking about the Department of Justice's announcement that it would not to defend Section 3 of DOMA. How did this happen?

**CAMILLA TAYLOR, Director, National Marriage Project, Lambda Legal:** We're glad the DOJ finally took this position—after fighting our client and others in court for years. We were one of the organizations to argue in various publications that there was precedent for the administration to refuse to defend a patently unconstitutional law, and it was heartening to see the administration stake out this position for itself. However, once the DOJ has determined that a law is manifestly unconstitutional and therefore indefensible, Congress has the option to determine whether it will itself defend the statute—and, unfortunately, the House leadership has decided to use taxpayers' money to do just that. Congress has retained a lawyer for this purpose who has already appeared in court in cases around the country to defend DOMA, including our case representing Karen Golinski.

**SUSAN SOMMER, Director of Constitutional Litigation, Lambda Legal:** Both Bush administrations, the Reagan administration as well as the Clinton administration on occasion found laws passed by Congress so clearly indefensible as a constitutional matter that those administrations would not defend them. This is nothing new.

**IMPACT:** Was this announcement a surprise?

**SOMMER:** There wasn't necessarily an expectation that the Obama administration would take this step any second. But it was certainly a step that had been long considered and discussed, certainly by many who were of the mind that DOMA is simply unconstitutional. For the Obama administration to defend the constitutionality of DOMA, it would have to make repugnant arguments that no longer have any place in our jurisprudence.

**TAYLOR:** Yes. The Obama administration was faced with the reality that it's not possible both to defend DOMA, and to maintain at the same time that gay and lesbian parents and their children are equal citizens deserving of a fair shake in this country. For a lawyer to defend DOMA, the lawyer must be prepared to make bogus claims dependent only on junk science, and to demonize an entire class of people and their children.

For example, take a look at what a lawyer defending DOMA would need to say to justify

using a lenient method of review for laws that target people for discriminatory treatment based on their sexual orientation. We have always argued that courts should take a skeptical look at such laws—both because of the history of discrimination against lesbian and gay people, and because we know that a person's sexual orientation has nothing to do with that person's ability to

and finally declare it unconstitutional. The administration is also saying that it's not going to be enough for a trial-level court to declare DOMA unconstitutional. This in fact has already happened in the *Gill* case, brought by GLAD, that had a victory in district court in Massachusetts and is proceeding to the First Circuit Court of Appeals.

“Our Department of Justice has concluded that it is simply impossible to find a credible argument that supports the constitutionality of this law.”



—CAMILLA TAYLOR, Director, National Marriage Project

contribute to society. There's now a growing recognition that arguments to the contrary are offensive on a gut level. I think that we'll look back on the DOJ's decision not to defend DOMA's constitutionality as a watershed moment, not just for what it accomplished in court in our cases, but also because it reflects our nation's growing understanding that discrimination against lesbian and gay people in any context is both shameful and indefensible.

However, people should understand that DOMA remains in effect, and it will remain in effect until Congress repeals it or until a court strikes it down.

**SOMMER:** I completely agree that the Obama administration's legal analysis—that laws discriminating on the basis of sexual orientation should be subject to heightened scrutiny—is certainly a game changer as a psychological matter. It's an extremely strong statement coming from this nation's highest government lawyer, the Attorney General. If the courts adopt that standard—and we've just seen I think a big advance in the ability to persuade courts to do so—it is incredibly difficult to imagine any law singling out gay people for disadvantage that could withstand that level of scrutiny.

However, the administration has also said that it will continue to enforce DOMA unless and until Congress repeals it or the courts definitively

**TARA BORELLI, Staff Attorney, Lambda Legal:** With respect to the Department of Justice's statement about the appropriate level of review, I think that's going to have significant ripple effects for other cases even when DOJ isn't representing the federal government as a defendant. For example, we're currently working on another case in federal court called *Collins v. Brewer*, that challenges the Arizona legislature's attempt to strip domestic partner benefits from the state's gay and lesbian employees. That case is against state defendants, so DOJ isn't participating to make arguments about the level of constitutional review. But when the government discriminates against gay people, that's precisely the type of discrimination that the court should view with significant suspicion, and it's powerful to have DOJ agree.

It's not clear which court in the country will be next to recognize that proposition, but the DOJ's position makes it increasingly clear that the government rarely, if ever, has any adequate reasons for singling out gay people for differential treatment, and the government should have to overcome a very heavy burden to justify the discrimination. We've been making these arguments for years, of course, but this DOJ announcement adds very important momentum.

It's also important to note that if an appellate court agrees that heightened scrutiny is appropriate in a case about DOMA, that holding will apply to government actions across the board in that

jurisdiction. Additionally, we have argued that heightened scrutiny applies to sexual orientation-based discrimination, not just because that's correct, but also because we have long believed that the failure to decide that question sends a signal that discrimination against gay people is less serious than discrimination against others. It's an invitation to private parties to discriminate. It's very important to have DOJ urging that this question be properly decided, as has been done for discrimination against other groups.

**IMPACT:** Can we talk about what's at stake in Lambda Legal's suit *Golinski v. U.S. Office of Personnel Management*? That didn't start out as a DOMA suit.

**BORELLI:** In this case, Lambda Legal represents Karen Golinski, who was denied spousal health benefits for her wife by her employer, the U.S. 9th Circuit Court of Appeals in San Francisco [see sidebar, facing page]. We didn't always think of *Golinski* as a case challenging DOMA. We originally filed the case to get enforcement of a nondiscrimination policy, arguing that there was a way to provide equal treatment that didn't require having to confront DOMA. It's quite a statement about the progress we've made that, when we began the case in 2008, it seemed easier to argue about when one branch of government gets to tell another branch of government to do something. Who could imagine that by this point in the case, DOMA would seem like the easier question?

So for some time this case was argued in the courts as an issue of Karen's employer, the judicial branch, having a right to provide her equal treatment without interference from the executive branch. It was the Obama administration's Office of Personnel Management that decided to reach across the country and insert arguments about DOMA as a justification for withholding benefits from Karen's wife, Amy.

So we filed a motion for preliminary injunction in federal trial court in Northern California to try to get access to the plan for Karen, because she's been waiting for a long time for health benefits for Amy. However, in March—in the midst of some complicated questions about intergovernmental power struggles—the judge dismissed our case, inviting us to re-file the case and to make it squarely about DOMA this time.

Judge White said that Karen has a clear right to relief and that the Court would, if it could, address the constitutionality of DOMA. We were only too happy to give the Court that opportunity, and we filed the complaint in mid-April. We're eager to press the case forward.

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—SUSAN SOMMER, Director of Constitutional Litigation

**IMPACT:** What are the possibilities for striking down DOMA in Congress?

**TAYLOR:** The Respect for Marriage Act is a DOMA-repeal bill that's been introduced in Congress. The lead sponsors in the House are Jerrold Nadler (D-N.Y.), Barney Frank (D-Mass.), Tammy Baldwin (D-Wisc.), Jared Polis (D-Col.) and John Conyers (D-Mich.). Senators Diane Feinstein (D-Calif.), Patrick Leahy (D-Vt.) and Kirsten Gillibrand (D-N.Y.) introduced a companion bill in the Senate. And it's gaining more sponsors every day. For example, Congressmen Braley and Loeb sack and Senator Harkin, all Iowans, support it. It's important to see Iowa federal representatives interested in repealing DOMA because there are a number of Iowa married couples they represent.

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—TARA BORELLI, Staff Attorney

Who could have anticipated five years ago that we'd have elected representatives from the Midwest supporting the repeal of discrimination against Midwest married same-sex couples? But here we are, in 2011, and a significant number of Midwest federal reps have signed on.

**SOMMER:** Whether there will be a congressional repeal before a judgment in court, it's hard to say. I think there's a good chance that a case involving DOMA will go to the U.S. Supreme Court before it's over.

**IMPACT:** What does the status of DOMA mean for couples on the ground? Is the legal status of their relationships in any way improved?

**SOMMER:** Not yet but there have been some organized or individual efforts to register, in different ways, opposition to DOMA and to its enforcement. For example, there are ways for couples, without incurring penalties, to make sure the government knows at tax filing time that they are married and that their marriages should be respected. We have information on our website about that.

**TAYLOR:** In the context of immigration, under the current laws, where one spouse is a U.S. national and the other one is not, couples are particularly vulnerable. The spouse who is a U.S. national may have no way of rejoining his or her spouse in the nation of origin of the spouse. It may not be possible to get a visa to travel to that country or to remain there, and so they may be separated permanently if the spouse is deported. Similarly, LGBT immigrants are often escaping considerable antigay discrimination in their home countries. And regardless of whether they are eligible to file for asylum, it can be cruel to send an LGBT immigrant back to his or her country of origin. The administration has great discretion with respect to how and when to enforce immigration laws concerning deportation and when a U.S. citizen is permitted to petition, and we have just witnessed an important step by Attorney General Holder, who exercised his discretion in a deportation case in New Jersey and vacated the previous ruling that had relied on DOMA. But repealing DOMA would clearly be the best solution for binational couples.

**IMPACT:** What problems will a DOMA repeal not address?

**SOMMER:** The cases that are working their way through the courts now are focused on taking down Section 3 of DOMA, that portion of DOMA focused on the deprivation of federal protection to those married under their states'

laws. People shouldn't be confused into thinking that those DOMA challenges are a broad-scale federal constitutional challenge to states that still don't allow same-sex couples to marry. That is a different issue.

**TAYLOR:** Yes. The DOMA cases that are currently in the courts—including *Golinski*, *Gill*, *Pederson* and *Windsor*, concerning whether the federal government must respect a state's determination of who is married—wouldn't cause a state with a marriage ban to have to alter it in any way. Also, of course the repeal of DOMA would not conclude the work that we still have to do in the many states where marriage is still barred for same-sex couples and in the areas of workplace discrimination, transgender rights, school-based discrimination and the rights of people living with HIV, as well as LGBT seniors, just to name a few examples.

**IMPACT:** But if DOMA is struck down, can a couple get married in Iowa or another state where marriage is legal for same-sex couples and then file taxes jointly?

**SOMMER:** It depends on where you live. If you live in Mississippi, get married in Iowa and move back to Mississippi, chances are you wouldn't be able to file your taxes as married because the federal government, in most of its benefits, looks to the law of the state in which you live to determine if you're married. There's a good chance that simply with a ruling in a case like *Gill*, people who have gone to other places to get married but live in states that in no way respect their marriages are still not going to get federal benefits. That will be litigation for another day.

**IMPACT:** So even though people should feel somewhat excited about the possibility of DOMA ending, it still sounds like there's a lot of work to do.

**SOMMER:** I don't necessarily want to say it's a marathon rather than a sprint, but this is going to be a process. We encourage people who are feeling the terrible pinch and bite of DOMA to contact us with questions and their concerns. We can fill people in more on what's going on in their particular context, and see if we can offer help. **L**



## The Couple Behind the Case

An interview with the plaintiff in Lambda Legal's DOMA challenge, **Karen Golinski** (above, left, with wife **Amy Cunningham**)

**Did you ever expect things to proceed this way when you first sought to enroll Amy in your benefits plan?** No, we did not, although (former Lambda Legal Marriage Project Director) Jenny Pizer warned us that my "little employment dispute" might take on a life of its own. When I first put in my paperwork to add Amy to my health insurance, she and I joked that we were going to try, but hoped we wouldn't have to "make a federal case out of it." We laugh quite a bit about that now, two and a half years and a federal lawsuit later.

**How do you feel about the case now moving forward as a direct challenge to DOMA?** We feel honored and a bit overwhelmed to be part of this movement that is challenging DOMA. When we talk to people about our case, it seems so simple and unfair to everyone, and we are glad that our case highlights the clearly discriminatory nature of DOMA. We are also amazed by how the legal landscape has changed since I first tried to add Amy to my health insurance—the number of cases across the country that are now challenging the unfair treatment of lesbians and gay men due to DOMA, as well as the Administration's significant decision to stop defending this discriminatory law.

**"LAMBDA LEGAL WARNED US THAT MY 'LITTLE EMPLOYMENT DISPUTE' MIGHT TAKE ON A LIFE OF ITS OWN."**

**As an attorney, what has it been like for you to find a very personal issue of your own at the center of a high-profile case?** Quite honestly, it has been uncomfortable at times, especially as a federal judiciary employee now suing the federal government. With that said, I am incredibly grateful to my employer, the Ninth Circuit Court of Appeals, for its comprehensive employee dispute resolution plan, which covers both sex and sexual orientation discrimination. The court has tried in every way possible to treat me fairly and to put Amy on my health plan.

**What have the past three years been like for you as a family?** An emotional rollercoaster! It is difficult to explain to friends and family that despite having won several rulings during the employee dispute resolution process, Amy has not yet been added to my family health plan. It is surreal. Amy and I are also fairly private people, and the public nature of this case has been challenging. We steel ourselves for the appearance of news articles, reminding each other that we are fighting an important fight for our own family and for others like ours.

