

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

MAJ SHANNON L. MCLAUGHLIN, et al.)	
)	
Plaintiffs,)	
)	
v.)	No. 1:11-cv-11905-RGS
)	
LEON E. PANETTA, in his official capacity as)	
Secretary of Defense; et al.,)	
)	
Defendants.)	
)	

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR
SUMMARY JUDGMENT**

INTRODUCTION

The United States military often highlights the importance of the "military family" by emphasizing that it "recruits soldiers, but retains families." The military provides typical employee benefits to service members' families and family support services to assist family members, especially when service members are deployed, wounded or die serving their country.

The so-called Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, requires the military to turn its back on certain military families because it nullifies same-sex marriages for federal purposes. These military spouses cannot be designated as the primary next-of-kin to receive notice of the service member's death and to arrange interment, 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 access to military bases to take their children to base doctors, and 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 cannot be buried in a military cemetery next to the veteran they married. During this time of war, American service members and their families are among DOMA's victims, and our national security may suffer as a result.

This Court already held Section 3 of DOMA unconstitutional in two thoughtful opinions. Massachusetts v. United States Dep't of HHS, 698 F. Supp. 2d 234 (D. Mass. 2010) (Tauro, J.); Gill v. OPM, 699 F. Supp. 2d 374 (D. Mass. 2010) (Tauro, J.). Additionally, the United States agrees with this Court that "Section 3 of DOMA unconstitutionally discriminates." Gov't Sup. Br. at 21, Massachusetts, No. 10-2204 (1st Cir. Sept. 22, 2011). In a February 23, 2011 letter, the Attorney General advised Congress that both he and the President have concluded that Section 3 of DOMA is unconstitutional and that the United States government will not defend it:

After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in such cases. I fully concur with the President's determination.

Holder Letter at 1 (Ex. A). More recently, on October 1, 2011, President Obama stated:

I vowed to keep up the fight against the so-called Defense of Marriage Act. There's a bill to repeal this discriminatory law in Congress, and I want to see that passed. But until we reach that day, my administration is no longer defending DOMA in the courts. I believe the law runs counter to the Constitution, and it's time for it to end once and for all. It should join "Don't Ask, Don't Tell" in the history books.

President Obama, Human Rights Campaign National Dinner Address (Oct. 1, 2011) (Ex. B).¹

FACTS

There are no factual disputes in this case: (1) Plaintiffs are eight legally married couples; (2) in each couple, one spouse is now serving in the military or has retired from the military and is eligible for veterans' benefits; and (3) in each case, the military refused to recognize the

¹ In accordance with Local Rule 7.1(a)(2), Plaintiffs' counsel conferred with counsel for the government. The government has not announced a decision about the defense of this case.

marriage and provide spousal benefits because Section 3 of DOMA prevents the military from recognizing marriages between persons of the same sex. (See Statement of Undisputed Facts.)

ARGUMENT

Summary judgment is warranted because Title 10, Title 32 and Title 38, as modified by DOMA, are plainly unconstitutional under this Court's reasoning in Massachusetts and Gill. Summary judgment must be granted where "the pleadings, the discovery and disclosure materials on file and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

I. SECTION 3 OF DOMA VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

A. Section 3 Of DOMA Fails Rational Basis Review

Following this Court's decisions in Massachusetts and Gill, the Chief Judge of the Northern District of California held that "strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation." Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010). The Plaintiffs assert that strict scrutiny is the appropriate standard of review in this case, but the Court does not need to reach that issue "because DOMA fails to pass constitutional muster even under the highly deferential rational basis test." Gill, 699 F. Supp. 2d at 387. In Gill, the Court exhaustively considered each of the purported justifications for Section 3 of DOMA and rejected each one. Id. at 388-97. Gill was correctly decided, and the Court should find that DOMA violates the equal protection component of the Due Process Clause of the Fifth Amendment on the same basis here.

The United States argues that Section 3 of DOMA is unconstitutional under heightened scrutiny, but now appears to agree that it would fail rational basis review as well. The United States acknowledges that DOMA "was motivated by animus toward gay and lesbian people" and argues that the Supreme Court has twice held that laws motivated by such an animus fail even

rational basis review. Gov't Sup. Br. at 26 n. 9, Massachusetts, No. 10-2204, (1st Cir. Sept. 22, 2011) (citing Romer v. Evans, 517 U.S. 620 (1996) and Lawrence v. Texas, 539 U.S. 558 (2003)); see also id. at 48 (invoking Lawrence, Romer and Dep't of Agric. v. Moreno, 413 U.S. 528 (1973), invalidating laws that would fail even rational basis review, to argue that anti-gay animus "is not a government interest that justifies sexual orientation discrimination"). Given the United States' acknowledgment that DOMA is motivated by invidious discrimination, it would fail rational basis review even if the denial of benefits furthered an otherwise legitimate desire to limit government spending. See, e.g., City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985) (invalidating under a rational basis test a government decision that rested "on an irrational prejudice against the mentally retarded"); Shapiro v. Thompson, 394 U.S. 618, 633 (1969) (a state "may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools The saving of welfare costs cannot justify an otherwise invidious classification.").

B. Section 3 Of DOMA Is Irrational In The Context Of Military Benefits

At the time DOMA was enacted in 1996, it does not appear that any thought was given to how it would impact same-sex married couples in the military. That is not surprising. At that time, same-sex marriage was prohibited in all 50 states. Moreover, because Don't Ask, Don't Tell ("DADT") was enacted in 1993 and made marriage to a person of the same sex grounds for a military discharge, even the legalization of same-sex marriage would not have been thought to implicate military spousal benefits at the time of the Act's enactment.

As this Court noted in Gill, DOMA is a sweeping statute, and Congress paid little attention to how it would operate in practice. "The federal definitions of 'marriage' and 'spouse,'

as set forth by DOMA, are incorporated into at least 1,138 different federal laws. . . ." Gill, 699 F. Supp. 2d at 395. The Court added: "[i]t strains credulity to suggest that Congress might have enacted such a sweeping status-based enactment, touching every single federal provision that includes the word marriage or spouse, simply in order to further the discrete goal of consistency in the distribution of federal marriage-based pecuniary benefits." Id. DOMA fails rational basis review because there must be a reasonable relationship between the classification and the purpose it purportedly serves, and such a relationship cannot exist when the Act's proffered purpose is "without footing in the realities of the subject addressed" and where the "proffered rationales for a law are clearly and manifestly implausible." Id.

Any claim that DOMA, as applied to military spousal benefits, survives rational basis review is strained because 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 then by gender -- there never has been any debate as to whether similarly situated service members who do the same work deserve the same benefits. Once admitted to the military, each service member must be treated the same. The only legal impediments to this principle of equality are the definitions of "spouse" in Title 10, Title 32 and Title 38, as modified by Section 3 of DOMA.

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

Although the toll that service takes on members of our armed services cannot be overstated, military 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 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). Recognizing that emotional support of spouses aids service members by bolstering their morale, Congress sought to improve the standard of living for military spouses. See, e.g., 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") (Senator DeConcini).

Family stability fosters morale among our troops. Id. As President Eisenhower (a five-star general) said of a law providing medical benefits to military family members, this "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) (Ex. C). When troops take comfort in knowing 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. 93-235 (June 20, 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: Health Affairs/ TRICARE Management Activity Organization: Hearing Before Military Personnel Subcommittee of the Comm. on Armed Services, 111th Cong. 8 (Apr. 29, 2009) (LTG Schoomaker).

Service members who fear their spouses will not be cared for if something should happen to them may be less likely to risk their lives on the battlefield.

For us in uniform, there are, in fact, places where we are going to need to have in uniform specialty capabilities for family members, because family 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. (ADM Robinson).

Congress did not consider any of this in 1996 when it enacted DOMA. If it had done so, it could not rationally have approved that legislation.

2. DOMA's Application To Military Spousal Benefits Harms Recruitment And Retention

The armed services must compete with private industry for the recruitment and retention of well-qualified military employees. Anderson v. United States, 16 Cl. Ct. 530, 535 n.9 (Ct. Cl. 1989) ("It is recognized that the federal government must compete with private industry for the recruitment and retention of 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"). See 10 U.S.C. § 1071 (benefits "maintain high morale"); 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 (May 14, 2009) ("The military health system helps to maintain the health of military personnel so they can carry out their military missions. . . . In addition, recruitment 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").² In contrast to the military, private employers typically provide benefits to same-sex spouses in states where their marriages are recognized and many employers provide benefits to same-sex domestic partners. See Amicus Br. of 70 Businesses, Massachusetts, No. 10-2204, (1st Cir. Nov. 3, 2011).

The repeal of DADT, formerly codified at 10 U.S.C. § 654, did not merely alter the treatment of current service members; it signaled the military's desire to actively recruit openly-gay service members. Marines Hit the Ground Running in Seeking Recruits at Gay Center, N.Y. Times, at A1 (Sept. 20, 2011). The military now insists that one's sexuality is a personal matter that may not be considered in the context of enlistment, promotion or even record-keeping. Mem. for Secy's of the Military Depts, Repeal of Don't Ask, Don't Tell and Future Impact on Policy at 4 (Jan. 28, 2011) (Ex. E). This departure from past policy evinces a firm commitment to welcome, recruit and retain well-qualified gays and lesbians. To recruit these qualified candidates, as well as heterosexual candidates who oppose discrimination, the military must offer

² Competition has been difficult for the military. In recent years, it lowered enlistment standards to meet recruitment needs, admitting even convicted child molesters. Deroy Murdock, Don't Make Sense: A policy that deserves a dishonorable discharge, The National Review Online, July 23, 2008 (Ex. D).

attractive and equitable benefits. See Lawrence J. Korb et al., Ending "Don't Ask, Don't Tell", June 24, 2009 (Ex. F) ("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. What's more, military recruiters face generalized hostility and opposition everywhere from high schools to colleges and law schools over the issue of discrimination against gays") (commenting on DADT). It is regrettable that these recruitment efforts are stifled by DOMA's application to military benefits.

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, and the courts do not look any further"). To further 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) (validating command that a subordinate remove his yarmulke, noting the military's broad discretion to "foster instinctive obedience, unity, commitment, and esprit de corps"); see also 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. 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.").

The military historically has prevented instances of inequality. The Defense Department 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 opposition to H.R. 456, which would have provided special benefits to specific families of soldiers who were mistakenly killed in combat, because the bill would encourage unequal treatment of survivors: "[w]e are concerned that enactment of this bill would create inequities in the treatment of survivors of service members dying on active duty"). The inequity that the Defense Department opposed then is no greater than the one created by DOMA today -- denying some married members of the military the spousal benefits that other married service members receive.

The repeal of DADT reflects Congress' desire to redress inequality in the military, and to better promote national security. See Remarks by the President and Vice President at Signing of the Don't Ask, Don't Tell Repeal Act of 2010 (Dec. 22, 2010) (Vice President Biden described 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"); see Sec. Panetta's Stmt. On Cert. of Readiness to Implement Repeal of Don't Ask, Don't Tell (July 22, 2011) ("implementation of such policies and regulations is consistent with the standards of military readiness and effectiveness, unit cohesion, and military recruiting and retention"). One reason that the military opposes inequities is that they harm unit cohesion, which remains a "very critical goal" for the armed forces. As Congress noted in enacting DADT in 1993: "Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion. One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members." 10 U.S.C. § 654(6)-(7). The First Circuit upheld DADT's constitutionality based on the

perceived "risk to unit cohesion" that Congress then feared open service by gays and lesbians would cause at that time. Cook v. Gates, 528 F.3d 42, 46 (1st Cir. 2008). But -- now that Congress and the military support open service by gays and lesbians because it benefits national security -- the current threat to unit cohesion comes from DOMA itself by causing the military to treat members of the same unit differently.

It is unfortunate that the United States has struggled with whether the admission of certain classes of its citizens into the military would threaten unit cohesion -- whether that involved race, gender or sexual orientation -- but there never has been any debate over the fact that unit cohesion would suffer if a class of citizens was allowed to serve but nonetheless was treated differently. Once admitted, all service members must be treated equally to maintain unit cohesion. A policy that creates two classes of service members would be divisive, undermine unit cohesion and threaten national security.

II. CONGRESS HAD NO AUTHORITY TO ENACT SECTION 3 OF DOMA

In Massachusetts, this Court held that Section 3 of DOMA exceeds the scope of federal power enumerated by Article I of the Constitution and violates the sovereignty of the states reserved by the Tenth Amendment. Massachusetts, 698 F. Supp. 2d at 246-54. The Court noted that DOMA does not contain any jurisdictional element (such as a nexus to interstate commerce) and that the only suggested constitutional basis for DOMA was Congress' spending power. Id. at 247, 249. The Court appropriately rejected the spending power as a legitimate basis for DOMA because that power cannot be used to violate another constitutional guarantee. Id. at 248 ("DOMA violates the equal protection principles embodied in the Due Process Clause of the Fifth Amendment") (emphasis in original). The Court also rejected the use of the spending power in this context because "DOMA plainly intrudes on a core area of state sovereignty -- the ability to define the marital status of its citizens. . . ." Id. at 249. The Court explained that

DOMA's de facto regulation of the states' ability to determine marital status infringes upon a core area of state sovereignty. Id. at 249-53; see also Dragovich v. United States Dep't of Treasury, 764 F. Supp. 2d 1178, 1189 (N.D. Cal. 2011) (relying on Massachusetts in holding DOMA unconstitutional "because it impairs the states' authority to define marriage, by robbing states of the power to allow same-sex marriages that will be recognized under federal law").

Nothing has changed since the Court's ruling in Massachusetts, and the Court should again find that Section 3 of DOMA exceeds the federal government's authority under the Constitution. Because the Plaintiffs have suffered "injury from governmental action taken in excess of the authority that federalism defines," they have standing to pursue this claim. Bond v. United States, 113 S. Ct. 2355, 2363-64 (2011).

III. SECTION 3 OF DOMA IMPOSES AN UNCONSTITUTIONAL CONDITION ON ACCESS TO FEDERAL SPOUSAL BENEFITS

Section 3 of DOMA places an unconstitutional condition on the fundamental right to marry in accordance with state law by restricting access to federal spousal benefits in Title 10, Title 32 and Title 38. DOMA requires the Plaintiffs to sacrifice their constitutional right to marry the person of their choice in accordance with state law to receive spousal benefits. This case does not raise the separate question of whether the Constitution compels states to permit same-sex couples to marry. In re Levenson, 587 F.3d 925, 931 n.5 (9th Cir. 2009) (regardless of whether the Constitution allows same-sex couples to marry, DOMA is unconstitutional as applied to same-sex couples who are legally married). Each Plaintiff already is married in accordance with existing state law. Marriage is a legal status conferred only by state law and, once formed, is protected as a fundamental constitutional right. See, e.g., Turner v. Safley, 482 U.S. 78, 95 (1987) ("[T]he decision to marry is a fundamental right"); Zablocki v. Redhail, 434 U.S. 374, 388 (1978) ("The right to marry is of fundamental importance for all individuals"); Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized

that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment"); Loving v. Virginia, 388 U.S. 1, 12 (1967) ("freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men"); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (marriage is a fundamental right).³ Congress cannot condition benefits upon the Plaintiffs dissolving their marriages, and then marrying someone more to Congress' liking.

When legislation burdens the free exercise of a fundamental right, it is subject to strict scrutiny. See, e.g., Zablocki, 434 U.S. at 388 (invalidating a statute prohibiting anyone subject to a child support order from marrying without judicial consent). A statute that denies a financial benefit to those who exercise a constitutional right is viewed as an infringement of that constitutional right itself. See, e.g., Speiser v. Randall, 357 U.S. 513, 518 (1958) (invalidating a statute that denied property tax exemptions for veterans who did not sign a loyalty oath because the denial of the exemptions burdened the petitioner's First Amendment rights). Such limitations "have the effect of coercing the claimants to refrain from" constitutionally protected conduct. Id. at 519. Here, the definition of "spouse" in Title 10, Title 32 and Title 38, as modified by Section 3 of DOMA, cannot withstand strict scrutiny because there is no legitimate, much less compelling, justification for it. (See discussion of rational basis review, supra pages 3-11.)

"Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit

³ In Perry, the Northern District of California held that the Constitution requires the states to permit persons of the same sex to marry. 704 F. Supp. 2d at 993. To be clear, Plaintiffs are not making a Perry claim here, arguing that the Constitution compels the states to allow same-sex marriages, because they do not have to make that argument -- they are already married. Instead, Plaintiffs ask only that their existing legal marriages receive the same Constitutional protection as all other legal marriages.

conferred by the government where the benefit sought has little or no relationship to the property." Dolan v. City of Tigard, 512 U.S. 374, 385 (1994). The Supreme Court "has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests. . . ." Rutan v. Repub. Party of Ill., 497 U.S. 62, 72 (1990) (quoting Speiser, 357 U.S. at 526) (emphasis in Rutan); see Alliance for Open Soc'y Int'l, Inc. v. United States Agency for Int'l Dev., 651 F.3d 218, 231 (2d Cir. 2011) ("Pursuant to this 'unconstitutional conditions' doctrine, as it has come to be known, the government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient's constitutionally-protected rights, even if the government has no obligation to offer the benefit in the first instance").

The Supreme Court has applied the unconstitutional conditions doctrine to invalidate restrictions on benefits eligibility. In Sherbert v. Verner, 374 U.S. 398 (1963), the Court invalidated a South Carolina law that prohibited the payment of unemployment benefits to those who would not work on Saturday, the Sabbath Day of their faith. The Court held the law placed an unconstitutional condition upon obtaining the benefits, as it forced the plaintiff "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." Id. at 404.

Similarly, in Shapiro v. Thompson, 394 U.S. 618 (1969), the Court invalidated a one-year residency requirement for eligibility for welfare benefits because it infringed upon the constitutional right to interstate travel. Id. at 634. Courts have applied Shapiro to invalidate

residency requirements for the eligibility of other welfare benefits in Saenz v. Roe, 526 U.S. 489 (1999), and in Cole v. Housing Auth. City of Newport, 435 F.2d 807 (1st Cir. 1970).

Section 3 of DOMA imposes an unconstitutional condition upon the receipt of military spousal benefits because it forces the Plaintiffs to renounce not only their constitutional right to marry in accordance with state law, but it also requires the Plaintiffs to renounce their very spouses to receive benefits. To obtain such benefits, Plaintiffs would first have to divorce their same-sex spouses and would then be forced to marry someone of the opposite sex to obtain spousal benefits (a fraudulent act). Such a condition does nothing to foster the purpose of military spousal benefits -- providing benefits to the one person each service member has chosen to marry and support. Because there is no legitimate, much less compelling, justification for such a requirement, it is unconstitutional. Conditioning the reward of spousal benefits upon the destruction of a marriage that both spouses are committed to and have the constitutional right to enjoy is an outrageous proposition and a condition the Constitution does not tolerate.

IV. SECTION 3 OF DOMA IS AN UNCONSTITUTIONAL BILL OF ATTAINDER

Section 3 of DOMA creates unconstitutional bills of attainder in Title 10, Title 32 and Title 38. See U.S. Const. art. I, § 9. In contrast to the "historically entrenched tradition of federal reliance on state marital status determinations" in deciding eligibility for federal benefits, Massachusetts, 698 F. Supp. 2d at 250, Section 3 of DOMA isolates a class of persons who otherwise would be eligible for such benefits as a matter of state law -- legally married same-sex couples -- and it imposes a disability upon them as a class. As the government concedes, DOMA's legislative history demonstrates "that the statute was motivated in significant part by animus towards gays and lesbians and their intimate and family relationships." Gov't Sup. Br. at 46. DOMA's deprivation of these rights was a legislative decree intended to show "moral disapproval of homosexuality." Id. at 47 (quoting H.R. Rep. No. 104-664, at 16 (1996)).

A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." Selective Serv. Sys. v. Minn. P.I.R.G., 468 U.S. 841, 846-47 (1984) (quoting Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468 (1977); Cummings v. Missouri, 71 U.S. 277, 323 (1867)). "Legislative acts, no matter what their form, that apply to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." United States v. Brown, 381 U.S. 437, 448-49 (1965) (quoting United States v. Lovett, 328 U.S. 303, 315 (1946)). "[A] major concern that prompted the bill of attainder prohibition" was "fear that the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of judge -- or, worse still, lynch mob." Nixon, 433 U.S. at 480. Such laws "subvert the presumptions of innocence, and alter the rules of evidence. . . . They assume that the parties are guilty." Cummings, 71 U.S. 328. The Court held that any statute that imposes "sanctions on named or identifiable individuals would be immediately constitutionally suspect." Nixon, 433 U.S. at 473.

Section 3 of DOMA, as applied to Title 10, Title 32 and Title 38, presents attainder issues similar to those considered in the so-called "test oath" cases. See Ex Parte Garland, 71 U.S. (4 Wall.) 333 (1867); Cummings, 71 U.S. 277; see also Pierce v. Clarkson, 83 U.S. (16 Wall.) 234 (1873) (applying Garland and Cummings to invalidate a similar statute). After the Civil War, the government imposed disabilities upon persons who refused to take an oath swearing they had not previously supported the Confederacy. In Garland, the Court considered a statute that imposed a disability upon an immutable class of persons -- those who already had supported the Confederacy -- by preventing them from becoming licensed to practice law in federal courts. 71 U.S. at 374. Just as federal marriage benefits are dependent upon state law definitions of marriage, the Garland court noted that it has been the practice of federal courts to admit attorneys

based on their admission to practice law by a state. Id. at 378. The Court explained this "legislative decree of perpetual exclusion" of Confederacy supporters from the benefit of practicing law was a form of punishment and was void as a bill of attainder. Id. at 377.

In Cummings, the Court reversed the conviction of a Catholic priest who was prosecuted under a Missouri statute that prohibited a person from acting as a priest (among other vocations) without first taking an oath swearing that he had not supported the Confederacy. 71 U.S. at 317. The Court noted there was "no connection" between the oath and a person's fitness to hold any job for which the oath was required. Id. at 319. The Court had no trouble finding this was a bill of attainder because "these disabilities . . . constitute[d] punishment," and it rejected the notion that "punishment" should be construed narrowly to encompass only imprisonment or fines. Id. at 320. "The deprivation of any rights, civil or political, previously enjoyed may be punishment. . . ." Id. The Court also rejected the notion that a bill of attainder is limited to individual prosecutions because a bill of attainder "may be directed against a whole class." Id. at 323.⁴

Subsequent to Garland and Cummings, the Supreme Court revisited the Attainder Clause in the employment context in United States v. Lovett, 328 U.S. 303 (1946) -- a case the Solicitor General declined to defend. Id. at 306. There, the Supreme Court invalidated as a bill of attainder a statute that declared that no compensation could be paid to three named federal employees unless they were re-nominated by the President and confirmed by the Senate. A Congressional investigation found these individuals were "subversive" in the midst of the Red Scare and that they should not be compensated for their work despite their exemplary

⁴ Laws that impose disabilities short of imprisonment or death are known as "bills of pains or penalties" and they are prohibited by the Bill of Attainder Clause. See United States v. Brown, 381 U.S. 437, 447 (1965); Fletcher v. Peck, 10 U.S. 87, 138 (1810) (Marshall, C.J.).

employment records. Id. at 304-05. Relying upon Garland and Cummings, the Court had no trouble finding this condition to constitute a bill of attainder.

In United States v. Brown, 381 U.S. 437 (1965), the Supreme Court invalidated an employment restriction that prevented current or recent members of the Communist Party from serving as labor unions leaders. The Court emphasized that "the Bill of Attainder Clause was not intended as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply -- trial by legislature." Id. at 442. The Clause "should be read in light of the evil the Framers had sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups." Id. at 447. The Court rejected any notion that the statute escaped the attainder prohibition by defining the affected class based on membership in the Communist Party rather than by the individual's name because, historically, bills of attainder were applied "to inflict their deprivations upon relatively large groups of people, sometimes by description rather than name," as in Garland and Cummings. Id. at 461. Other federal courts also have applied the Attainder Clause in the employment context. See, e.g., Crain v. City of Mountain Hope, 611 F.2d 726, 729 (8th Cir. 1979) (invalidating ordinance that reduced the salary of the "City Attorney" to \$1 per year); Steinberg v. United States, 143 Cl. Ct. 1, 3 (Cl. Ct. 1958) (invalidating policy that prevented payment of a federal pension to anyone who asserted their Fifth Amendment right to remain silent before a grand jury or at trial).

As in each of these cases, Title 10, Title 32 and Title 38, as modified by Section 3 of DOMA, impose a disability upon a clearly identifiable class of persons -- same-sex couples who are lawfully married -- for no purpose other than to punish them. The federal government would otherwise pay spousal benefits to any service member lawfully married according to the laws of any state, so those laws impose a disability upon this class of persons based on their status as

members of same-sex married couples. Moreover, the disability imposed -- the denial of spousal benefits -- in no way serves to further the purpose behind the payment of military benefits. Indeed, the denial of spousal benefits to members of legally-recognized same-sex marriages harms enlistment, retention and the well-being of the military family. Consequently, these laws are bills of attainder and are per se unconstitutional.

V. THE STATUTORY DEFINITIONS OF "SPOUSE" IN TITLE 10, TITLE 32 AND TITLE 38 CANNOT PROHIBIT RECOGNITION OF SAME-SEX MARRIAGES

Because DOMA's definition of "spouse" is imposed upon Title 10, Title 32 and Title 38, and prior to DOMA it was not legal to marry someone of the same gender or for gays and lesbians to serve openly in the armed forces, no court ever considered whether the term "spouse", as defined in those titles, would exclude same-sex spouses. Congress plainly believed, however, the definition of "spouse" would cover every legally married spouse of any service member.

Section 101(31) of 38 U.S.C., concerning veterans' benefits, is similar to DOMA in providing: "The term 'spouse' means a person of the opposite sex who is a wife or husband." Similarly, "[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 same-sex marriages. Rather, it was "part of the effort to re-write the statute to conform with emerging Constitutional mandates for gender equality." *Amicus Br. of Family Law Professors* at 12 n.8, Massachusetts, No. 10-2204, (1st Cir. Nov. 3, 2011). 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, that it would reach all marriages as were then defined. A literal interpretation of "opposite sex" to preclude recognition of same-sex spouses would undermine that purpose, and produce the absurd result of recognizing some, but not all, legal

marriages. In such cases, the Court should avoid giving a statute a literal reading that would undermine Congress' purpose and produce absurd results. See, e.g., Watt v. Alaska, 451 U.S. 259, 266 (1981) ("The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect.").

Title 10, concerning active duty benefits, provides: "'spouse' means husband or wife, as the case may be." 10 U.S.C. § 101(f)(5) (adopted in 1956). Similarly, Title 32, concerning the National Guard, tracks the language of Title 10: "'Spouse' means husband or wife, as the case may be." 32 U.S.C. § 101(18) (adopted in 1958). Because the "opposite sex" language is absent, neither statute excludes same-sex spouses. Men who marry men have "husbands" and women who marry women have "wives." Moreover, the Dictionary Act renders any distinction based on gender irrelevant. See 1 U.S.C. § 1 ("words importing the masculine gender include the feminine as well"). These definitions can easily be read to include same-sex, as well as opposite-sex, spouses.

If there is any ambiguity, these statutes should be construed to effectuate their purpose of recognizing any spouse who is legally married in accordance with state law and to avoid a constitutional question. There is no suggestion that Congress sought to discriminate against same-sex spouses in the 1950s or in 1975, but instead thought it was including all who were legally married. To the extent these definitions preclude recognition of same-sex spouses, they are unconstitutional for the same reasons as DOMA. Consequently, a construction of the term "spouse" that excludes same-sex spouses would fail whatever level of scrutiny is applied.

CONCLUSION

The Court should adhere to its own precedent in Massachusetts and Gill, and hold that Title 10, Title 32 and Title 38, as modified by Section 3 of DOMA, are unconstitutional.

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