



# Iowa General Assembly

## 2013 Legal Updates

Legislative Services Agency – Legal Services Division

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**Purpose.** *Legal update briefings are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative matters of recent court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although a briefing may identify issues for consideration by the General Assembly, a briefing should not be interpreted as advocating any particular course of action.*

### FEDERAL DEFENSE OF MARRIAGE ACT RULED UNCONSTITUTIONAL IN PART

Filed by the United States Supreme Court

June 26, 2013

#### United States v. Windsor

No. 12-307

[http://www.supremecourt.gov/opinions/12pdf/12-307\\_6j37.pdf](http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf)

**Background.** Two women, Edith Windsor and Thea Spyer, met in 1963 in New York City and began a long-term relationship. They registered as domestic partners in 1993 when this status became available in New York. When Spyer's health deteriorated due to multiple sclerosis and a heart condition, the couple traveled to Canada in 2007, where same-sex marriage was legal, married, and thereafter resided in New York City. Their marriage was deemed valid in New York. Spyer died in February 2009, leaving her entire estate to Windsor. Windsor did not qualify for the marital exemption from the federal estate tax because under section 3 of the federal Defense of Marriage Act (DOMA), Windsor, as a same-sex spouse, was not defined as a "surviving spouse." Windsor paid \$363,053 in estate taxes, requested a refund, and the Internal Revenue Service denied the refund citing DOMA. Windsor then filed suit for a refund in the United States District Court for the Southern District of New York, contending that DOMA violates equal protection as applied to the federal government through the Fifth Amendment to the Constitution of the United States. While the suit was pending, the Attorney General of the United States informed the U.S. Speaker of the House of Representatives in a letter that the Department of Justice (DOJ) would no longer defend the constitutionality of section 3 of DOMA. In the letter, the Attorney General informed Congress that the President had determined that based on various factors, classifications based on sexual orientation should be subject to a heightened standard of scrutiny. However, the President also instructed the DOJ that section 3 of DOMA would continue to be enforced by the executive branch to recognize the judiciary as the final arbiter of the constitutional claims. Generally, 28 U.S.C. §530D letters are preceded by an adverse judgment, but this letter reflected the President's own determination, prior to resolution by the courts, that heightened equal protection scrutiny should apply to laws that classify based on sexual orientation. Following submission of the letter, the Bipartisan Legal Advisory Group (BLAG) of the United States House of Representatives voted to intervene to defend the constitutionality of section 3 of DOMA. The District Court denied intervention as of right, but did grant intervention as an interested party.

The District Court ruled against the United States on the merits, holding that section 3 of DOMA is unconstitutional and ordered payment of the refund with tax and interest. Both the DOJ and BLAG filed notice of appeal and the Solicitor General filed a petition for certiorari. Before the petition was heard, the Court of Appeals for the Second Circuit affirmed the judgment of the District Court applying heightened scrutiny. The United States did not comply with the judgment, no refund was issued, and the executive branch continued to enforce section 3 of DOMA.

The United States Supreme Court (Court) granted certiorari on the constitutionality of section 3 of DOMA. The Court also requested briefing and argument on the questions of whether the United States' agreement with Windsor's legal position precludes further review and whether BLAG has standing to appeal the case. Justice Kennedy delivered the opinion of the Court in which Justices Ginsburg, Breyer, Sotomayor, and Kagan joined.

**Issue—Jurisdiction.** Whether the government, by agreeing that the law is unconstitutional, precludes further review and whether BLAG has standing to appeal to the Court of Appeals and to seek certiorari.

#### Analysis.

**District Court—Justiciable Controversy.** When the case was in the District Court there was a concrete disagreement

between the parties, and the taxpayer had standing to challenge the collection of a specific tax as unconstitutional and suffered a redressable injury that was concrete, persistent, and unredressed. Even though the government agreed with Windsor's position, the Court determined that in the District Court, there was still a justiciable controversy.

**Appeal and Petition for Certiorari—Jurisdictional Requirements and Prudential Limitations.** Once the District Court issued its judgment ordering the refund, the parties were no longer adverse. The amicus position was that because the parties were no longer adverse and the government did not seek redress from the judgment, the appeal and the petition for certiorari should be dismissed.

The Court, however, distinguished between two principles relating to a determination of standing under Article III: the jurisdictional requirements (the Article III standing which enforces the constitutionally based case or controversy requirement) and the prudential limits on its exercise (the judicially imposed limits on exercise of federal jurisdiction). Article III standing requires that the plaintiff has suffered an injury in fact that is concrete and particularized as well as actual or imminent; that there is a causal connection between the injury in fact and the challenged conduct; and that the injury is likely to be redressed by a favorable decision. The Court asserted that the rules of prudential standing are more flexible rules of appellate practice to protect the Court from deciding abstract questions of wide public significance when there are other options to address the questions.

**Jurisdictional Requirements.** The Court determined that the United States retained a significant stake sufficient to support Article III standing on appeal and on certiorari. Even though the executive branch disagreed with section 3 of DOMA, Windsor's judgment for a refund, the government's refusal to pay, and Windsor's ongoing claim for payment establishes a controversy sufficient for Article III jurisdiction. Additionally, the payment of the refund by the government would be a real economic injury to the government sufficient to constitute standing in the case. In *INS v. Chadha*, 462 U.S. 919 (1983), the executive branch determined that the statute allowing one house of Congress to deport an individual was unconstitutional, but the Immigration and Naturalization Service (INS) continued to abide by the statute. The Court found that the INS was sufficiently aggrieved by the Court of Appeal's decision, prohibiting it from taking action it would have taken but for the decision, to constitute a justiciable dispute required by Article III. Even when the government agrees with the opposing party on the merits, sufficient adverseness and an adequate basis for jurisdiction remains if the government intends to enforce the challenged law against the party. Additionally, even though a party that receives all the relief sought generally cannot appeal, the party may still appeal if the party retains a stake in the appeal satisfying the requirements of Article III.

**Prudential Limitations.** While the Court found that a justiciable controversy remained, it also determined that the prudential problems stemming from the executive branch's unusual position in agreeing with Windsor's legal argument required further discussion. There are reasons to hear a case and issue a ruling even when one party is reluctant to prevail.

Prudential considerations that counsel against hearing a case may be outweighed by countervailing considerations. One such consideration is the extent to which adversarial presentation of the issues is assured by the participation of amici curiae prepared to defend with vigor the constitutionality of the legislative act. In this case, BLAG presented a substantial argument for the constitutionality of section 3 of DOMA, thereby satisfying the prudential concerns against hearing an appeal when the principal parties agree. If the Court dismissed the case, extensive litigation would ensue because the district courts would have no precedential guidance in cases involving not only tax refunds, but also cases involving the over 1,000 federal statutes and federal regulations that are based on the definition of spouse in section 3 of DOMA. While the extent of DOMA's mandate would make it more likely that another case without the prudential concerns raised in this case would arise in the future, the cost in judicial resources and expense of litigation for those adversely affected prior to the resolution of the issue would be immense.

**Separation of Powers Concerns—Not a Common Practice.** While the Court determined that the petition may be heard on the merits, it did caution that if this were a common practice, difficulties would ensue. Because the executive branch failed to defend the constitutionality of section 3 of DOMA, based on a constitutional theory not yet established in a judicial decision, a procedural dilemma is created. On one hand, the government's agreement with Windsor raises questions about the propriety of entertaining a suit in which the government seeks affirmance of an order invalidating a federal law and ordering the United States to pay money. On the other hand, if the executive branch's agreement with the plaintiff that the law is unconstitutional is enough to preclude judicial review, the Court's primary role in determining the constitutionality of a law that inflicts real injury on a plaintiff who brought a justiciable claim would become secondary to the President's, and undermine the clear distinction of the principle of separation of powers with respect to judicial branch powers. Additionally, with respect to legislative branch powers, when Congress passes a statute and the President signs it, if the executive branch later nullifies the legislative enactment on its own initiative and without a determination of the Court, this also poses a threat to the principle of separation of powers. When the executive branch makes a decision that a law is unconstitutional, it faces a difficult choice. It is appropriate for the executive branch to make the case to Congress to amend or repeal a law, otherwise the integrity of the political process would be at risk if difficult constitutional issues were referred to the Court routinely. However, the case in point is not routine: it is of immediate importance to the federal government and to hundreds of thousands of people, thereby supporting the Court's decision to proceed on the merits.

**Holding.** The Court has jurisdiction to consider the merits of the case. Because of the unusual and urgent circumstances of the case, it is the Court's proper responsibility to take jurisdiction. The prudential and Article III requirements are met in this case and the Court did not need to determine if BLAG would have standing to challenge the previous rulings on BLAG's own authority.

**Issue—Constitutionality of DOMA.** Whether section 3 of DOMA violates the Fifth Amendment of the United States Constitution guaranteeing equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their state.

**Analysis.** Marriage laws have changed over time in those states where the citizens have determined that limiting lawful marriage to heterosexual couples is an unjust exclusion. In New York, initially, the state only recognized same-sex marriages performed elsewhere. Later New York amended its own marriage laws to permit same-sex marriage in the state.

Historically and traditionally, the definition and regulation of marriage has been within the purview and authority, and virtually the exclusive province, of the individual states. State laws defining and regulating marriage must do so in a manner that respects the constitutional rights of persons. The definition of marriage in a state is central to the state's domestic relations law applicable to those domiciled within its borders, and throughout history the federal government has deferred to state law policy decisions with respect to domestic relations. When the Federal Constitution was adopted, it was common understanding that domestic relations were the purview of the states. Congress has, however, enacted statutes and made determinations that bear on marital rights and privileges. Some such actions include those relating to the right of a spouse to life insurance proceeds, marriages entered into relative to immigration status, and the income-based criteria for Social Security benefits. DOMA has a far greater reach in affecting marriage rights and privileges by enacting a directive applicable to over 1,000 federal statutes and numerous federal regulations.

In those states where lawful marriage is defined to include same-sex couples, the states decided to utilize their historic and essential authority to give a class of persons the right to marry, conferring upon them a dignity and status of import. The extent and reach of DOMA departs from this traditionally state-based province and instead uses this state-defined class to impose restrictions and disabilities. The Court must determine if the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment. What the state of New York treats as alike, DOMA treats as unlike and injures the same class the state seeks to protect. Through New York's initial recognition of the validity of same-sex marriages performed in other jurisdictions and subsequent enactment of authorization of same-sex marriages in the state, the state acted to give protection and dignity to that bond. DOMA seeks to injure the class of persons that New York seeks to protect. DOMA's deviation from the usual tradition of recognizing and accepting state definitions of marriage operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. The purposes and practical effect of the law is to impose a disadvantage, a separate status, and a stigma on individuals who enter same-sex marriages that are lawful under the purview of the state. The legislative history of DOMA, which was titled "The Defense of Marriage Act," evidences that the purpose was to defend the institution of traditional heterosexual marriage and to express both moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional morality. The Act's demonstrated purpose was to ensure that if any state decides to recognize same-sex marriages, those unions will be treated as second-class marriages for the purpose of federal law. This raises serious Fifth Amendment concerns. When New York enacted its law permitting same-sex marriage, it sought to eliminate inequality. DOMA writes inequality into the entire United States Code. DOMA applies to not only the estate tax affected in this case, but to over 1,000 statutes and numerous federal regulations including those pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits. DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. DOMA forces same-sex couples to live as married for the purposes of state law, but unmarried for the purposes of federal law, undermining the public and private significance of state-sanctioned same-sex marriages, classifying otherwise valid marriages as unworthy of federal recognition and as second-tier marriages. The differentiation demeans the couple whose moral and sexual choices the Constitution protects, and whose relationship the state dignifies. Additionally, it makes it even more difficult for the children being raised by same-sex couples to understand their own family and its place among the other families in the community. DOMA touches varied aspects of married and family life through limitations on public benefits and protections for the couple and brings financial harm to the children of same-sex couples.

Congress has great power to design laws, but it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment. DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution, which contains a prohibition against denying any person the equal protection of the laws. The Fifth Amendment withdraws from government the power to degrade or demean in the way DOMA does, and the equal protection guarantee of the 14th Amendment makes the Fifth Amendment right all the more specific and all the better understood and preserved.

DOMA directs its restrictions and restraints on those persons who are joined in same-sex marriages made lawful by the states. DOMA singles out this class of persons, and imposes a disability on the class by refusing to acknowledge a status the state recognizes as dignified and proper. DOMA instructs everyone, including the children of the couple, that their

marriage is less worthy than the marriages of others. DOMA is invalid because no legitimate purpose overcomes the effect of disparaging and injuring those whom the state, through its marriage laws, sought to protect. DOMA is in violation of the Fifth Amendment because it displaces the state-sanctioned protection of persons in same-sex marriages and treats those persons living in these marriages with less respect than others. The opinion and its holding are limited to those lawful marriages.

**Holding.** Section 3 of the Defense of Marriage Act is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment.

#### **Dissenting Opinions.**

**Chief Justice Roberts.** Chief Justice Roberts filed a dissenting opinion. Justice Roberts concluded the Court lacked jurisdiction to review the decisions of the courts below. On the merits of the constitutionality of the law, Justice Roberts concluded that Congress acted constitutionally in the interests of uniformity and stability in passing DOMA. Justice Roberts disagreed with the majority analysis and felt it important to point out that the majority analysis leads no further, i.e., that the Court did not have before it, and did not decide, the distinct question whether the states may continue to utilize the traditional definition of marriage. While the Court may have to resolve challenges to state marriage definitions affecting same-sex couples, that issue was not before the Court in this case and the Court lacked jurisdiction to consider it in the context of the case before the Court.

**Justice Scalia.** Justice Scalia filed a dissenting opinion in which Justice Thomas joined and in which Chief Justice Roberts joined as to Part I. Justice Scalia concluded that the Court had neither the jurisdiction to review the case nor the power to invalidate democratically enacted legislation. The majority incorrectly asserted the supremacy of the Court as the final arbiter and primary power within government. The Court can say what the law is when the law is alleged to conflict with the Constitution only when the allegation will determine the outcome of a lawsuit and is contradicted by the other party. Windsor's injury was cured by the judgment in her favor. In the Court of Appeals and the Supreme Court, neither party sought to undo the judgment for Windsor, and so both courts should have dismissed the appeal for lack of jurisdiction. The Court has never before agreed to say what the law is when there was no controversy before the Court. Justice Scalia did not agree with the majority's discussion of the requirements of Article III standing as being either jurisdictional or prudential. He did not consider adverseness to be merely a prudential limitation in meeting Article III requirements. The question is whether there is a controversy, which requires contradiction between the United States and Ms. Windsor, and there is not. The authorities the majority cites stand for the proposition that prudential discretion may be utilized to deny an appeal even when a live controversy exists, not the discretion to grant one when it does not. The existence of a controversy is an essential element of Article III, not a prudential requirement.

Some may argue that if the Court did not assert jurisdiction when the President determines a statute is unconstitutional, it will not be subject to judicial review. When both the President and the plaintiff agree, this is as it should be. When the executive branch enforces an unconstitutional law, suit will lie. This suit arose only because the executive branch enforced the Act even though it believed it to be unconstitutional. The President could instead have chosen neither to defend nor enforce the statute, in which case Windsor would not have been injured and the matter would have been left to the President and Congress. The President could also have declined to appeal the lower courts' decisions with which he agreed.

On the merits, Justice Scalia concluded that the majority's justifications were rootless and shifting between federalism, equal protection, and substantive due process. If the case is based upon an equal-protection argument, the majority did not determine whether the Equal Protection Clause required laws restricting the definition of marriage to be reviewed under a rational basis or strict scrutiny standard.

To date, it has been a familiar principle of constitutional law to not strike down an otherwise constitutional law on the basis of alleged illicit legislative motive. Proponents for the passage of DOMA argued that it avoids difficult choice-of-law issues, and that it preserves the intended effects of prior legislation against unforeseen changes in circumstances. The majority concluded, however, that the only motive for the Act was the desire to harm a politically unpopular group. The Court should not rule based upon a presumed insidious intent on the part of Congress.

Justice Scalia concluded that even though the majority limited the holding and the opinion to lawful same-sex marriages by declaring anyone opposed to same-sex marriage an enemy of human decency, the majority armed every potential challenger to a state law restricting marriage to the traditional definition with a basis for challenging the statute.

**Justice Alito.** Justice Alito filed a dissenting opinion in which Justice Thomas joined as to parts II and III. Justice Alito concluded that the United States government did not have standing in the case because the executive branch declined to defend the statute. If the Court reviewed a decision at the behest of such a party, it would be tantamount to rendering an advisory option. BLAG did have standing because it represents the interests of the House of Representatives which suffered an injury in fact, and the suit was otherwise undefended. The Court has long held that Congress is the proper party to defend the validity of a statute when an agency of government charged with enforcing the statute agrees with the plaintiffs and refuses to defend the statute on constitutional grounds.

While same-sex marriage presents a highly emotional and important question of public policy, it is not a difficult question

of constitutional law. The Court has sometimes found the Due Process Clause to have a substantive component guaranteeing liberties beyond physical restraint and the Court's holding that DOMA is unconstitutional as a deprivation of the liberty of the person protected under the Fifth Amendment of the Constitution suggests that substantive due process may underlie this holding. But, substantive due process only protects those fundamental rights and liberties that are deeply rooted in the nation's history and tradition. The Constitution does not guarantee the right to enter into a same-sex marriage because that right is not deeply rooted in this nation's history and tradition. The definition of marriage should be left to the people to determine through their elected officials.

Windsor and the United States argue that section 3 of DOMA discriminates on the basis of sexual orientation and should trigger a review based on heightened scrutiny. By asking the Court to strike down DOMA as not satisfying heightened scrutiny is tantamount to asking the Court to resolve a debate between the traditional view of marriage as an intrinsically opposite-sex institution, and the new view of marriage as a solemnization of mutual commitment between two persons. The United States Constitution does not codify either view of marriage and the silence of the Constitution on this question should end the matter as to the role of the judiciary. Both state legislatures and Congress may enact laws recognizing either of the two views of marriage, provided the vision they adopt is not countermanded by the Constitution. The Court strikes down section 3 of DOMA as an encroachment on the states' sovereign prerogative to define marriage. The Court's ultimate conclusion is that DOMA runs afoul of the Fifth Amendment because it singles out a class of persons protected and recognized under state law and refuses to recognize a status the state finds dignified and proper. Justice Alito stated his disagreement and did not find DOMA to encroach on the prerogative of the states. Section 3 of DOMA does not prevent any state from recognizing same-sex marriage or from extending any rights, privileges, or benefits to them. Section 3 of DOMA defines a class of persons to whom federal law extends certain special benefits and imposes certain burdens. Section 3 of DOMA does not violate the Fifth Amendment.

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