



Office of the Attorney General
Washington, D. C. 20530

September 4, 2013

The Honorable John Boehner
Speaker
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

On February 17, 2012, I wrote to notify Congress of the Executive Branch's determination that 38 U.S.C. § 101(3) and 38 U.S.C. § 101(31), as applied to same-sex couples who are legally married under state law, violate the equal protection component of the Fifth Amendment. I further informed Congress that the Department of Justice would not defend these provisions in court against equal protection challenges, but the Executive Branch would continue to enforce them pending a definitive judicial verdict against their constitutionality.

I write now to inform you that, in light of subsequent developments and my recommendation, the President has directed the Executive Branch to cease enforcement of Sections 101(3) and 101(31) of Title 38. Decisions by the Executive not to enforce federal laws are appropriately rare. Nevertheless, for the reasons described below, the unique circumstances presented here warrant non-enforcement.

The Title 38 provisions in question, which govern eligibility for benefits provided to veterans and their families, and in some instances active-duty service members or reserve members and their spouses, are substantively identical to the definitions in Section 3 of the Defense of Marriage Act (DOMA) that the Supreme Court declared unconstitutional in *United States v. Windsor*, No. 12-307, 133 S. Ct. 2675 (June 26, 2013). Like Section 3, the Title 38 provisions define the term spouse to mean a "person of the opposite sex," and therefore cannot reasonably be interpreted to include legally married same-sex couples under any available rule of statutory construction.

Although the Supreme Court did not directly address the constitutionality of the Title 38 provisions in *Windsor*, the reasoning of the opinion strongly supports the conclusion that those provisions are unconstitutional under the Fifth Amendment. The Title 38 provisions resemble DOMA Section 3 in that they "single[] out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty" and "impos[e] a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper." *Id.* at 2695-96. Like Section 3, the Title 38 provisions have the effect of placing lawfully married same-sex couples in a "second-tier marriage," which "departs from [a] history and tradition of reliance on state law to define marriage," *id.* at 2694, 2692, for "no legitimate purpose," *id.* at 2695. The Court's conclusion that Section 3 "violates basic due process and equal protection principles" by "impos[ing] a disadvantage, a separate status, and so a stigma upon all who enter into same-sex

marriages made lawful by the unquestioned authority of the States,” *id.* at 2693, would seem to apply equally to the Title 38 provisions.

Indeed, following the Supreme Court’s decision in *Windsor*, the Bipartisan Legal Advisory Group of the U.S. House of Representatives (BLAG) withdrew from pending litigation challenging the constitutionality of the Title 38 provisions. And, last week, a federal district court held these provisions unconstitutional on Fifth Amendment grounds, concluding that the exclusion of legally married same-sex spouses from veterans benefits is not rationally related to any military interest or other identified governmental purpose. See *Cooper-Harris, et al. v. United States*, No. 2:12-00887-CBM (C.D. Cal. Aug. 29, 2013).

In light of these developments, continued enforcement of the Title 38 provisions pending further judicial review is unwarranted. The decision of the Supreme Court in *Windsor* reinforces the Executive’s conclusion that the Title 38 provisions are unconstitutional, and another Article III court now has so determined. Moreover, as I explained in my earlier letter, one of the primary interests underlying the earlier decision to continue enforcement of the Title 38 provisions was to allow representatives of Congress to present a defense of those provisions to the judicial branch. BLAG’s decision to withdraw from the Title 38 litigation in light of *Windsor*, and therefore to cease its defense of the provisions at issue, means that continued enforcement would no longer serve that interest. In the meantime, continued enforcement would likely have a tangible adverse effect on the families of veterans and, in some circumstances, active-duty service members and reservists, with respect to survival, health care, home loan, and other benefits.

In these unique circumstances, continued enforcement of 38 U.S.C. §§101(3) and (31) is no longer appropriate, and the Executive Branch will no longer enforce them. Letters pursuant to 28 U.S.C. § 530D will follow from the appropriate officials.

Please do not hesitate to contact us if you have questions.

Sincerely yours,



Eric H. Holder, Jr.
Attorney General