

STATEMENT OF THE ATTORNEY GENERAL ON LITIGATION INVOLVING THE DEFENSE OF MARRIAGE ACT

WASHINGTON – The Attorney General made the following statement today about the Department’s course of action in two lawsuits, *Pedersen v. OPM* and *Windsor v. United States*, challenging Section 3 of the Defense of Marriage Act (DOMA), which defines marriage for federal purposes as only between a man and a woman:

In the two years since this Administration took office, the Department of Justice has defended Section 3 of the Defense of Marriage Act on several occasions in federal court. Each of those cases evaluating Section 3 was considered in jurisdictions in which binding circuit court precedents hold that laws singling out people based on sexual orientation, as DOMA does, are constitutional if there is a rational basis for their enactment. While the President opposes DOMA and believes it should be repealed, the Department has defended it in court because we were able to advance reasonable arguments under that rational basis standard.

Section 3 of DOMA has now been challenged in the Second Circuit, however, which has no established or binding standard for how laws concerning sexual orientation should be treated. In these cases, the Administration faces for the first time the question of whether laws regarding sexual orientation are subject to the more permissive standard of review or whether a more rigorous standard, under which laws targeting minority groups with a history of discrimination are viewed with suspicion by the courts, should apply.

After careful consideration, including a review of my recommendation, 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 more heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in such cases. I fully concur with the President’s determination.

Consequently, the Department will not defend the constitutionality of Section 3 of DOMA as applied to same-sex married couples in the two cases

filed in the Second Circuit. We will, however, remain parties to the cases and continue to represent the interests of the United States throughout the litigation. I have informed Members of Congress of this decision, so Members who wish to defend the statute may pursue that option. The Department will also work closely with the courts to ensure that Congress has a full and fair opportunity to participate in pending litigation.

Furthermore, pursuant to the President's instructions, and upon further notification to Congress, I will instruct Department attorneys to advise courts in other pending DOMA litigation of the President's and my conclusions that a heightened standard should apply, that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3.

The Department has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense. At the same time, the Department in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because – as here – the Department does not consider every such argument to be a “reasonable” one. Moreover, the Department has declined to defend a statute in cases, like this one, where the President has concluded that the statute is unconstitutional.

Much of the legal landscape has changed in the 15 years since Congress passed DOMA. The Supreme Court has ruled that laws criminalizing homosexual conduct are unconstitutional. Congress has repealed the military's Don't Ask, Don't Tell policy. Several lower courts have ruled DOMA itself to be unconstitutional. Section 3 of DOMA will continue to remain in effect unless Congress repeals it or there is a final judicial finding that strikes it down, and the President has informed me that the Executive Branch will continue to enforce the law. But while both the wisdom and the legality of Section 3 of DOMA will continue to be the subject of both extensive litigation and public debate, this Administration will no longer assert its constitutionality in court.