



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

February 17, 2012

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

Re: *McLaughlin v. Panetta*, No. 11-11905 (D. Mass.)

Dear Mr. Speaker:

On February 23, 2011, I notified Congress of the Executive Branch's determination that Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, is unconstitutional as applied to same-sex couples who are legally married under state law, and to inform Congress that I would instruct Department attorneys to cease defense of Section 3 against a challenge under the equal protection component of the Fifth Amendment. Pursuant to 28 U.S.C. § 530D—and after consultation with the Department of Defense and the Department of Veterans Affairs—I write to inform you of steps the Department will take in *McLaughlin v. Panetta*, No. 11-11905 (D. Mass.), a case that presents constitutional challenges, including under the equal protection component of the Fifth Amendment, to Section 3 of DOMA and certain additional statutory provisions.

In *McLaughlin*, plaintiffs are current and former active duty members of the United States military seeking various federal benefits for their same-sex spouses. These benefits include medical and dental benefits, basic housing allowances, travel and transportation allowances, family separation benefits, military identification cards, visitation rights in military hospitals, survivor benefits, and the right to be buried together in military cemeteries. The plaintiffs claim that Section 3 of DOMA prevents their same-sex spouses from being eligible for these benefits. They also claim that certain additional statutory provisions, including two definitional provisions in Title 38, may affect the eligibility of same-sex couples for military and veterans' benefits, even independent of Section 3. The language of the Title 38 provisions is identical in material respects to the language of Section 3 of DOMA: Those provisions, like Section 3, define the term "spouse" (or "surviving spouse") as "a person of the opposite sex." 38 U.S.C. §§ 101(3), (31).

As I explained in my letter of February 23, 2011, the President and I have concluded that classifications based on sexual orientation should be subject to a heightened standard of constitutional scrutiny under equal protection principles, and that Section 3 of DOMA fails such scrutiny as applied to couples who are legally married under state law.

McLaughlin presents a challenge, among other things, to provisions of Title 38 that are the equivalent to Section 3 of DOMA. Like Section 3, the provisions of Title 38 challenged in *McLaughlin* classify on the basis of sexual orientation, by denying veterans' benefits to legally married same-sex married couples for which opposite-sex married couples would be eligible. Also like Section 3, these provisions as applied to legally married same-sex couples cannot survive heightened scrutiny because they are not "substantially related to an important government objective." *Clark v. Jeter*, 486 U.S. 456,461 (1988). Under heightened scrutiny, "a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." *United States v. Virginia*, 518 U.S. 515, 535-36 (1996). "The justification must be genuine, not hypothesized or invented post hoc in response to litigation." *Id.* at 533. The legislative record of these provisions contains no rationale for providing veterans' benefits to opposite-sex spouses of veterans but not to legally married same-sex spouses of veterans. Neither the Department of Defense nor the Department of Veterans Affairs identified any justifications for that distinction that could warrant treating these provisions differently from Section 3 of DOMA.

I have accordingly determined 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. My determination is confined to the defense of those particular provisions against challenge under the equal protection component of the Fifth Amendment, and does not implicate the other challenges raised by the plaintiffs in *McLaughlin*. In accordance with my determination, I will instruct Department attorneys not to defend those provisions against the equal protection claims in *McLaughlin* and to inform the district court of the Department's view that, like Section 3 of DOMA, 38 U.S.C. § 101(3) and 38 U.S.C. § 101(31) cannot be constitutionally applied to same-sex couples who are legally married under state law. As they have in cases challenging Section 3, our attorneys will also notify the court of our interest in providing Congress a full and fair opportunity to participate in the litigation. We will remain a party to the case and continue to represent the defendants and the interests of the United States throughout the litigation. As with Section 3 of DOMA, the Executive Branch will continue to enforce 38 U.S.C. § 101(3) and 38 U.S.C. § 101(31), consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals those provisions or the judicial branch renders a definitive verdict against their constitutionality.

On February 15, 2012, the court in *McLaughlin* stayed the case for 60 days. Thus, an answer or other responsive pleading and response to plaintiffs' motion for summary judgment would be due on April 28, 2012. Please do not hesitate to contact us if you have any questions.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "Eric H. Holder, Jr.", is written over a faint circular stamp.

Eric H. Holder, Jr.
Attorney General