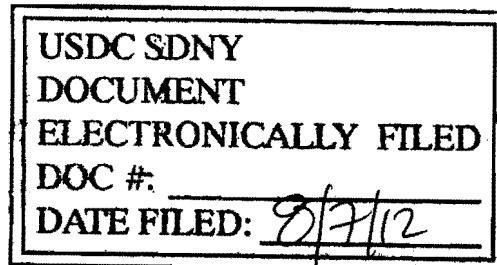




March 6, 2012

By Overnight Delivery

The Honorable Barbara S. Jones  
United States District Judge  
United States District Court for the  
Southern District of New York  
500 Pearl Street  
New York, NY 10007



Re: *Windsor v. United States*, 10 Civ. 8435 (BSJ) (JCF)

Dear Judge Jones:

This responds to Plaintiff's letter to the Court dated February 21, 2012, regarding the Attorney General's recent decision not to defend 38 U.S.C. § 101(3) and 101(31). The constitutionality of those two statutory provisions is not at issue in this case.

Title 38 of the U.S. Code concerns veterans' benefits, including eligibility for such benefits. Section 101(31) provides that for purposes of Title 38 the term "spouse" means a person of the opposite sex who is a wife or husband." 38 U.S.C. § 101(31). For its part, Section 101(3) provides that the term "surviving spouse"

means (except for purposes of chapter 19 of this title) a person of the opposite sex who was the spouse of a veteran at the time of the veteran's death, and who lived with the veteran continuously from the date of the marriage to the date of the veterans' death (except where there was a separation which was due to the misconduct of, or procured by, the veteran without the fault of the spouse) and who has not remarried or (in cases not involving remarriage) has not since the death of the veteran, and after September 19, 1962, lived with another person and held himself or herself out openly to the public to be the spouse of the other person.

38 U.S.C. § 101(3).

These federal definitions were not enacted as part of the Defense of Marriage Act (DOMA). Indeed, they were enacted in the mid-1970s—more than two decades *before* DOMA. The House of Representatives cited Section 101(3) and other statutes to this Court in support of the observation that

Congress did not, of course, invent the definition of marriage and the related term ‘spouse’ in 1996. Rather, in DOMA, Congress merely codified and confirmed what Congress always has meant in using those words. Even before DOMA, whenever Congress used terms connoting a marital relationship, it meant a traditional male-female couple.

Memorandum of House of Representatives in Support of Motion to Dismiss at 3 (Doc. 53). That observation remains unquestionably true: Congress in enacting federal law has always used words like “marriage” to mean the legal union of two members of the opposite sex.

Section 101(3) also illustrates the important point that Congress does not always treat a person who is married under state or foreign law as married for purposes of federal law. In other words, even before DOMA, Congress did not automatically defer to a state’s or foreign nation’s recognition of a marriage. Under Section 101(3), a person who was validly married under state or foreign law to a veteran would *not* be regarded by federal law as the veteran’s “surviving spouse” if the person did not “live[ ] with the veteran continuously from the date of the marriage to the date of the veterans’ death.” 38 U.S.C. § 101(3). Thus, even before DOMA, having a marriage license issued by a state or a foreign nation did not necessarily mean that the marriage would be recognized for purposes of federal law. *See* Memorandum in Support of Intervenor’s Opposition to Plaintiff’s Motion for Summary Judgment at 21-22 (Doc. 50).

Finally, we note that the Attorney General’s view that Section 101(3) and 101(31) fails heightened scrutiny under equal protection analysis is irrelevant in this case, for two reasons. First, the constitutionality of Section 101(3) and 101(31) is not at issue here as Plaintiff does not contend those statutes operate to deny her any benefits. Second, because the classification drawn in DOMA is subject to *rational basis review*, as the House has explained in prior briefing, it is irrelevant that the Attorney General now believes Section 101(3) and 101(31) fails *heightened scrutiny*. Notably, the Attorney General did not say in his letter to Speaker Boehner that Section 101(3) and 101(31) would fail rational basis review. The position of the Department of Justice is that DOMA passes rational basis review. The House of Representatives agrees with that position, and so should this Court.

Respectfully submitted,



H. Christopher Bartolomucci

*Counsel for the Bipartisan Legal  
Advisory Group of the U.S. House of  
Representatives*

cc (via e-mail): Roberta A. Kaplan  
James D. Esseks  
Jean Lin