Case Nos. 10-56634, 10-56813

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOG CABIN REPUBLICANS,
a non-profit corporation,

Plaintiff-Appellee/Cross-Appellant,

v.

UNITED STATES OF AMERICA; and ROBERT M. GATES, Secretary of Defense, in his official capacity,

Defendants—Appellants/*Cross-Appellees.*

On Appeal from The United States District Court
for The Central District of California
No. CV 04-8425, Honorable Virginia A. Phillips, Judge

Brief of *Amicus Curiae* Servicemembers United In Support of Brief for Appellee / Cross-Appellant Log Cabin Republicans

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, counsel for *Amicus Curiae* Servicemembers United, certifies that:

1. Servicemembers United is a not-for-profit corporation organized under the District of Columbia Nonprofit Corporation Act and section 501(c)(3) of the Internal Revenue Code.

2. Servicemembers United has no parent corporation and no publicly-held corporation owns ten percent or more of Servicemembers United.

DATED: April 4, 2011

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Amicus curiae, Servicemembers United, submits this brief in support of the Log Cabin Republican's (Plaintiff-Appellee / Cross-Appellant) position in opposition to the United States of America and Robert M. Gates, Secretary of Defense's (Defendants - Appellants/Cross-Appellees) ("the Government") Brief appealing the October 12, 2010 injunction of the "Don't Ask, Don't Tell" Act, 10 U.S.C. § 654, ("DADT"), issued by the Honorable Virginia A. Phillips, Judge of The United States District Court for The Central District of California, in the case of *Log Cabin Republicans v. United States of America and Gates*, Case No. CV 04-8425.

This brief is filed pursuant to the consent of all parties.

INTEREST OF *AMICUS CURIAE*

Servicemembers United ("SU"), a non-profit and non-partisan organization, is the nation's largest organization of gay and lesbian troops and veterans and their supporters. SU engages in organizing, education, and advocacy on the issues that impact the gay military, veteran, and defense community. SU was founded by gay and lesbian troops and veterans in order to provide a way for those actually affected by DADT to join the movement for its repeal. SU's membership consists of active duty gay and lesbian servicemembers, veterans, and other individuals who recognize that discrimination is not an American value. Based on its extensive work in support of gay and lesbian troops and veterans, including its efforts to repeal DADT, SU is uniquely qualified to assist the Court in the instant case.

SUMMARY OF ARGUMENT

On December 22, 2010, President Obama signed The "Don't Ask, Don't Tell Repeal Act of 2010" into law. Pub. L. No. 111-321, 124 Stat. 3515 (2010) (hereinafter "DADT Repeal Act"). Rather than put an immediate end to DADT's unconstitutional exclusion of gays and lesbians from the military, the DADT Repeal Act leaves the policy in place until 60 days after the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff certify to Congress that ending DADT will not adversely impact military effectiveness. *Id.*

In the instant Appeal, the Government effectively concedes that DADT is unconstitutional, but argues that its "orderly repeal" is constitutional. It simply cannot be that a law that offends the Constitution and daily inflicts substantial and irreparable harm on active and prospective gay and lesbian servicemembers may lawfully remain in effect for an indeterminate amount of time.

I. The Congressional repeal of 10 U.S.C. § 654 did not end DADT's unconstitutional discrimination against gays and lesbians. Due to military age limitations, countless gays and lesbians will become permanently ineligible to serve or become commissioned officers during DADT's pending repeal. Similarly, each day DADT remains in effect is another day those discharged under DADT fall further behind their military peer group in terms of lost opportunities to earn promotions, income, and benefits and gain valuable training and experience.

II. This Court should reverse the district court's dismissal of Log Cabin Republican's Equal Protection claim and hold that laws regulating individuals based on sexual orientation are subject to heightened scrutiny. Laws regulating gays and lesbians in the military in particular, including DADT, should be afforded heightened scrutiny under the factors set forth by our Constitutional jurisprudence. Gay and lesbian servicemembers have suffered a history of discrimination in the military, their sexual orientation is an immutable characteristic that defines them as a discreet group, they are a politically powerless minority, and their sexual orientation bears no relation to legitimate policy objectives or their ability to perform or contribute to society. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985).

DADT Violates Equal Protection notwithstanding the level of scrutiny afforded laws regulating gay and lesbian servicemembers. In light of recent findings and policy pronouncements by our president, military leaders, and the Defense Department that DADT "undermines our national security" and its elimination poses a low overall risk to military effectiveness, there remains no rational basis for its existence. Absent any justification for excluding gays and lesbians from service, DADT becomes nothing more than a "bare ... desire to harm a politically unpopular group [which] cannot constitute a *legitimate* governmental

interest." *Romer v. Evans*, 517 U.S. 620, 634 (1996); *see See Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring).

III. This Court should affirm DADT's unconstitutionality under a heighted scrutiny standard in order to create the certainty necessary for gays and lesbians to join or re-join the military. Absent a court ruling that DADT is unconstitutional, this uncertainty will have a chilling effect on gay and lesbian accession that will only prolong and exacerbate the harm inflicted by DADT.

ARGUMENT

I. THE CONGRESSIONAL REPEAL OF 10 U.S.C. § 654 DID NOT END DADT'S UNCONSTITUTIONAL DISCRIMINATION AGAINST GAYS AND LESBIANS.

President Obama signed the DADT Repeal Act into law on December 22, 2010.[1] Pub. L. No. 111-321, 124 Stat. 3515 (2010). More than 100 days later, for the gay and lesbian servicemembers waiting to enter or re-enter the military, nothing has changed. DADT remains in effect, and no one knows for certain when, or even if, the policy will end.[2] Gays and lesbians can no more serve in the

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[1] The DADT Repeal Act leaves DADT policy in effect until 60 days after the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff certify to Congress that ending DADT will not adversely impact military effectiveness.

[2] The DADT Repeal Act provides that the policy will remain in effect until the requirements for certification are met, but does not provide a deadline for satisfying the requirements. The Act further provides that if these requirements are not met, DADT's repeal will never become effective. *Id.* at § 2(c).

military today than they could three months ago when the Repeal Act was signed, almost seven months ago when Judge Virginia Phillips declared DADT unconstitutional, or even 17 years ago when DADT was enacted. Servicemembers continue to be singled out for exclusion, investigation, prosecution, and potential discharge pursuant to this unconstitutional policy.[3]

The harm suffered by gays and lesbians waiting to begin or return to military careers is substantial and irreparable. Countless individuals on the cusp of the military's age requirements will be forever precluded from serving in the military or becoming commissioned officers if DADT is not swiftly enjoined. Each day that passes is also another day those discharged under DADT fall further behind their peer group, lose opportunities for advancement and promotion, and fail to earn military benefits. We ask this Court to put an end to these intolerable harms by immediately enforcing DADT's injunction.

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[3] For example, Derek Morado, Petty Officer 2nd Class, stationed at Lemoore Naval Air Station, continued to be investigated and prosecuted under DADT after "repeal." His discharge hearing took place March 31, 2011, exactly 100 days after the DADT Repeal Act was signed into law. *Gay Navy Man Faces Discharge at Lemoore NAS*, The Fresno Bee (March 31, 2011), *available at* http://www.fresnobee.com/2011/03/30/2331058/gay-navy-man-faces-discharge.html.

A. Countless Gays and Lesbians Will Become Ineligible to Serve in the Military or Become Commissioned Officers during DADT's Pending Repeal.

Every day DADT remains in effect, countless gays and lesbians waiting to join or re-join the military move closer to being permanently excluded from the armed forces. To date, tens of thousands of brave and patriotic servicemembers have either been discharged or have left the military due to the psychological toll placed on them by this unconstitutional policy. Once DADT is gone, many of these servicemembers will seek to re-join the military. Many gay and lesbian civilians will likewise seek to join the military for the first time upon DADT's end.

However, because the military branches have strict age limitations for enlistment and commissions, [4] a significant number of these courageous individuals will "age-out" while waiting for DADT's repeal and forever lose the opportunity to serve their country or become commissioned officers. These individuals who "age-out" while repeal is pending will likely never have the ability

[4] For example, in order to enlist in the Air Force for active duty without prior service, an individual must be 27 years old or younger. Likewise, 28 years old is the limit for the Marines, 34 for the Navy, and 42 for the Army. Servicemembers who wish to re-join may have their prior service considered and may have the age limit waived. However, there is no guarantee of receiving an age waiver, and this decision is in the discretion of the command handling the application. Each military branch treats those with prior service differently with respect to accession and commissions.

to serve in the armed forces or do so as commissioned officers absent enforcement of the district court's injunction.

Continuation of this unconstitutional policy poses special concerns for enlistees and commissioned officers already discharged under DADT and those who may be investigated or discharged while repeal is pending. Once servicemembers leave the military, it becomes increasingly difficult to return, especially for commissioned officers. After a certain period of time, some branches will not restore servicemembers to the position they left. Returning servicemembers may also be demoted in rank, thereby losing status, pay, and benefits, and may be required to repeat basic training. Therefore, each day DADT remains in effect, it becomes more difficult for servicemembers affected by the policy to return to active duty.

Our military will also lose these former servicemembers' skill, dedication, and experience if DADT is not immediately enjoined before they "age-out." Indeed, many of those who wish to re-join the military are highly-trained soldiers and officers our armed forces certainly need. Prolonged enforcement of DADT, however, will make these servicemembers' talents, and the effort and expense already expended by our military to train them, all for naught.

As the appeal of this case progresses, numerous individuals hoping to serve our country will "age-out" pending repeal. The following examples of SU

members who want to enlist, re-join, or become commissioned officers, but who will likely "age-out" during the next year or more, represent the real and imminent harm that countless individuals will suffer if this Court declines to immediately enforce the District Court's injunction of DADT.

1. Sergeant Kevin Forte

Sergeant Kevin Forte, a current SU member, is a decorated veteran who left the Marines due to the psychological toll exacted upon him serving under DADT. During his service, he received the Navy and Marine Corps Achievement Medal, Marine Corps Good Conduct Medal, Combat Action Ribbon for his service in Iraq, Marine Corps Overseas Ribbon, Marine Security Guard Ribbon, Global War On Terrorism Service Medal, Global War on Terrorism Expeditionary Medal, Sea Service Deployment Ribbon, National Defense Ribbon, Navy Meritorious Unit Commendation Medal, Presidential Unit Citation – Navy, Meritorious Mast, and Certificate of Appreciation. Sergeant Forte would undoubtedly still be a Marine but for the distress he suffered as a result of being forced to hide his sexual identity to avoid discharge under DADT.

However, if this Court does not immediately enforce DADT's injunction, Sergeant Forte will likely never have the opportunity to rejoin his ranks, as he is currently 27 years old and will turn 28 on June 15, 2011. Thus, Sergeant Forte will become ineligible to re-join or be commissioned in the Air Force only 73 days

from the filing of this brief. His time to re-commission into the Marines is similarly running short.

2. Specialist Jarrod Chlapowski

The situation is especially dire for Specialist Jarrod Chlapowski, a 28-year-old SU member, who served in the Army for five years before leaving the service because of DADT. He will turn 29 years old on May 6, 2011. On that day, Specialist Chlapowski will be prohibited from returning to the service and be commissioned as a Marine officer. While in the service, Specialist Chlapowski received numerous awards, medals, and commendations for his service including the Army Commendation Medal, Army Achievement Medal, Army Good Conduct Medal, National Defense Service Medal, Korea Defense Service Medal, Non Commissioned Officer Professional Development Ribbon, Army Service Ribbon, and Global War on Terrorism Service Medal. Only 33 days from the filing of this brief, Specialist Chlapowskit will be forever precluded from becoming a commissioned Marine officer.

In fact, under the DADT Repeal Act, which mandates a 60-day waiting period after certification, Specialist Chlapowski will never have the opportunity to become a commissioned Marine officer. The only way to prevent this irreparable harm is for the Court to immediately enforce DADT's injunction. If this Court

declines to do so, Specialist Chlapowski will have already lost the opportunity to become a commissioned Marine Officer by the time repeal becomes effective.

3. Brad Beckett

Brad Beckett, a 26-year-old gay civilian and SU member, wants to join the Air Force, but cannot because of DADT. Each day that passes under the DADT Repeal Act's protracted repeal process, Mr. Beckett moves closer to his age-out date for joining the Air Force. Soon, Beckett may lose the opportunity to ever join the Air Force, which requires enlistees to be no older than 27 years of age. Every day DADT remains in effect under the Repeal Act's protracted process, Mr. Beckett moves closer toward losing the opportunity to ever enlist in the Air Force.

4. Chris Robinson

Chris Robinson, a 34-year-old gay civilian and SU member, also wants to join the military, but is barred from doing so by DADT. Robinson, who will be 35 years old in November 2011, will be prohibited from enlisting in the Navy, and will be ineligible to become a commissioned officer in the Army, Navy, or Air Force if DADT remains in effect under the Repeal Act for much longer. Because of the Repeal Act's certification and 60-day waiting period requirements, unless certification is completed by August 2011, only five months from the filing of this brief, Mr. Robinson will be forever barred from becoming a commissioned officer in any branch of the armed services. DADT's immediate injunction is therefore

necessary to prevent irreparable harm to Mr. Robinson, and others like him, who want join the military but are approaching military age limitations.

As demonstrated by these examples of SU members, DADT's continued enforcement will cause substantial and irreparable harm to the many gay and lesbian individuals who want to serve our country and defend it from the many challenges we will likely face, but who will likely "age-out" absent enforcement of the District Court's injunction.

B. Each Day DADT Remains in Effect, Discharged Gay and Lesbian Servicemembers Become Increasingly Disadvantaged Relative to their Military Peer Group.

Each day DADT remains in effect, discharged gay and lesbian servicemembers waiting to re-join the military become increasingly disadvantaged relative to their military peer group. From the moment of their discharge, these former servicemembers began to fall behind their peers who remained in the military. Following their discharge, their peers had the opportunity to earn promotions, income, and benefits and gain valuable training and experience that were denied to discharged gay and lesbian servicemembers. Each day DADT is not enjoined is another day these brave service men and women are further deprived of these opportunities solely because of their sexual orientation.

II. THIS COURT SHOULD REVERSE THE DISTRICT COURT'S DISMISSAL OF LOG CABIN REPUBLICAN'S EQUAL PROTECTION CLAIM AND HOLD THAT LAWS REGULATING INDIVIDUALS BASED ON SEXUAL ORIENTATION ARE SUBJECT TO HEIGHTENED SCRUTINY.

A. Gay and Lesbian Servicemembers Meet the Criteria for Heightened Scrutiny.

Gay and lesbian servicemembers, perhaps even more so than civilians, exemplify the criteria set forth by our constitutional jurisprudence for determining whether heightened scrutiny applies to law regulating a class of people. In determining whether a law regulating a class of individuals merits heightened scrutiny, the Supreme Court has looked to: (1) whether the group in question has suffered a history of discrimination; (2) whether individuals "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group;" (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's "ability to perform or contribute to society." *See e.g.* Letter from Eric H. Holder, Jr., Attorney General, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html [hereinafter Atty. Gen. Holder Letter]; (citing *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987) and *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985)). Each of

these factors weighs in favor of subjecting laws regarding gays and lesbians in the military, including DADT, to heightened scrutiny.

1. Gay and Lesbian Servicemembers Have Suffered a History of Discrimination in the Military.

Gay and lesbian servicemembers have experienced a long history of discrimination in the U.S. military based on the very prejudice, animus, and stereotyping the Equal Protection Clause is designed to guard against. *Watkins v. U.S. Army*, 875 F.2d 699, 724 (9th Cir. 1989).[5] In 1949, the military declared homosexuality, in and of itself, grounds for mandatory disqualification and discharge. Working Group Rpt., *supra* note 1, at 20. The percentage of gay and

[5] "As the Army concedes, it is indisputable that 'homosexuals have historically been the object of pernicious and sustained hostility.'" *Id.* While this Court has rejected Equal Protection challenges to DADT since *Watkins*, the Court's ruling in each of these cases relied on the military's stated justification for discharge of homosexual servicemembers as necessary to military effectiveness. *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997) (upholding discharge under DADT on Equal Protection Grounds based on military's stated justification of military effectiveness); *Holmes v. California Army Nat. Guard*, 124 F.3d 1126, 1133 - 1134 (9th Cir. 1997) (upholding discharge under DADT on Equal Protection Grounds based on military's stated justification that excluding homosexuals furthers discipline and combat readiness in the military by preventing risks to unit cohesion); *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008) (upholding discharge under DADT on Equal Protection Grounds based on precedence established by *Philips*). In light of modern government findings to the contrary regarding homosexual servicemembers' risk to military effectiveness, this justification no longer applies and *Philips* and its progeny are no longer controlling. *See e.g.* Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell" at 20 (November 30, 2010), *available at* http://www.defense.gov/home/features/2010/0610_gatesdadt/ [hereinafter "Working Group Rpt."]; *See infra* Part II. B.

lesbian discharges increased significantly in 1953 following issuance of Executive Order 10450, which declared "sexual perversion" cause for dismissal from Federal employment. *Id.* Beginning in 1959, the military discharged gays under Department of Defense Directive 1332.14, which described homosexual acts and sodomy as "sexual perversion." *Id.* In 1975, the Defense Department changed Directive 1332.14's language to describe "homosexual acts and other aberrant sexual tendencies" as grounds for discharge. *Id.*

The words chosen by the U.S. military to describe gays' and lesbians' intimate conduct—"perversion," "aberrant"—to justify their exclusion from service, demonstrates precisely the type of animus toward a class of people the Equal Protection Clause proscribes. *See* Atty. Gen. Holder Letter, *supra,* (citing *Cleburne*, 473 U.S. at 448, *Romer v. Evans*, 517 U.S. 620, 635 (1996), and *Palmore v. Sidotti*, 466 U.S. 429, 433 (1984)). These words make clear that the military's exclusion of gays and lesbians was historically based solely on a moral judgment that their intimate sexual conduct—i.e. the conduct that defines the group—rendered them unfit to serve.

Discrimination against gay and lesbian servicemembers continues today and will continue even after DADT is overturned. Some servicemembers still strongly oppose gays and lesbians serving in the military on moral grounds. *See* Working Group Rpt., *supra* note 1, at 51-56. These servicemembers believe that

homosexuality is morally offensive and inclusion of gays and lesbians in the military will erode the institution's moral fabric and family values. *See* Working Group Rpt., *supra* note 1, at 51-52, 55-56.

The current discharge proceedings against Navy Petty Officer Stephen Jones illustrate that efforts to exclude gays and lesbians from the military will likely continue even after DADT's abolishment. Petty Officer Jones currently faces discharge for "dereliction of duty" for failing to "behave professionally in the barracks" because he and another male sailor fell asleep in the same bed. Craig Whitlock, *Navy Seeks to Discharge Sailor Found Asleep in Bed with Another Male Sailor*, Wash. Post, March 5, 2011, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2011/03/04/AR2011030403022.html?hpid=moreheadlines. Thus, even the mere suspicion of being gay will likely continue to pose a threat to gay and lesbian servicemembers' military careers even after DADT's demise. Gay and lesbian servicemembers, therefore, remain a "politically unpopular group" in need of enhanced protection under the law. *See Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring).

2. Gay and Lesbian Servicemembers' Sexual Orientation is an Immutable Characteristic that Defines them as a Discreet Group.

Gay and lesbian servicemembers' sexual orientation is an immutable characteristic that defines them as a discreet group. *Watkins*, 875 F.2d at 725-726.[6] From the perspective of active, veteran, and prospective gay and lesbian servicemembers, the question of whether sexual orientation is "immutable," i.e. unchangeable, is simply absurd. DADT has ended and threatens to end promising military careers of tens of thousands of gay and lesbian servicemembers ranging from infantrymen, builders, and technicians to engineers, physicians, and scientists. Even setting aside "the growing scientific consensus . . . that sexual orientation is a characteristic that is immutable," Atty. Gen. Holder Letter, *supra*, to the gays and lesbians serving in silence under DADT, suffering financial hardship following discharge under DADT, or waiting to commence or recommence their military careers following DADT's end, the question of whether it is their "choice" to be gay is more than absurd—it is insulting.

Gay and lesbian servicemembers' sexual orientation also defines them as a discreet group. While one's sexual orientation may not be obvious simply by

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[6] "I have no trouble concluding that sexual orientation is immutable for the purposes of equal protection doctrine. . . . [A]llowing the government to penalize the failure to change such a central aspect of individual and group identity would be abhorrent to the values animating the constitutional ideal of equal protection of the laws." *Id.* at 726.

looking at someone, absent DADT's stifling of gay servicemembers' speech, one's sexual orientation becomes apparent through the regular course of social interaction that takes place in the military. Honest conversations that would ordinarily occur between servicemembers, for example, regarding how they spent their recreation or leave time, would naturally reveal their sexual orientation.[7] It is only through the intentional obfuscation and outright lying required to conceal one's sexual orientation that the characteristic remains discreet.

3. Gay and Lesbian Servicemembers are a Politically Powerless Minority.

Gay and lesbian servicemembers are a politically powerless minority in the U.S. military. While the precise number of gay and lesbian servicemembers cannot be determined due to DADT's requirement of silence, numerically speaking, gays and lesbians certainly are a "minority" in the military. In fact, their numbers are thought to be even lower in the military than in the civilian population. Working Group Rpt., *supra* note 1, at 126. The military's

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[7] Conversations of this nature demonstrate the line drawn by DADT between the speech, status, and conduct of homosexual versus heterosexual servicemembers as well as the breath of DADT's intrusion into gay and lesbian servicemembers' daily life. When asked by a fellow servicemember,"What did you do this weekend?" the honest response, "I went on a date with a great girl" could either prompt an investigation leading to the end one's military career or be an inconsequential pleasantry depending on the speaker's sexual orientation. Such an imposition of "a broad and undifferentiated disability on a single named group" offends equal protection. *See Romer*, 517 U.S. at 632.

longstanding exclusion of gays and lesbians from the military, including under DADT, further diminishes their numbers through discharges and deterrence.

DADT's mandate of silence regarding homosexuality further curtails gay and lesbian servicemembers' political power. DADT silences the voices of the very people injured by the policy and thereby prevents them from advocating against it on their own behalf. DADT further squelches public discourse by active duty gay and lesbian servicemembers regarding all aspects of gay rights, including gay marriage, adoption, etc., for fear of discharge.

Permitting open service alone will not rectify gay and lesbian servicemembers' political powerlessness. Gays and lesbians likely will not receive any of the protections afforded to the other groups, namely women and racial minorities, who were excluded and later integrated into the military. *See* Working Group Rpt., *supra* note 1, at 13-14. For example, sexual orientation will not be placed alongside race, color, religion, sex, and national origin, as a class eligible to utilize the Military Equal Opportunity Program's complaint resolution process. *Id.* at 13. Instead, complaints regarding sexual orientation discrimination, harassment, and abuse will be dealt with through the Inspector General and chain of command.[8]

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[8] Of course, where the complaint concerns someone *in* the chain of command, such as in Petty Officer Jones' case, the Inspector General becomes the only avenue of redress for a servicemember subjected to sexual orientation discrimination, harassment, or abuse. Practically speaking, being required to seek out and involve

Id. at 14. Gay and lesbian servicemembers' inability to obtain even the same rights as other groups historically excluded from the military demonstrates the limits of their political power.

4. Gay and Lesbian Servicemembers' Sexual Orientation Bears No Relation to Legitimate Policy Objectives or their Ability to Perform or Contribute to Society.

Gay and lesbian servicemembers' sexual orientation bears no relation to legitimate military policy objectives or their ability to perform or contribute to society. *See Watkins,* 875 F.2d at 725 ("Sexual orientation plainly has no relevance to a person's 'ability to perform or contribute to society.'"). As stated by President Obama, "sacrifice, valor and integrity are no more defined by sexual orientation than they are by race or gender, religion or creed." Statement by the President on the Don't Ask, Don't Tell Repeal Act of 2010 (December 18, 2010) The White House Blog, www.whitehouse.gov/blog/2010/12/18/president-dont-ask-dont-tell-repeal-act-2010-historic-step. Moreover, rather than serve any legitimate policy objective, our Commander-in-Chief has proclaimed that excluding and silencing gay and lesbian servicemembers under DADT, "undermines our national security." *Id.* A majority of senior military leaders, including the Chairman of the Joint Chiefs of Staff Admiral Mike Mullen, have similarly expressed support for DADT's repeal. *See e.g.*, Elisabeth Bumiller, *Top Defense Officials Seek to End*

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an authority at the Inspector General level, a move that is often seen as extreme by junior personnel, is a strong deterrent against making a complaint at all.

'Don't Ask, Don't Tell', N.Y. Times, February 3, 2010, *available at* http://www.nytimes.com/2010/02/03/us/politics/03military.html?_r=1&pagewanted=print. Adm. Mullen told the Senate Armed Services Committee, "No matter how I look at the issue, I cannot escape being troubled by the fact that we have in place a policy which forces young men and women to lie about who they are in order to defend their fellow citizens," and said it was his personal belief that "allowing gays and lesbians to serve openly would be the right thing to do." *Id.* The Department of Defense likewise determined, after comprehensive study, that open service by gays and lesbians poses a low overall risk to military effectiveness (including military readiness, unit effectiveness, and unit cohesion). Working Group Rpt., *supra* note 1, at 129. In light of the government and military's official policies and findings to the contrary, it is untenable to argue that servicemembers' sexual orientation bears any relation to legitimate military policy objectives.

B. DADT Violates Equal Protection under any Level of Scrutiny, Including Rational Basis Review.

DADT violates Equal Protection under any level of scrutiny, including rational basis review. Our President, military leaders, and the Defense Department agree that DADT undermines national security and its elimination poses a low overall risk to military effectiveness. *Supra*, Part.II.A.4. Absent any justification for excluding gays and lesbians from service, DADT becomes nothing more than a "bare ... desire to harm a politically unpopular group [which] cannot constitute a

legitimate governmental interest." *Romer*, 517 U.S. at 634; *see also Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring). Elimination of this justification similarly renders prior legal decisions upholding exclusion and discharge of gay and lesbian servicemembers based military effectiveness no longer applicable, and therefore, no longer controlling.[9]

Not only does DADT fail to advance any legitimate government interest, it actually harms the military and our nation. Because of DADT, we have lost the service of countless highly-skilled servicemembers who would have otherwise served their country during the last ten years of war. Many individuals ousted from the military under DADT, including more than 60 Arab linguists, are highly-trained soldiers and officers whose skills the military greatly needs. Our nation simply cannot afford to exclude talented and skilled servicemembers based purely on prejudice.

III. THIS COURT SHOULD AFFIRM DADT'S UNCONSTITUTIONALITY UNDER A HEIGHTED SCRUTINY STANDARD IN ORDER TO CREATE THE CERTAINTY NECESSARY FOR GAYS AND LESBIANS TO JOIN OR RE-JOIN THE MILITARY.

It is critical that this Court affirm DADT's unconstitutionality in order to create finality and certainty that cannot be obtained through the political process.

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[9] *See supra* note 5.

Despite passage of the Repeal Act, substantial fear remains among SU members and the general gay and lesbian community that DADT will be reinstated.

Indeed, at least three potential 2012 presidential candidates have recently voiced their intention to reinstate DADT even in light of the Defense Department's finding that repeal poses low overall risk to military effectiveness. [10] One of these potential candidates, Mississippi Governor Haley Barbour, encourages DADT's reinstatement because "when you're under fire, and people are living and dying on split-second decisions, you don't need any kind of amorous mindset that can affect saving people's lives and killing bad guys." Comments like Governor Barbour's reveal a clear intent to disadvantage gay and lesbian individuals based on the very stereotypes and animus that offends our constitution.

Comments like Governor Barbour's also make clear that a ruling by this Court affirming DADT's unconstitutionality is necessary to avoid DADT's reinstatement or a passage of a similar ban on gays and lesbians in the military. In light of the Defense Department's findings that DADT's repeal does not endanger

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[10] Barr, Andy, *Mike Huckabee Wants to Repeal 'Don't Ask, Don't Tell' Repeal*, March 22, 2011 *at* http://www.politico.com/news/stories/0311/51760.html. Weigel, David, *Tim Pawlenty: I'd "Support Reinstating" Don't Ask, Don't Tell*, *at* http://www.slate.com/blogs/blogs/weigel/archive/2011/01/13/tim-pawlenty-i-d-support-reinstating-don-t-ask-don-t-tell.aspx). Rayfield, Jillian, *Barbour: I'd Reinstate DADT to Avoid Distracting 'Amorous Mindset'*, March 25, 2011, *at* http://tpmdc.talkingpointsmemo.com/2011/03/barbour-id-reinstate-dadt-to-avoid-distracting-amorous-mindset-video.php?ref=fpi).

military effectiveness, Working Group Rpt., *supra* note 1, further exclusion of gays and lesbians from military service can only be based on the very fear, animus, and stereotyping of "a politically unpopular group" equal protection proscribes. *See Romer*, 517 U.S. at 634; *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring). Absent any military justification for excluding gays and lesbians from service, DADT becomes nothing more than a "bare ... desire to harm a politically unpopular group [which] cannot constitute a *legitimate* governmental interest." *See Romer*, 517 U.S. at 634; *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring).

The uncertainty surrounding DADT's repeal has left a looming cloud of fear among gays and lesbians who want to join or re-join the military. Thus, even if DADT's repeal goes into effect, without a court ruling affirming DADT's unconstitutionality, this uncertainty will have a chilling effect on gay and lesbian accession. Gay and lesbian servicemembers already discharged under DADT will be far less likely to re-join the military where there is a danger of discharge again upending their lives and career. Gays and lesbians will be similarly less likely to join for the first time where threat of discharge remains. Because DADT can be reinstated as easily as it was repealed, this Court should affirm that the policy is unconstitutional, under a heightened scrutiny standard, in order to create the certainty necessary for gays and lesbians to join or re-join in the military and serve

their country without fear that DADT, or a similar policy, will bring a swift end to their military careers.

CONCLUSION

For all the reasons stated above, SU respectfully requests that this Court affirm the district court's judgment enjoining the "Don't Ask, Don't Tell" Act, 10 U.S.C. § 654. SU further requests that this Court reverse the district court's dismissal of Log Cabin Republican's equal protection claim and remand that aspect of the case to the district court for its decision in the first instance whether the evidence it received at trial also requires a finding that DADT violates the equal protection component of the Fifth Amendment under a required heightened scrutiny analysis.

DATED: April 4, 2011

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,395 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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DATED: April 4, 2011

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CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 707 Wilshire Blvd., Ste. 4750, Los Angeles, CA 90017.

I hereby certify that on April 4, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

Executed on April 4, 2011, at Los Angeles, California.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ David J. Sarnoff
David J. Sarnoff