



1 in support of Plaintiffs' Motion. [Doc. No. 113.] Subsequent to the Supreme  
2 Court's decision in *United States v. Windsor*, 133 S. Ct. 2675, 186 L. Ed. 2d 808

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1 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). The evidence presented  
2 by the parties must be admissible. Fed. R. Civ. P. 56(c)(2). Conclusory,  
3 speculative testimony in affidavits and moving papers is insufficient to raise  
4 genuine issues of fact and defeat summary judgment. *See Thornhill Pub. Co. v.*  
5 *GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

6 “Summary judgment is especially appropriate where there is no genuine  
7 issue of material fact and the only dispute is as to pure legal questions.” *Miller v.*  
8 *Cnty. of Santa Cruz*, 796 F. Supp. 1316, 1317-18 (N.D. Cal. 1992) *aff’d*, 39 F.3d  
9 1030 (9th Cir. 1994).

### 10 III. DISCUSSION

11 Plaintiffs argue that (1) heightened scrutiny is the appropriate standard of  
12 review for sexual orientation discrimination, (2) heightened scrutiny also applies  
13 because DOMA and Title 38 discriminate on the basis of sex, (3) if the Court finds  
14 that heightened scrutiny is not the appropriate standard of review, DOMA and  
15 Title 38 do not survive rational basis scrutiny. (*See Motion at 7.*)

#### 16 A. Title 38

17 Plaintiffs challenge Title 38. (Motion at 24-25.) BLAG’s withdrawal states  
18 that “in light of the Supreme Court’s opinion in *Windsor*, that it no longer will  
19 defend [Title 38].” [Doc. No. 136, at 2:7-10.] However, the Supreme Court does  
20 not address Title 38’s constitutionality. *See, e.g., Windsor*, 133 S. Ct. at 2694.

21 Plaintiff argues that the appropriate standard of review is heightened  
22 scrutiny. The current standard of review for sexual orientation classifications in  
23 the Ninth Circuit remains unsettled. *See In re Levenson*, 587 F.3d 925, 931 (9th  
24 Cir. 2009). Like the *Diaz* Court, “[w]e do not need to decide whether heightened  
25 scrutiny might be required” because as discussed below Title 38 is  
26 unconstitutional under rational basis scrutiny. *See Diaz v. Brewer*, 656 F.3d 1008,  
27 1012, 1015 (9th Cir. 2011).

1                   **1. Rational Basis**

2                   Under rational basis review, a statute will be upheld as constitutional “if the  
3 classification drawn by the statute is rationally related to a legitimate state  
4 interest.” *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105  
5 S. Ct. 3249, 3254, 87 L. Ed. 2d 313 (1985).

6                   Plaintiffs state that Congress enacted Title 38 to remove “unnecessary  
7 gender references,” and promote gender equality and expand the availability of  
8 veterans’ benefits. (Motion at 24:7-13.) The Court finds that the exclusion of  
9 spouses in same-sex marriages from veterans’ benefits is not rationally related to  
10 the goal of gender equality.

11                   Plaintiffs also argue that Title 38 is not rationally related to any military  
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