

No. 12-307

IN THE
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

EDITH S. WINDSOR, ET AL.,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

**BRIEF OF AMICUS CURIAE OUTSERVE-SLDN
INC. ON THE MERITS IN SUPPORT OF
RESPONDENT EDITH WINDSOR**

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INTEREST OF AMICUS CURIAE¹

OutServe-SLDN Inc. is a non-profit organization that supports lesbian, gay, bisexual and transgender (“LGBT”) current and former members of the United States military. OutServe-SLDN submits this amicus curiae brief to highlight the significant implications of the Court’s decision in this case for the physical, psychological and financial well-being of gay and lesbian veterans and members of the armed forces, and for the vitality of our nation’s military as a whole.

OutServe-SLDN comprises two formerly separate organizations, which merged in 2012: Servicemembers Legal Defense Network (“SLDN”) and OutServe. SLDN was founded in 1993, in response to Congress enacting “Don’t Ask, Don’t Tell” (“DADT”), to provide free, confidential and direct legal services to LGBT service members and veterans affected by DADT and by the previous ban on gay and lesbian

¹ No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution to fund the preparation or submission of this brief. No one other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

service. SLDN assisted more than 12,000 active and former service members, and was instrumental in the successful effort to repeal DADT. After DADT's repeal, SLDN assisted veterans discharged under DADT by correcting discharge records and helping those who wished to return to service; supported transgender military service; helped defend LGBT service members and veterans facing discrimination; and worked to secure equal benefits for LGBT service members, veterans and their families.

As part of that effort, SLDN sued the United States on behalf of current and former members of the military and their same-sex spouses, alleging the Defense of Marriage Act unconstitutionally denies same-sex spousal benefits for active duty members of the military, members of the National Guard and veterans. Complaint, *McLaughlin v. Panetta*, No. 1:11-cv-11905-RGS (D. Mass. Oct. 27, 2011) ("*McLaughlin*"). The constitutional challenges brought against DOMA in *McLaughlin* overlap substantially with the challenges brought by Ms. Windsor in the case presently before the Court.

OutServe began as an underground network of LGBT service members connected via Facebook in 2010, and had more than 6,000 members worldwide. During the fight to repeal DADT, OutServe facilitated telling the stories of active duty gay and lesbian service

members in the media and at the Pentagon, allowing the voices of those who were serving in silence to be heard.

As a unified organization, OutServe-SLDN continues to work toward open service for all LGBT members of the military and to ensure that they, and their families, receive the same benefits as their opposite-sex counterparts. Given the pending *McLaughlin* lawsuit and its long history in assisting LGBT service members, OutServe-SLDN believes its perspective may be of assistance to the Court.

SUMMARY OF ARGUMENT

The military often highlights the importance of the “military family” by emphasizing that it “recruits soldiers, but retains families.” The military provides financial benefits and support services to service members’ families that are invaluable, particularly in trying times when service members are deployed, wounded or die serving their country.

The military demands far more from those who serve and their families than does a typical employer. To protect their country, service members accept that they may be deployed far from their families and loved ones, and they must prepare for the possibility that their service may cost them their lives. The separation and sacrifice caused by a distant deployment often puts a considerable strain on military families, and service members often worry whether their families will be provided for in their absence or, even more troubling, in the event they should die protecting this country.

In asking so much from its service members and their families, the military extends a promise in return. The military assures service members it will provide for their families in their absence, whether that absence results from a temporary deployment or death. It keeps that promise by providing military families a host of

benefits and family support services, many of which hinge upon a person's status as a "spouse" of a service member.

The so-called Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, prevents the military from honoring its promise to certain military families because it nullifies marriages between persons of the same sex for federal purposes. Even where a same-sex couple is legally married under state law, DOMA prevents the military from recognizing that marriage and acknowledging a service member's same-sex spouse as a "spouse" in providing benefits. These military spouses cannot be designated the next-of-kin to receive notice of the service member's death and do not receive a surviving spouse death benefit. They are not included in family support programs for families of deployed service members. They are denied housing, health care and other benefits that are important to military families and essential for attracting and retaining well-qualified military personnel. When they die, these military spouses do not have the right to be buried in a military cemetery next to the veteran they married.

In the military context, the denial of equal benefits for equal service and equal sacrifice is more than a fairness issue. The military consistently has emphasized that providing benefits to military spouses improves morale and

is critical to national security. These benefits address an important source of worry for service members, allowing them to focus on the tasks at hand. A Marine who is ordered to kick down a door or to take a hill in the midst of incoming gunfire should not have to worry about what would happen to his or her spouse if the Marine were to die in battle. The military knows this and has explicitly made that point to Congress in seeking spousal benefits in the past. Accordingly, the military also has committed itself to provide equal benefits to the same-sex spouses of its service members in the event this Court invalidates DOMA.

In addition to recognizing the need for spousal benefits, the military recognizes the importance of uniformity in benefits. Uniformity is a bedrock military principle, which fosters the unit cohesion necessary for the military to function effectively. Providing disparate benefits to service members, who are performing the same service and making the same sacrifices, sends the wrong signal that the military does not value all service members or their families equally.

Finally, the provision of spousal benefits is critical for the military to compete with other employers in recruitment and retention. It is a well-established fact that many people do not enlist, or choose to leave the military, when they

believe they would receive better benefits in the private sector. There also is no question that more and more private sector employers provide benefits to same-sex spouses. Numerous gay and lesbian service members have reported to OutServe-SLDN that the absence of spousal benefits has caused them to leave the military or to consider doing so. They report that the issue is not just one of financial security, but also is grounded in a desire to be part of an organization that values them as equals.

ARGUMENT

DOMA HARMS MILITARY FAMILIES AND UNDERMINES NATIONAL SECURITY

The military context perhaps best illustrates the irrationality of DOMA's broad sweep. By preventing same-sex spouses from being recognized as "spouses" who are entitled to military benefits and family support services, DOMA not only harms military families, it threatens core military values and undermines the military as a whole.

A. DOMA Harms Military Families

Spousal benefits related to military service are conferred through nearly 100 provisions of the U.S. Code, primarily in Title 10, concerning active-duty benefits; Title 32, concerning National Guard benefits; Title 37, concerning service

member pay and allowances; and Title 38, concerning veterans' benefits. OutServe-SLDN, *Military Spousal Benefits Denied by DOMA*, <http://www.sldn.org/DOMAdenies> (listing 94 provisions). Service members who have a "spouse" and persons who are recognized as a "spouse" are entitled to numerous benefits under these titles.

Although same-sex spouses appear covered as "spouses" under Title 10 and Title 32, which define "spouse" as "husband or wife, as the case may be," 10 U.S.C. § 101(f)(5); 32 U.S.C. § 101(18), DOMA limits those definitions to opposite-sex spouses. DOMA modifies the definition of "spouse" throughout the U.S. Code by requiring that

[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7. DOMA also defines "spouse" for Title 37, which does not independently define the term, but adjusts pay and allowances by whether

a service member has a “spouse.” Title 38 defines “spouse” and “surviving spouse” in terms similar to DOMA,² restricting the definitions to persons of the “opposite sex.”³

² In Title 38, “[t]he term ‘spouse’ means a person of the opposite sex who is a wife or husband,” 38 U.S.C. § 101(31), and “[t]he term ‘surviving spouse’ means . . . a person of the opposite sex who was the spouse of a veteran at the time of the veteran’s death” 38 U.S.C. § 101(3). Unlike DOMA, however, there is nothing in the legislative history to indicate that, when this language was added in 1975, there was any concern with persons of the same sex marrying. Rather, it was “part of the effort to rewrite the statute to conform with emerging Constitutional mandates for gender equality.” Br. of *Amici Curiae* Family Law Professors at 12 n.8, *Massachusetts v. U.S. Dep’t of HHS*, 682 F.3d 1 (1st Cir. 2012); see *McLaughlin*, Dkt. 28-2 (D. Mass. Feb. 21, 2012) (Letter from Attorney General Holder to the Speaker of the House explaining the legislative record offers “no rationale” for including opposite-sex spouses but not legally married same-sex spouses in Title 38). Congress was trying to rid the statute of “unnecessary gender references” by eliminating the terms “wife” and “widow.” S. Rep. No. 94-568 at 19-22 (1975). Congress defined “spouse” in Title 38 to emphasize its breadth, reaching all marriages as defined at that time.

³ The plaintiffs in *McLaughlin* challenged the constitutionality of these definitions in Title 38 on the same grounds they challenged DOMA. *McLaughlin*, Dkt. 1 (D. Mass. Oct. 27, 2011). The United States agreed Title 38 is

Those provisions, as modified by DOMA, are inconsistent with the values of the modern military. They were crafted at a time when gays and lesbians were precluded from openly serving in the military, and when same-sex couples could not legally marry in the United States. While those provisions effectively covered all military spouses in the past, that is no longer true. Now that persons of the same sex can legally marry, and gays and lesbians now serve openly in the military, service members with same-sex spouses do serve in the ranks. To maintain the uniformity of benefits that Congress believed it created, the definition of “spouse” must include these spouses as well.

The death of Staff Sergeant Donna Johnson illustrates the real-world impact of DOMA. While on her third deployment in Afghanistan, Sgt. Johnson was killed in October 2012, along with two other married soldiers, when a Taliban suicide bomber drove a motorcycle packed with explosives into their patrol. Because of DOMA, the military did not notify Sgt. Johnson’s wife of her death, but instead notified Sgt. Johnson’s

unconstitutional. *McLaughlin*, Dkt. 28-2 (D. Mass. Feb. 21, 2012) (Letter from Attorney General Holder to the Speaker of the House explaining these provisions of Title 38 are unconstitutional for the same reasons DOMA is unconstitutional).

mother. Sgt. Johnson's wedding ring was not returned to her wife, but was given to her mother along with her personal effects. The flag that draped Sgt. Johnson's coffin was handed to her mother, not to her spouse. And her spouse was denied the spousal death benefits and support services that opposite-sex spouses of fallen soldiers are entitled to receive, including the opposite-sex spouses of the other soldiers killed in the same attack.⁴ The military's inability to notify the spouses of fallen soldiers of their deaths, to return the soldiers' wedding rings to their spouses, or to extend other benefits to compensate military spouses for their loss—solely because Congress disapproves of the gender of their spouses—is indefensible, and an insult to those who give their lives serving this country.

⁴ The Military Times has a moving video interview with Sgt. Johnson's wife and mother about their ordeal. *She Lost Her Wife To War* (2013), http://link.brightcove.com/services/player/bcpid53221775001?bckey=AQ~~,AAAAACnIIBGk~,NZYO3xUDM_HmzYYpFSh6tKdqfRye3V9a&bctid=2071265587001; see also Paul Szoldra, *Pentagon Decision on Benefits Sets Up Huge Fight Over Defense of Marriage Act*, Business Insider (Feb. 15, 2013).

B. In Enacting DOMA, Congress Never Considered Its Impact On The Military

As the Courts of Appeals have observed, the scope of change DOMA brought to the U.S. Code was “broad, touching more than a thousand federal laws.” *Windsor v. United States*, 699 F.3d 169, 187 (2d Cir. 2012); *see Massachusetts v. U.S. Dep’t of HHS*, 682 F.3d 1, 6 (1st Cir. 2012) (“DOMA affects a thousand or more generic cross-references to marriage in myriad federal laws.”). But “despite its ramifying application throughout the U.S. Code, only one day of hearings was held on DOMA . . . and none of the testimony concerned DOMA’s effects on the numerous federal programs at issue.” *Massachusetts*, 682 F.3d at 13.

It does not appear that any thought was given to how DOMA would impact same-sex married couples in the military when it was enacted in 1996. That is not surprising. At that time, marriage between persons of the same sex was not permitted anywhere in the United States. Moreover, because DADT had been enacted previously, in 1993, and made marriage to a person of the same sex grounds for a discharge,⁵ even the legalization of such

⁵ DADT, formerly codified at 10 U.S.C. § 654, was enacted as a compromise. President Clinton sought to lift the ban on gay and lesbian military service, but was

opposed by those who supported maintaining the ban. DADT allowed gays and lesbians to serve in the military, so long as their sexual identity was concealed. The military was no longer to “ask” whether service members were gay or lesbian, and service members were not supposed to “tell” whether they were. Nevertheless, “[t]he policy generally required a service member be separated from the military if he had engaged or attempted to engage in homosexual acts, stated that he is a homosexual, or married or attempted to marry a person of the same sex.” *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1165 (9th Cir. 2011); *see* 10 U.S.C. § 654(b)(3) (repealed) (attempt to marry someone of the same sex was grounds for discharge). Despite the hope that DADT would reduce discharges, the opposite occurred. Investigations opened at an increased pace and more than 13,000 service members were discharged, despite troop shortages and the fact that many who were discharged had critical skills. *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 949-52 (C.D. Cal. 2010), *vacated as moot following DADT repeal*, 658 F.3d 1162 (9th Cir. 2011). The policy was widely regarded as a failure, and many who supported its passage came to favor its repeal. The DADT Repeal Act was enacted in 2010, making repeal effective after the Secretary of Defense received a report addressing the impact of repeal and recommending policy changes, and “the President, Secretary of Defense and Chairman of the Joint Chiefs of Staff certified they had considered the report’s recommendations and were prepared to implement the repeal consistent with military readiness, military effectiveness, and unit cohesion.” *Log Cabin Republicans*, 658 F.3d at 1165. Certification occurred, and repeal

marriages would not have been thought to implicate military spousal benefits at the time DOMA was enacted.

C. Denying “Spousal” Benefits to Same-Sex Military Spouses Threatens Core Military Values And National Security

There is no question that paying unequal benefits to service members runs directly counter to the military values of uniformity, fairness and unit cohesion. While there was once a debate as to whether gay and lesbian service members should be allowed to serve openly in the armed forces—just as there were similar debates regarding integrating the military by race, and later by gender⁶—there never has been any

became effective in September 2011. *Id.* The Secretary of Defense noted: “One of the great successes at the Department of Defense has been the implementation of DADT repeal. It has been highly professional and has strengthened our military community.” U.S. Dep’t of Defense, *News Release: Statement from Secretary of Defense Leon E. Panetta on the Extension of Benefits to Same-Sex Partners*, No. 077-13 (Feb. 11, 2013) (“DOD 2/11/13 News Release”).

⁶ The military recently announced the last remaining barrier to military service by women, related to service in combat, will be lifted. U.S. Dep’t of Defense, *Defense Department Rescinds Direct Combat Exclusion Rule; Services to Expand Integration of Women into Previously*

debate as to whether similarly situated service members deserve the same benefits. Once admitted to the military, each service member should be treated the same. DOMA, however, is a significant barrier to this principle of equality.

Since gay and lesbian service members became able to serve openly, the United States military *never* has advocated discrimination against them in terms of entitlement to spousal benefits. *McLaughlin*, Dkt. 28-2, at 2. (D. Mass. Feb. 21, 2012) (Letter from Attorney General Holder to the Speaker of the House explaining “[n]either the Department of Defense nor the Department of Veterans Affairs identified any justifications for that distinction” in paying veterans benefits to opposite-sex, but not same-sex, spouses). Indeed, the Attorney General, “in consultation with the Department of Defense and the Department of Veterans Affairs,” notified the court in *McLaughlin* that it cannot defend DOMA’s application to the military. *Id.* at 1.

Since the *McLaughlin* suit was filed, the President and Secretary of Defense have made clear there is no military interest served by discriminating against the families of gay and lesbian service members, and they have sought

Restricted Occupations and Units, News Release No. 037-13 (Jan. 24, 2013).

to equalize benefits where possible. On February 11, 2013, Secretary Panetta announced the military would extend numerous benefits to same-sex spouses, although he noted that DOMA would continue to deny many significant benefits. DOD 2/11/13 News Release. In doing so, Secretary Panetta emphasized:

It is a matter of fundamental equity that we provide similar benefits to all those men and women in uniform who serve their country. . . . Extending these benefits is an appropriate next step under current law to ensure that all service members receive equal support for what they do to protect this nation.

Id. Secretary Panetta advised the military:

Today, our military leaders are ensuring that all America's sons and daughters who volunteer to serve our Nation in uniform are treated with equal dignity and respect, regardless of their sexual orientation. Our work must now expand to changing our policies and practices to ensure fairness and equal treatment and to taking care of all of our Service

members and their families, to the extent allowable under law.

Secretary of Defense, *Memorandum: Extending Benefits to Same-Sex Domestic Partners of Military Members* at 1 (Feb. 11, 2013) (“DOD 2/11/13 Mem.”).

Despite the military’s desire to extend equal benefits to the spouses of all its members, Secretary Panetta explained “[t]here are certain benefits that can only be provided to spouses as defined by [DOMA], which is now being reviewed by the Supreme Court.” DOD 2/11/13 News Release. He added:

In the event that the Defense of Marriage Act is no longer applicable to the Department of Defense, it will be the policy of the Department to construe the words “spouse” and “marriage” without regard to sexual orientation, and married couples, irrespective of sexual orientation, and their dependents, will be granted full military benefits.

DOD 2/11/13 Mem. at 2.

In the most recent State of the Union, President Obama made clear that extending equal benefits remains a priority for him in his role as Commander-in-Chief:

As long as I'm Commander-in-Chief, we will do whatever we must to protect those who serve their country abroad, and we will maintain the best military the world has ever known We will ensure equal treatment for all servicemembers, and equal benefits for their families—gay and straight.

State of the Union Address (Feb. 13, 2013), *available at* <http://www.whitehouse.gov/state-of-the-union-2013>.

The irrationality of DOMA's broad sweep is made clear in the military context. At the time DOMA was enacted, no thought whatsoever appears to have been given to how it could impact the military. Now that DOMA's adverse impacts on the military are clear, the military is working to minimize DOMA's harm where possible and is calling for DOMA to be overturned.⁷

⁷ One brief in support of BLAG addresses DOMA in the military context, and argues narrowly that overturning DOMA would adversely affect the military chaplaincy. See Br. of *Amici Curiae* the Chaplain Alliance for Religious Liberty et al. There is no basis for this conclusion, and the *amici* fundamentally misstate Defense Department policy. The brief ignores the fact that the

1. DOMA's Application To Spousal Benefits Threatens The Military Family And National Security

Although the toll that service takes on members of our military cannot be overstated, their spouses and families also bear heavy burdens:

The theme of the “military family” and its importance to military life is widespread and well publicized. Military spouses are still expected to fulfill an important role in the social life and welfare of the military community. Child care and management of the family household are many times solely the spouse’s responsibility. The military spouse lends a cohesiveness to the family

military has made clear that, “a chaplain is not required to participate in or officiate a private ceremony if doing so would be in variance with the tenets of his or her religion or personal beliefs.” Undersecretary of Defense, *Memorandum: Military Chaplains* (Sept. 30, 2011). The Forum on the Military Chaplaincy has published a rebuttal, disproving the claims made in the *Amici*’s brief. Jeff Hersh, *The Defense of Marriage Act Must Go: The Forum’s Response*, <http://forumonthemilitarychaplaincy.org/2013/02/the-defense-of-marriage-act-must-go-the-forums-response>.

facing the rigors of military life, including protracted and stressful separations. The committee finds that frequent change-of-station moves and the special pressures placed on the military spouse as a homemaker make it extremely difficult to pursue a career affording economic security, job skills and pension protection.

S. Rep. No. 97-502, at 6 (1982); *see also* John McHugh & Raymond Odierno, *A Statement on the Posture of the United States Army 2012*, at 12 (“We will not walk away from our commitment to our Families We must fulfill our moral obligation to the health, welfare and care of our Soldiers, Civilians and Families.”).

Recognizing that support from spouses bolsters service members’ morale, Congress sought to improve the standard of living for military spouses. *See, e.g.*, 10 U.S.C. § 1071 (benefits “maintain high morale”); 127 Cong. Rec. 21,378 (1981) (“[A] spouse who is secure in the knowledge of his or her entitlement to a portion of the member’s retirement benefit is likely to be more supportive of that member, encourage the member to participate in the military until retirement age and generally add to the stability of the military family.”) (Sen. DeConcini). Family stability fosters troop morale. *Id.* As

President Eisenhower (a former five-star general) said of a law providing medical benefits to military families, knowing one's family will be provided for "removes one of the greatest sources of worry to our servicemen and servicewomen around the world." Statement by the President Concerning the Medical Care Program for Dependents of Members of the Uniformed Services (1956) (*McLaughlin*, Dkt. 14-3 (D. Mass. Nov. 21, 2011)).

When troops know their spouses are cared for through benefits like healthcare, housing and family support programs, their combat-readiness improves. "Success in modern warfare demands the full utilization of every ounce of both the physical and mental strength and stamina of its participants. No soldier can be and remain at his best with the constant realization that his family and loved ones are in dire need of financial assistance." S. Rep. No. 93-235 (1973). As Congress was recently told:

For an Army at war, care of our families is critical. The warrior must know that his or her family is safe and is being cared for, and the warrior and their families must be confident that if that warrior is injured or ill in the course of their duties that they are going to survive,

they are going to return home, and they will have the best chance at full recovery and an active or productive life, either in uniform or out.

The Military Health System: Hearing Before The Mil. Pers. Subcomm. of the H. Comm. on Armed Servs., 111th Cong. 8 (2009) (Lt. Gen. Schoomaker).

Conversely, service members who fear their spouses will not be cared for are less likely to risk their lives in battle, potentially jeopardizing their comrades and their mission.

[F]amily care is mission impact. When our men and women are in harm's way, if they are not confident their families are fully cared for, they will not be focused on what is in front of them. And that has mission impact. So family care plays directly into the mission.

Id. at 19 (Vice Adm. Robinson).

President Eisenhower and the senior military officials who persuaded Congress to provide generous spousal benefits were not wrong. Indeed, the very problems they said would occur if spousal benefits were not provided are now reported by gay and lesbian service members who are denied spousal benefits because of DOMA.

The plaintiffs' declarations in *McLaughlin* are illustrative. Lieutenant Colonel Victoria Hudson, USAR (Ret.), addressed these issues at length in her declaration. Lt. Col. Hudson risked her military career by marrying her wife, Monika Poxon, in 2004, while DADT was in effect. She volunteered for deployment to Iraq in 2005, where she served as a convoy commander for approximately 19 convoys. *McLaughlin*, Dkt. 17 ¶¶ 11 & 12 (D. Mass. Nov. 21, 2011). Lt. Col. Hudson found that “[e]ach time I left the safety of the compound, I wondered if I would return. Each time I wondered whether Monika would be notified if I were injured or killed.” *Id.* ¶ 13. Among other things, she worried that

since the Army does not recognize Monika as my legal spouse, if something were to happen to her, I might not be allowed to return from deployment to care for her. If I were wounded, she might not be able to have an active role in the decisions attendant to that situation.

Id. ¶ 20. Lt. Col. Hudson explained:

For an Army Reserve Soldier, the experience of being ripped away from your usual life and thrust into the stress and challenges of mobilized status on active duty is intense.

Accessing the same benefits and support that heterosexual Soldiers receive is crucial to Monika and me. We are just like every other Army couple. We want the same things. Monika wants me to come home from war safe and whole. While I serve, I want to know that she is safe and will be cared for and protected. This improves my readiness and ensures that I am a Soldier focused on the mission rather than on what is needed at home. I know that during the uncertainty of deployment to hostile areas, the knowledge that my wife will have access to all the same benefits and support afforded to every other Army wife will go far to alleviate the anxieties inherent in deployment.

Id. ¶ 22.

Similarly, Captain Steve Hill married his husband, Joshua Snyder, in 2011, after his first deployment, and he was redeployed to Iraq shortly after their wedding. *McLaughlin*, Dkt. 20 ¶¶ 8 & 9 (D. Mass. Nov. 21, 2011). Capt. Hill explained the spousal benefits he seeks

are critical to me and to Joshua and to our future together. Being safe and secure in the knowledge that

Joshua is cared for and will benefit from my service will make me a more focused soldier, will help alleviate the anxieties I experience while on deployment, will improve my morale, will provide us with an improved standard of living and sense of stability, and will allow us to plan our futures together the way opposite-sex couples can.

Id. ¶ 12; *see also McLaughlin*, Dkt. 16 ¶ 9 (D. Mass. Nov. 21, 2011) (declaration of Major Shannon McLaughlin conveying the same concerns for her wife, Casey McLaughlin).

DOMA's discrimination even follows distinguished service members to their graves. Colonel Stewart Bornhoft graduated from West Point, completed two tours in Vietnam, returned to teach at West Point, and concluded a 26-year career in the Army with numerous commendations for his service. *McLaughlin*, Dkt. 18 ¶¶ 2-4 (D. Mass. Nov. 21, 2011). Yet his husband, Stephen McNabb, was denied access to base facilities and other important benefits, including medical coverage. *Id.* ¶ 9. Col. Bornhoft laments the fact that, despite his extraordinary military career, he may decide not to be buried in a military cemetery because

DOMA denies him “the right for Stephen to be buried next to me.” *Id.*⁸

Many service members report their concerns are particularly severe when their spouses have been denied health insurance. Lieutenant Gary Ross, a graduate of the Naval Academy, explains that his same-sex spouse, Dan Ross, did not have access to affordable health care and had to travel to Mexico to obtain health care. *McLaughlin*, Dkt. 19 ¶ 7 (D. Mass. Nov. 21, 2011).

Two days after our marriage, Dan was returning from a medical procedure in Mexico when gunfire broke out at the border. A customs agent and many civilians were hurt, and we both feared for Dan’s life that day. Ever since, we have been especially anxious about Dan’s health, knowing he will have to cross the border to obtain care.

⁸ The Secretary of Veterans Affairs recently granted a waiver for a same-sex spouse to be buried in a veterans’ cemetery, but there is no guarantee such waivers will be granted in the future. Mike Francis, *In a First, Veterans Affairs Approves Request By Oregon Woman to Bury Same-Sex Spouse in National Cemetery*, The Oregonian (Feb. 14, 2013).

Id. ¶ 7. Lt. Ross emphasizes that knowing his spouse has access to medical care, among other benefits, would be a tremendous comfort and allow him to remain focused on his service, particularly during deployments. *Id.* ¶ 10; *see also McLaughlin*, Dkt. 16 ¶ 9 (D. Mass. Nov. 21, 2011) (declaration of Airman First Class Daniel Henderson, noting his husband, Jerret Henderson, lacks health insurance to cover a needed surgery).

The denial of spousal benefits is particularly distressing for service members who know their deaths are imminent. Chief Warrant Officer Charlie Morgan served in Kuwait, Qatar and Iraq. *McLaughlin*, Dkt. 1 ¶ 55 (D. Mass. Oct. 27, 2011). When her wife, Karen Morgan, began staying home to raise their young daughter, CWO Morgan became the family's "sole breadwinner." *McLaughlin*, Dkt. 22 ¶ 9 (D. Mass. Nov. 21, 2011). In 2008, CWO Morgan was diagnosed with breast cancer and chose to do everything possible to improve her chances of survival. She underwent chemotherapy, radiation and had a double mastectomy. *Id.* ¶ 9. The treatment appeared effective, and CWO Morgan deployed to Kuwait for a year. Upon her return in 2011, however, she was diagnosed with end-stage cancer, which had spread throughout her body. *Id.* Her doctors advised it would be unlikely for her to survive past October 2012, but she held

on. She said her “motivation for staying alive” was to see DOMA overturned, so she could die with the comfort of knowing her family would be provided for when she was gone. Andrea Stone, *Soldier’s Last Wish: Let DOMA Die Before I Do*, Washington Post (Nov. 23, 2012).⁹ Unfortunately, CWO Morgan died on February 10, 2013, without any assurance the benefits she fought so hard to secure for her family would be provided.

2. DOMA’s Application To Military Spousal Benefits Undermines Recruitment And Retention

Our armed services must compete with the private sector in recruiting and retaining well-qualified employees. To the extent the military does not extend spousal benefits comparable to those offered by the private sector, the military risks losing qualified candidates and troops. *Anderson v. United States*, 16 Cl. Ct. 530, 535 n.10 (Ct. Cl. 1989) (“It is recognized that the federal government must compete with private industry for the recruitment and retention of

⁹ The end-of-life decisions CWO Morgan faced are similar to those other service members confront. See Complaint, *Cooper-Harris v. United States*, No. cv-12-0887 (C.D. Cal. Feb. 1, 2012) (lesbian veteran with multiple sclerosis challenges DOMA to secure additional disability benefits, and survivor benefits for her same-sex spouse).

overseas employees. Employees who are dissatisfied or believe they are being treated unfairly are more inclined to leave the government than those who are satisfied or believe otherwise.”); 127 Cong. Rec. 15,133 (1981) (“Morale, motivation, and reenlistment of our armed services depend on more than take-home pay. Long-range benefits which insure the future financial security of both partners in a military marriage will improve morale and increase reenlistment The purpose of this chapter is to create and maintain high morale in the uniformed services by providing an improved and uniform program of medical and dental care for members and certain former members of those services, and for their dependents.”) (Sen. Hatfield); 105 Cong. Rec. 18,439 (1959) (Rep. Lane) (benefits needed to compete with private sector); Don Jansen, *CRS Report for Congress: Military Medical Care*, at 1-2 (2008) (“[R]ecruitment and retention are supported by the provision of health benefits to military retirees and their dependents.”); *see also Sierra Mil. Health Servs, Inc. v. United States*, 58 Fed. Cl. 573, 585 (Fed. Cl. 2003) (noting the “public interest in maintaining the morale of our military personnel by providing improved health care benefits to dependents”).

Gay and lesbian service members often report to OutServe-SLDN that they are considering leaving the military for the private sector to

obtain spousal benefits, particularly health care. In contrast to the military, a substantial and increasing number of private employers provide benefits to same-sex spouses and domestic partners. More than half of Fortune 500 companies—and eight of the top ten—provide domestic partner health insurance benefits to their employees. Human Rights Campaign, *Corporate Equality Index*, at 8 (2013), available at http://www.hrc.org/files/assets/resources/CEI_2013_Final_low.pdf.pdf.

After DADT was repealed, the military actively began recruiting gays and lesbians, but the lack of equal benefits hinders those efforts. Elisabeth Bumiller, *Marines Hit the Ground Running in Seeking Recruits at Gay Center*, N.Y. Times (Sept. 20, 2011). To recruit qualified gay and lesbian candidates, as well as heterosexual candidates who oppose discrimination, the military must offer attractive and equitable benefits. See Lawrence J. Korb et al., *Ending “Don’t Ask, Don’t Tell”*, June 24, 2009 (*McLaughlin*, Dkt. 14-6 (D. Mass. 2/21/12)) (“Perhaps most important, this outmoded policy sends the wrong signal to the young people—straight or gay—that the military is trying to recruit. It tells them that the military is an intolerant place that does not value what they

value, namely, diversity, fairness, and equality.”) (commenting on DADT).

Our nation’s experience with DADT is instructive. By some estimates, approximately 4,000 service members voluntarily chose not to reenlist each year due to DADT, while it was in effect. *Log Cabin Republicans*, 716 F. Supp. 2d at 951-52 (also noting the General Accounting Office estimated it cost \$95 million to replace and train soldiers who left service due to DADT). The repeal of DADT has improved these numbers substantially, but there can be no doubt that denying equal benefits for equal work undermines recruitment and retention, particularly when same-sex spousal benefits are available in the private sector, including from many defense contractors that recruit top military talent.

The experience of Captain Joan Darrah, USN (Ret.), demonstrates that many of the problems that plagued recruitment and retention efforts prior to DADT’s repeal remain due to DOMA. Capt. Darrah left a briefing in the Pentagon on 9/11 seven minutes before American Airlines flight #77 crashed into the building, killing 125 people inside (and another 59 on the plane). *McLaughlin*, Dkt. 23 ¶ 6 (D. Mass. Nov. 21, 2011). That day haunted Capt. Darrah, as it did most Americans. She had the added concern, however, that had she been killed, her same-sex

partner whom she later married, Jacqueline Kennedy, would not have been notified and would not have received spousal benefits. *Id.* ¶6. That experience led Capt. Darrah to retire earlier than planned. *Id.*

Despite the repeal of DADT, the concerns that led Capt. Darrah to leave the military after 9/11 would not play out any differently now. If a married gay or lesbian service member were to die today, the military would still view his or her spouse as a legal stranger. There is no guarantee the military will notify the spouse of the death, and it certainly will not provide the benefits and family support services available to opposite-sex spouses. Given the current state of the law, service members who find themselves in Capt. Darrah's position may very well choose to leave the military or retire early, just as she did.

3. DOMA Creates Inconsistencies In The Disbursement Of Military Spousal Benefits, And Threatens Uniformity, Fairness And Unit Cohesion

Uniformity is a pillar of military culture. It is a necessary component of an effective, well-prepared national defense. *See Hartmann v. Stone*, 68 F.3d 973, 984-85 (6th Cir. 1995) ("[T]he military considers the maintenance of uniformity and the discipline it engenders to be a necessary ingredient of its preparedness"). To

promote uniformity and preserve high morale, the military discourages all inequities and distinctions among its members. *See, e.g.*, *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (noting the military's broad discretion to "foster instinctive obedience, unity, commitment, and *esprit de corps*"); *Anderson*, 16 Cl. Ct. at 535 n.9 ("It is not difficult to appreciate the morale problem inherent in the case of two teachers, both recruited in the United States, who work at the same overseas [Defense Department] school, perform the same duties, receive the same salary [yet do not receive the same benefits.]"); S. Rep. No. 86-1647, at 3339-40 (1960) ("The effectiveness of their performance is directly related to the fairness and wisdom inherent in the policies under which personnel are employed [M]orale suffers when two employees arrive at a post together, are booked into the same hotel, pay the same room rate, but receive a different allowance.").¹⁰

¹⁰ The military historically has sought to prevent instances of inequality. The military has maintained uniformity even when abandoning that principle would have been popular. *See, e.g.*, H.R. Rep. No. 106-270, at 7 (1999) (stating the Defense Department's opposed H.R. 456, which would have provided special benefits to the families of soldiers who were mistakenly killed by friendly fire during an incident in Iraq, because "[w]e are concerned that enactment of this bill would create

The repeal of DADT reflects Congress' desire to redress inequality in the military and to better promote national security. *See Secretary Panetta's Statement On Certification of Readiness to Implement Repeal of Don't Ask, Don't Tell* (July 22, 2011) (finding repeal of DADT "is consistent with the standards of military readiness and effectiveness, unit cohesion, and military recruiting and retention"); Remarks by the President and Vice President at Signing of the Don't Ask, Don't Tell Repeal Act of 2010 (Dec. 22, 2010) (describing DADT as "a policy that actually weakens our national security, diminished our ability to have military readiness and violates a fundamental American principle of fairness and equality"). The military's recent efforts to extend same-sex spousal benefits as a matter of "fundamental equity" and to provide "fairness and equal treatment" to all service members, regardless of sexual orientation, is in keeping with that goal. DOD 2/11/13 News Release. But, as Secretary of Defense Panetta noted, it is DOMA and not any desire by the military that requires discrimination to remain within the armed forces. DOD 2/11/13 Mem. at 2.

inequities in the treatment of survivors of service members dying on active duty").

CONCLUSION

The repeal of DADT was an important step in the military's march for equality, but true equality will not be achieved until the next step is taken and DOMA is invalidated. The military is prepared to take that step; only DOMA stands in its way. As long as DOMA remains in effect, both the families of gay and lesbian service members and the military itself will suffer.

Respectfully submitted,

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