

November XX, 2013

The Honorable Barack Obama  
The White House  
1600 Pennsylvania Avenue NW  
Washington, DC 20500

Dear President Obama:

As Members of Congress, we are concerned that religious freedom, the very first freedom that our Founding Fathers listed as protected from the government in the Bill of Rights, is being trampled following the Supreme Court's decision in *United States v. Windsor*. The Court's classification of support for traditional marriage as mean-spirited and motivated by animus calls into question the ability of people of faith to freely express their religious views without fear of discrimination or retribution.

Many have denied the claim that the cherished First Amendment freedoms of speech and free exercise are in jeopardy, but a recent decision made by the Supreme Court of New Mexico highlights the truth of this concern. On August 22, 2013, the New Mexico Supreme Court upheld almost \$7,000 in fines against a wedding photographer and her husband for declining to photograph a same-sex ceremony. The couple was able to procure another photographer, but the fact that Elane and Jonathan Huguenin's First Amendment rights could be respected and the couple still receive the service they were seeking did not matter. Refusing to coexist, the couple instead filed a complaint with the New Mexico Human Rights Commission.

In a blatant disregard for First Amendment rights, the New Mexico Supreme Court upheld the fines imposed by the Commission. In his concurring opinion, Justice Bosson acknowledged that the Huguenins are now "compelled by law to compromise the very religious beliefs that inspire their lives," and yet, he concludes, "it is the price of citizenship."

Justice Bosson could not be more mistaken. Our Founding Fathers saw the price of citizenship as sacrificing their lives, livelihoods, and sacred honor for the sake of freedom. Our First Amendment freedoms are not the price of citizenship, they are the *prize* of citizenship, to be cherished and protected. The Huguenins' fight to defend their constitutionally-protected freedoms is but one of the first of many cases that our country will see if our elected leaders and judges do not stand for the fundamental human rights of free speech and religious freedom.

Furthermore, the Supreme Court left Section 2 of the Defense of Marriage Act (DOMA) intact, and states have a right to define marriage without interference from the federal government. The Court's opinion specifically noted that the "definition and regulation of marriage" has historically been "within the authority and realm of the separate States." The Court noted that "when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States" (citing *Ohio ex. rel. Popovici v. Agler*, 280 U.S. 379, 383–84 (1930)).

However, your Agencies have begun issuing memos and guidance that go beyond the scope of *Windsor*, which held that the federal government cannot restrict the recognition of same-sex marriages that are valid under state law. The Agencies' decisions do not have the authority to create law, nor do their interpretations of a court decision receive any deference (*Negusie v. Holder*, 129 S. Ct. 1159 (2009)). These decisions are wrongfully trampling on both religious freedom and state laws regarding marriage:

- **The Department of Labor (Department) is forcing private business owners to recognize same-sex marriages in retirement plans.** On September 18, 2013, the Department issued Technical Release 2013-04, which interprets the definitions of "spouse" and "marriage" in the Employee Retirement Income Security Act of 1974 (ERISA) to include same-sex couples that are married under state law. This decision reached far beyond the Court's decision and conflicts with state laws for businesses that operate in a state that legally defines marriage as one man and one woman. Furthermore, it infringes on the religious liberty rights of business owners who believe as a matter of conscience in a traditional definition of marriage.
- **The Attorney General has ordered the Department of Veterans Affairs (VA) to offer benefits in spite of the VA's organic statute.** On September 4, 2013, Attorney General Holder announced that you ordered the VA to begin offering benefits to married same-sex couples, despite the definition of marriage in Title 38. This was an affirmative action to override a federal law, rather than to allow the law to be properly adjudicated by the courts—a process which was already ongoing.
- **The Department of Defense (DoD) is infringing on state National Guard programs in states that have legally defined marriage as one man and one woman.** On August 13, 2013, DoD issued a memo entitled *Extending Benefits to the Same-Sex Spouses of Military Members*, extending marriage benefits to all married couples. However, states are individually responsible for their National Guard programs, and DoD's directive conflicts with the marriage laws of over 30 states. The National Guard programs are under the command of the state governors, not DoD. States that are refusing to issue benefits, such as Oklahoma, Tennessee, Mississippi, and Louisiana, are well within their authority as independent states.
- **DoD is making discriminatory determinations for benefits on the basis of sexual orientation.** Secretary Hagel's implementation of *Windsor* is also resulting in discriminatory treatment on the basis of sexual orientation. As part of his August 13 memo, Secretary Hagel announced that same-sex couples would be eligible for additional

leave to travel for the purpose of getting married. In clarifying guidance issued by DoD on September 4, 2013 entitled *Clarifying Policy-Administrative Absence to Obtain a Legal Marriage*, DoD announced that available leave had been altered to administrative absences. No such benefit has been extended to heterosexual couples, and even with the alteration in the class of leave, this is discrimination on the basis of sexual orientation.

- **The Department of Health and Human Services (HHS) is requiring private Medicare Advantage providers to cover the skilled nursing care of same-sex married couples.** On August 29, 2013, HHS issued a memo entitled *Impact of United States v. Windsor on Skilled Nursing Facility Benefits for Medicare Advantage Enrollees – IMMEDIATE ACTION REQUIRED*. This memo directs that private Medicare Advantage plans must cover services in a skilled nursing facility for married same-sex couples. This memo not only goes beyond the scope of the Court's decision in *Windsor*, it also creates a religious freedom conflict for providers who are compelled by their conscience to support traditional marriage. More such conflicts may arise from the HHS's implementation of *Windsor*, as the August 29 memo was "the first of many steps" in translating the Court's decision into HHS policy.

The Agencies have utilized memos to issue what are, in fact, rules as defined by the Administrative Procedure Act (APA) and the Congressional Review Act (CRA). 5 U.S.C. § 551(4) and the Congressional Review Act (5 U.S.C. § 804(2), (3)). "Rule" is defined under the APA as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy describing the organization, procedure, or practice requirements of an agency . . . ."

By utilizing memos, the Agencies are avoiding the democratic process, usurping the authority of Congress and of the American people. Memos are not subject to the Congressional review process. Furthermore, they are not required to be subjected to the public comment period that is required for rules. The American people have a right to the opportunity to express their support or dissent to an Agency's proposed rule *prior* to the rule taking effect, and the Agencies are depriving them of this right.

These actions run directly contrary to your promise of transparency and public participation in government. You clearly instructed the Agencies in your memo entitled *Memorandum for the Heads of Executive Departments and Agencies*, "Executive departments and agencies should offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective expertise and information."

In 2012, you said that there are people of goodwill on both sides of this debate. The right to object is not simply a matter of goodwill; it is constitutionally protected. It is imperative that the constitutional rights of free speech and free exercise are preserved as our country process the results of the Court's decision. Furthermore, it is the job of Congress, not the Executive Branch, to create law. As the Agencies continue to implement the Court's decision, it is essential that they confine their guidance to the scope of the Court's decision.

We urge that you respect the democratic process which you have sworn to defend and respect the democratic process as the by rescinding these memos and requiring your Agencies to follow the rule of law. We appreciate your prompt response, indicating how you and your administration will work to uphold the First Amendment, protecting the First Amendment rights of *all* Americans.

Sincerely,

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Member of Congress

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Member of Congress