



NATIONAL CENTER FOR LESBIAN RIGHTS

## **Frequently Asked Questions about the President's Historic Decision to Stop Defending Discriminatory Federal Defense of Marriage Act**

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### **What does the administration's announcement say and what does it mean?**

The announcement says that, after carefully considering the issue, President Obama has determined that Section 3 of the federal Defense of Marriage Act (DOMA) is unconstitutional and has directed the Department of Justice to stop defending it. This means that President Obama believes that, like laws that target people based on race, sex, or religion, laws that discriminate against same-sex couples deserve a heightened level of scrutiny. It also means that the federal government will stop defending DOMA in lawsuits.

### **What does "heightened scrutiny" mean?**

When considering whether a law is constitutional, courts give most laws the benefit of the doubt that they are constitutional. Generally, laws are constitutional as long as there is any possible "rational basis" supporting them. However, courts are more suspicious of laws that target groups with a history of discrimination against them. So in order to determine whether those laws are constitutional, courts hold them to a higher standard than just "rational basis". For instance, laws that discriminate against groups based on their race, national origin, or sex are generally presumed to be unconstitutional. They will only be upheld if the government can show a very strong reason for the law, and can also show that discriminating is necessary to achieve that goal. In practice, such laws are almost always unconstitutional.

In addition to deciding that DOMA should be held to a higher level of scrutiny, the administration has also determined that DOMA cannot meet that heightened standard and is therefore unconstitutional.

## **Is DOMA dead?**

No. Today's decision by the President and the Department of Justice that the executive branch will no longer defend DOMA does not overturn or repeal the law. That will take an act of Congress or a decision from the federal courts. Senator Dianne Feinstein (D-CA) has announced that she will introduce a bill to repeal DOMA in the Senate. Representative Jerrold Nadler (D-NY) has announced that he will introduce the Respect for Marriage Act of 2011, which would repeal DOMA, in the House.

## **What is Section 3 of DOMA?**

Section 3 of DOMA prevents the federal government from recognizing marriages of same-sex couples for any purpose, even if those marriages are valid under the law of the state where the couple lives. It limits all federal benefits and recognition of marriage to different-sex couples. This is the portion of DOMA that will no longer be defended by the federal government.

## **What does this mean for the cases challenging DOMA that are pending in the courts?**

President Obama has directed the DOJ to stop defending Section 3 of DOMA in all pending cases and to refuse to defend it in any future cases. However, the DOJ will remain a party in the pending DOMA cases. The Attorney General has sent a letter to Speaker of the House John Boehner (R-OH) informing him of the policy shift so that members of Congress who wish to defend the statute may seek to intervene in those cases.

## **What does this mean for the federal challenge to Prop 8?**

The federal government is not a party to the Prop 8 case, so this decision does not directly affect that case. However, by publicly stating that laws targeting LGBT individuals deserve heightened scrutiny, the administration has put the power of the White House and the federal Department of Justice behind the position that such laws should be presumed unconstitutional. That will be a strong boost for the plaintiffs in *Perry v. Schwarzenegger* who are challenging Prop 8.

**If and when DOMA is overturned, does that mean marriage for same-sex couples will be legal everywhere in the country?**

No. DOMA section 3 prohibits the federal government from recognizing marriages between same-sex couples where those marriages are legally recognized in a state. Repealing or overturning DOMA will simply allow the federal government to recognize valid marriages performed in states and countries that have legalized marriage for same-sex couples. Even if DOMA is repealed or held unconstitutional by a court, that will not necessarily affect the many state laws that exclude same-sex couples from marriage.

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