

To: Our Clients and Friends

August 2, 2013

## The Supreme Court Strikes Down DOMA

On June 26, the US Supreme Court decided the case of [United States v. Windsor](#), holding (1) that the Court had jurisdiction to consider the merits of the case, and (2) that Section 3 of the Defense of Marriage Act ("DOMA") is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment. For a description of the previous history of the case, see our prior posts [here](#) and [here](#). In a 5-4 opinion, Justice Kennedy delivered the opinion of the Court. Justices Ginsburg, Breyer, Sotomayor and Kagan concurred, while Justices Scalia, Roberts, Alito, and Thomas dissented.

### Facts:

Edith Windsor ("Windsor") and Thea Spyer ("Spyer"), New York residents, were legally married in Ontario, Canada, in 2007, after being in a relationship since 1963. Prior to their marriage, the two had registered as domestic partners when New York City gave that right to its citizens in 1993. While New York did not legalize same-sex marriage in New York until 2011, in 2008, the State of New York began recognizing marriages of same-sex couples validly performed elsewhere as valid marriages for purposes of New York law. Therefore, starting in 2008, New York recognized Windsor's and Spyer's Ontario marriage as a valid marriage. Spyer died in 2009, leaving her entire estate to her wife, Windsor.

As we've discussed in a prior post anticipating this decision (see [here](#)), the federal government allows an unlimited marital deduction for the federal estate tax for certain gifts on death to the decedent's spouse. In this case, however, DOMA prevented Windsor from being able to claim the marital deduction on Spyer's federal estate tax return because theirs was not a marriage between one man and one woman.

DOMA was enacted in 1996, before any US State had acted to permit same-sex marriage. DOMA contains two operative sections. Section 2 of DOMA (which was not challenged in this case) allows States to refuse to recognize same-sex marriages performed under the laws of other States. Section 3 of DOMA ("Section 3") (which was challenged in this case) provides a federal definition of "marriage" and "spouse", as follows:

"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*

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*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."* (1 U.S.C. s 7) (emphasis added).

While DOMA does not prevent any State from enacting laws allowing same-sex marriages or civil unions, or providing state benefits to residents of that status, the Section 3 definition does "control over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law", including the federal tax code--specifically, in this case, the laws regarding the federal estate tax, which allows a marital deduction for "any interest in property which passes or has passed from the decedent to his surviving spouse." (26 U.S.C. 2056(s)).

Because Windsor was not able to claim the federal estate tax marital deduction, she paid \$363,053 in federal estate taxes and filed a claim for refund. When the IRS denied Windsor's claim for a refund, because she was not a "surviving spouse", she commenced her refund action in the District Court for the Southern District of New York, claiming that DOMA violates the guarantee of equal protection as applied to the Federal Government through the Fifth Amendment.

In an odd turn of events, which led to the jurisdictional claims decided by the Court, while Windsor's refund suit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives, pursuant to 28 U.S.C. s 530D, that the Department of Justice would no longer be defending the constitutionality of Section 3, informing Congress that "the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny." In addition, the statement added that, while the DOJ would no longer *defend* Section 3, it would continue to *enforce* Section 3.

#### **Intervention:**

In light of the President's notice that the DOJ would no longer defend the constitutionality of DOMA, the Bipartisan Legal Advisory Group ("BLAG") of the House of Representatives voted to intervene in the litigation, in order to defend the constitutionality of Section 3.

#### **District Court:**

The District Court ruled against the United States (BLAG was allowed to intervene as an interested party, not as a party as of right) on the merits of the tax refund suit, holding that Section 3 is unconstitutional and ordering the Treasury to refund the tax, with interest.

#### **Appeal to Second Circuit:**

Applying heightened scrutiny to classifications based on sexual orientation, the Second Circuit affirmed the District Court's judgment. After that decision, Windsor still did not receive her refund, and the DOJ continued to enforce Section 3.

## Supreme Court Opinion

In addition to the issue of the Constitutionality of Section 3, the Court also requested arguments as to whether the United States' agreement that Section 3 is unconstitutional precludes further review, and whether BLAG has standing to appeal the case. While we do not discuss these issues in this post, the Court found that Article III jurisdiction did apply in this case.

Based on the fact that, at the time of the ruling, 12 States and the District of Columbia allow same-sex marriage, the Court stated that "the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution." While the definition and regulation of marriage has historically and traditionally been treated as "within the authority and realm of the separate States", the Court allowed that Congress can pass statutes that "bear on marital rights and privileges." As an example, the Court cited to its recent decision in Hillman v. Maretta (which we recently discussed in our blog post, "[FGLIA: Wife Can't Enjoy Fruits of Husband's Labor](#)") and other cases, upholding the "general principle that when the Federal Government acts in the exercise of its own proper authority, it has a wide choice of the mechanisms and means to adopt." However, the Court differentiated DOMA from such cases of federal laws meant to regulate the meaning of marriage in order to further federal policy, stating that DOMA "has a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations. . . directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect."

In light of the history of state regulation of marriage, the Court stated, "DOMA rejects the long established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next." Regardless of this historical background, the Court declined to decide the case on federalism principles, stating that "it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism."

According to the Court, DOMA imposes restrictions and disabilities on a state-defined class of people upon which certain states have "conferred. . . a dignity and status of immense import." The Court stated that, based on that result, the Court is required to "address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment."

The Court held that the state of New York's actions in recognizing and then allowing same-sex marriages were "a proper exercise of its sovereign authority" and that, by seeking to injure the class of people New York sought to protect, DOMA "violates due process and equal protection principles applicable to the Federal Government. Quoting various earlier cases, the Court stated that "The Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group", and that, "[i]n determining whether a law is motivated by an improper animus or purpose, '[d]iscriminations of an unusual character' especially require careful consideration." The Court held: "DOMA cannot survive

under these principles.” In the Court’s view, DOMA’s deviation from the norm of allowing states to define and regulate marriage “operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages”, which the Court found to be “strong evidence of a law having the purpose and effect of disapproval of that class.” The Court stated that the legislative history of DOMA upholds the Court’s findings—the House report states that DOMA expresses “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.”

## HOLDING

“[T]he principal purpose and the necessary effect of [DOMA] are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution. . . . The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. . . . the federal statute is in violation of the Fifth Amendment.” This holding is confined to “lawful marriages.”

## Future Uncertainty

While this case seems to make clear that the federal government will now recognize valid same sex marriages for purposes of the over 1,000 federal laws and regulations discussed above, uncertainty still remains. Perhaps the biggest source of uncertainty was pointed out by Justice Scalia in his dissent—choice of law issues will now arise “absent a uniform federal definition of marriage”. Scalia, and many practitioners, question what state’s law will control for federal purposes? Using Scalia’s terms, the couple’s “state of celebration” or the couple’s “state of domicile”? If a same-sex couple marries in Iowa, for example, and moves to Missouri, which does not allow same-sex marriages to take place, nor recognize same-sex marriages validly performed elsewhere, will the couple be considered married for federal law purposes?

Complications may also arise for couples residing in states that do not recognize same-sex marriage when they file their income tax returns. If the “state of celebration” governs, and our hypothetical same-sex couple discussed above files a joint Federal income tax return, from an administrative standpoint, what difficulties will arise by them not being able to file their Missouri returns jointly?

If you would like to discuss how this matter may affect you or your organization, please contact a member of Bryan Cave’s [Private Client Group](#).