Written by **Dave Bohon** on June 1, 2012

Federal Courts Rushing to Declare DOMA Unconstitutional

A three-judge panel of the 1st U.S. Circuit Court of Appeals in Boston ruled May 31 that the Defense of Marriage Act (DOMA), which defines marriage as only between a man and a woman for federal purposes, is unconstitutional because it denies the federal benefits of marriage to homosexual partners in states that have legalized same-sex marriage.

The Associated Press reported that the panel "agreed with a lower court judge who ruled in 2010 that the law interferes with the right of a state to define marriage and denies married gay couples federal benefits given to heterosexual married couples, including the ability to file joint tax returns." The AP noted that the court didn't rule on DOMA's provision, saying that "states without same-sex marriage cannot be forced to recognize gay unions performed in states where it's legal. It also wasn't asked to address whether gay couples have a constitutional right to marry."

Circuit Judge Michael Boudin, writing for the three-judge panel, acknowledged that the ruling carries little weight since the case, and others like it, will eventually land in the U.S. Supreme Court. "Many Americans believe that marriage is the union of a man and a woman, and most Americans live in states where that is the law today," Boudin wrote, reflecting on the conflict that exists between states and the federal government on the issue. "One virtue of federalism is that it permits this diversity of governance based on local choice, but this applies as well to the states that have chosen to legalize same-sex marriage. Under current Supreme Court authority, Congress' denial of federal benefits to same-sex couples lawfully married in Massachusetts has not been adequately supported by any permissible federal interest."

A Boston-based group calling itself the Gay and Lesbian Advocates and Defenders (GLAD) brought one of the lawsuits in the case on behalf of seven homosexual "married couples," arguing that DOMA treats one group of married individuals as a "different class" by barring them from the benefits accorded traditional married couples. "We've been working on this issue for so many years, and for the court to acknowledge that yes, same-sex couples are legally married, just as any other couple, is fantastic and extraordinary," said Lee Swislow, the group's director.

Mary L. Bonauto, who represented GLAD in the case, applauded the decision, saying "we think today is a great day and look forward to the next round." Bonauto said the ruling was particularly positive for those advocating for homosexual marriage as they anticipated the Supreme Court case.

But attorney Dale Schowengerdt of the pro-family Alliance Defense Fund (ADF) argued that "society should protect and strengthen marriage, not undermine it. In allowing one state to hold the federal government, and potentially other states, hostage to redefine marriage, the First Circuit attempts a bridge too far. Under this rationale, if just one state decided to accept polygamy, the federal government and perhaps other states would be forced to accept it, too."

The decision is the third federal ruling against DOMA this year, and the second in a week. On May 24 a federal judge in California ruled that DOMA is unconstitutional because it bars the homosexual partners of California state employees and retirees from receiving long-term health insurance benefits. Additionally, reported the Associated Press, U.S. District Judge Claudia Wilken ruled "that a section of the federal tax code that made the domestic partners of state workers ineligible for long-term care insurance similarly violates the civil rights of people in gay and lesbian relationships. Both laws were based on what she called 'moral condemnation' of same-sex couples."

In her decision ordering the California Public Employees' Retirement System (CalPERS) to allow current and retired state employees to enroll their homosexual partners in the extended health plan, Wilken declared that "Congress' restriction on state-maintained long-term care plans lacks any rational relationship to a legitimate government interest, but rather appears to be motivated by anti-gay animus."

In February U.S. District Judge Jeffrey White in San Francisco ruled against DOMA in a case involving a federal employee who "married" her lesbian partner during the brief time that homosexual marriage was legal in California, but who was not permitted to add her partner to her federal health plan. In 2008, California voters passed Proposition 8, which defined marriage in the state as only between a man and a woman, effectively banning legalized same-sex marriage. In February the notoriously liberal Ninth Circuit Court of Appeals ruled that Prop. 8 is unconstitutional, setting up a likely final decision by the U.S. Supreme Court.

Elizabeth Kristen of the Legal Aid Society's Employment Law Center, which sued the U.S. Treasury Department and CalPERS on behalf of a group of same-sex couples, applauded Wilken's ruling. "Lesbian and gay couples are entitled to fair and equal treatment from the federal government," Kristen insisted. "Judge Wilken's ruling ensures that both same-sex spouses and registered domestic partners will be treated fairly with respect to the CalPERS long-term care insurance program."

In her ruling, which was widely covered by the media, Wilken cited some of the congressional debate over the passage of DOMA, arguing that it had demonstrated "evidence of moral condemnation and social disapprobation" against homosexual couples. "The legislative history described above demonstrates that animus toward, and moral rejection of, homosexuality and same-sex relationships are apparent in the congressional record," she wrote.

She added that the "preservation of marriage as an institution that excludes gay men and lesbians for the sake of tradition is not a legitimate governmental interest. Under equal protection jurisprudence, tradition is not a legally acceptable reason to prohibit a practice that historically has been the subject of social disapprobation."

The ADF's Dale Schowengerdt argued that Wilken's reasoning was outrageous. "To say that a law that was passed overwhelmingly by Congress is the product of animus is — I don't know how to say it — it's unbelievable," Schowengerdt was quoted by the Christian Science Monitor as saying. "It's just unbelievable that a judge would be making that sort of value judgment against the entire government,

the Congress, and President Bill Clinton."

Brian Camenker of the Massachusetts-based pro-family group Mass Resistance reacted to the most recent court rulings, saying that "federal judges just seem so … out of touch with reality [and] completely disjointed from the Constitution and the rule of law." Bill Duncan of the Marriage Law Foundation added that "the best way to say it is: These judges are substituting their judgment about what's good public policy, because they want to see same-sex marriage mandated on the country."