



JOHN J. GIBBONS FELLOWSHIP IN
PUBLIC INTEREST & CONSTITUTIONAL LAW

HONORABLE JOHN J. GIBBONS

LAWRENCE S. LUSTBERG
DIRECTOR

PORTIA PEDRO*
BENJAMIN YASTER

Gibbons P. C.
One Gateway Center
Newark, NJ 07102-5310
Phone: 973.596.4500

*admitted in NY only

September 11, 2013

VIA FACSIMILE

Honorable Mary C. Jacobson, A.J.S.C.
Superior Court of New Jersey – Civil Division
Mercer County Criminal Courthouse
400 South Warren Street
Trenton, New Jersey 08608
Fax: (609) 571-4463

Re: *Garden State Equality, et al. v. Dow, et al.*
Docket No. MER L-1729-11

Dear Judge Jacobson:

Plaintiffs respectfully write to further update their August 28, 2013 Supplemental Submission to the Court. As Your Honor may have read, on August 29, 2013, the United States District Court for the Central District of California invalidated portions of Title 38 of the United States Code defining, for purposes of allocating veteran's benefits, a "spouse" as "a person of the opposite sex who is a wife or husband," 38 *U.S.C.* § 101(3), and a "surviving spouse" as "a person of the opposite sex who was the spouse of a veteran at the time of the veteran's death," *id.* § 101(31). Consistent with the Supreme Court's decision in *United States v. Windsor*, 133 *S. Ct.* 2675 (2013), the district court held that "[t]he denial of benefits to spouses in same-sex marriages is not rationally related to any . . . military purposes," and thus invalidated these provisions of Title 38 under the equal protection component of the Fifth Amendment. *Cooper-Harris v. United States*, No. 2:12-cv-887-CBM, 2013 *U.S. Dist. LEXIS* 125030, at *6 (C.D. Cal. Aug. 29, 2013).

As it did with respect to DOMA in the *Windsor* litigation, in *Cooper-Harris* the United States Department of Justice refused to defend the constitutionality of 38 *U.S.C.* § 101(3) & (31), but nevertheless continued to enforce the law. Last week, however, Attorney General Eric Holder sent a letter to the U.S. House of Representatives stating that the Executive Branch will no longer enforce these provisions of Title 38 because, under *Windsor's* binding precedent, application of the law "to same-sex couples who are legally married under State law[] violate[s] the equal protection component of the Fifth Amendment" by "placing lawfully married same-sex couples in a 'second-tier marriage,' which 'departs from [a] history and tradition of relying on state law to define marriage,' [*Windsor*, 133 *S. Ct.*] at 2694, 2692, 'for no legitimate purpose,' *id.*

Honorable Mary C. Jacobson, A.J.S.C.
September 11, 2013
Page 2

at 2695.” Letter from Eric H. Holder, Jr., U.S. Attorney General, to John Boehner, Speaker, U.S. House of Representatives, at 1 (Sept. 4, 2013), *available at* <http://www.justice.gov/iso/opa/resources/557201394151530910116.pdf> (last visited Sept. 9, 2013) (alteration in original).¹ The Attorney General stated that, under *Windsor*, the federal government must provide spousal benefits on an equal basis to same-sex couples who are “legally married under state law,” lest it “impos[e] 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 1-2 (quoting *Windsor*, 133 S. Ct. at 2693) (emphases added). Attorney General Holder further explained that continued enforcement of these provisions would 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.” *Id.* at 2.

This decision is entirely in keeping with the previous decisions of the Office of Personnel Management, the State Department, the Department of Defense, the Department of Labor, the Treasury Department, the Department of Health and Human Services, and the Office of Government Ethics, with which Your Honor is already familiar. It is also consistent with the recent advisory opinion of the Federal Elections Commission (“FEC”) holding that, for purposes of federal campaign finance law, “same-sex couples married under State law are ‘spouses’ for the purpose of [FEC] regulations.” *FEC Advisory Opinion 2013-06*, at 3 (July 25, 2013), *available at* <http://saos.nictusa.com/saos/searchao?AONUMBER=2013-06> (last visited Sept. 9, 2013). As the FEC concluded, only “same-sex spouses legally married under state law” are recognized as marital spouses and are entitled to federal marital rights, benefits, and privileges. *Id.* at 5. In so ruling, the agency rejected the single comment submitted from the public, which “encourage[d] the [FEC] to regard state laws that define ‘spouse’ as same-sex couples in a civil union as spouses for the purpose of Commission regulations.” Email from Robert L. Austin to FEC (July 24, 2013), *available at* <http://saos.nictusa.com/saos/searchao?AONUMBER=2013-06> (last visited Sept. 9, 2013). Thus, the FEC, like the U.S. Attorney General and the other federal agencies to decide this issue to date, does not recognize civil-unioned couples as spouses for purposes of federal law.

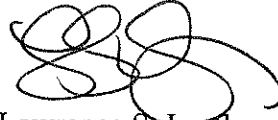
¹ The Bipartisan Legal Advisory Group of the U.S. House of Representatives intervened in the Central District of California, as it had in *Windsor*, to defend 38 U.S.C. § 101(3) & (31), but withdrew its appearance and cross-motion for summary judgment following the Supreme Court’s *Windsor* decision. See *Cooper-Harris*, 2013 U.S. Dist. LEXIS 125303, at *2. The House of Representatives’ decision to no longer intervene and defend these provisions of Title 38 was cited as an additional basis for the Attorney General’s decision to cease enforcing the law. See *Letter to John Boehner*, at 2.

GIBBONS P.C.

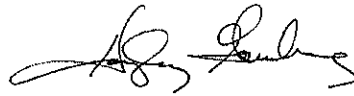
Honorable Mary C. Jacobson, A.J.S.C.
September 11, 2013
Page 3

Thank you for your kind consideration of this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lustberg", with a stylized, cursive flourish.

Lawrence S. Lustberg

A handwritten signature in black ink, appearing to read "Hayley Gorenberg", with a stylized, cursive flourish.

Hayley Gorenberg

cc: Kevin R. Jespersen, Esq., Asst. Attorney General (by electronic mail)
Jean Reilly, Deputy Attorney General (by electronic mail)
Ronald K. Chen, Esq. (by electronic mail)
Edward Barocas, Esq. (by electronic mail)