

Case Nos. 10-56634, 10-56813

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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LOG CABIN REPUBLICANS,

*Plaintiff-Appellee/Cross-Appellant,*

v.

UNITED STATES OF AMERICA,

and

ROBERT M. GATES,

Secretary of Defense in his official capacity,

*Defendants-Appellants/Cross-Appellees.*

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Appeal from the Final Order of Hon. Virginia A. Phillips of the  
United States District Court for the Central District of California  
in Case No. 2:04-cv-08425

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**BRIEF OF *AMICI CURIAE* ASIAN AMERICAN JUSTICE CENTER, ASIAN AMERICAN BAR ASSOCIATION OF THE GREATER BAY AREA, ASIAN AMERICAN INSTITUTE, ASIAN LAW CAUCUS, ASIAN PACIFIC AMERICAN BAR ASSOCIATION OF LOS ANGELES, ASIAN PACIFIC AMERICAN BAR ASSOCIATION OF SILICON VALLEY, ASIAN PACIFIC AMERICAN LEGAL CENTER, ASIAN PACIFIC AMERICAN WOMEN LAWYERS ALLIANCE, API EQUALITY-LA, ASIAN PACIFIC PARTNERS FOR EMPOWERMENT, ADVOCACY AND LEADERSHIP, CALIFORNIA WOMEN'S LAW CENTER, THE CHARLES HOUSTON BAR ASSOCIATION, JAPANESE AMERICAN CITIZENS LEAGUE, JORDAN/RUSTIN COALITION, KOREAN AMERICAN BAR ASSOCIATION OF NORTHERN CALIFORNIA, KOREAN AMERICAN BAR ASSOCIATION OF SOUTHERN CALIFORNIA, LATINO EQUALITY ALLIANCE, CO-CHAIRS OF THE MINORITY BAR COALITION, NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION, PHILIPPINE AMERICAN BAR ASSOCIATION OF LOS ANGELES, SAN FRANCISCO LA RAZA LAWYERS ASSOCIATION, SANTA CLARA COUNTY BLACK LAWYERS ASSOCIATION, VIETNAMESE AMERICAN BAR ASSOCIATION OF NORTHERN CALIFORNIA, AND WOMEN LAWYERS OF ALAMEDA COUNTY IN SUPPORT OF APPELLEE/CROSS-APPELLANT LOG CABIN REPUBLICANS**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* Asian American Justice Center, Asian American Bar Association of the Greater Bay Area, Asian American Institute, Asian Law Caucus, Asian Pacific American Bar Association of Los Angeles, Asian Pacific American Bar Association of Silicon Valley, Asian Pacific American Legal Center, Asian Pacific American Women Lawyers Alliance, API Equality-LA, Asian Pacific Partners for Empowerment, Advocacy and Leadership, California Women's Law Center, The Charles Houston Bar Association, Japanese American Citizens League, Jordan/Rustin Coalition, Korean American Bar Association of Northern California, Korean American Bar Association of Southern California, Latino Equality Alliance, Co-Chairs of the Minority Bar Coalition, National Asian Pacific American Bar Association, Philippine American Bar Association of Los Angeles, San Francisco La Raza Lawyers Association, Santa Clara County Black Lawyers Association, Vietnamese American Bar Association of Northern California, and Women Lawyers of Alameda County state that each of the *amici* is a non-profit organization, has no parent companies, and has not issued shares of stock.

**STATEMENT OF COMPLIANCE WITH RULE 29(C)(5)**

*Amici curiae* state that (a) no party's counsel authored this brief in whole or in part; (b) no party, nor counsel for either party, contributed money that was intended to fund preparing or submitting this brief; and (c) no person other than *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

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## STATEMENT OF INTEREST

The Asian American Justice Center (AAJC), a member of the Asian American Center for Advancing Justice, is a national organization whose purpose is to advance civil and human rights for Asian Americans and to promote a fair and equitable society. AAJC is joined on this brief by other race- and gender-based civil rights and bar organizations, each of which similarly is committed to advancing civil and human rights. A description of these additional *amici* is attached as Appendix A.<sup>1</sup>

*Amici* file this brief in support of appellee/cross-appellant Log Cabin Republicans because “Don’t Ask, Don’t Tell” (“DADT”) embodies the seminal vices that have denied minorities their fundamental rights throughout this Nation’s history. The Government’s justifications for excluding lesbian, gay and bisexual individuals from military service echo the same disturbingly familiar refrain that the Government has used in the past to exclude other minority groups from military service. And each time that the Government has eliminated discrimination from the military, the performance of minority groups has shown that the military’s justifications for its past discrimination were meritless.

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<sup>1</sup> Both parties have consented to *Amici* filing this brief. *See* Fed. R. App. Pro. 29(a)(1).

*Amici* have a strong interest in ensuring that fellow Americans do not suffer discrimination based on the same specious claims the Government used to justify past discrimination.

### **SUMMARY OF ARGUMENT**

The greatest indictment of the Government's justification for DADT is that it parrots the reasons that the Government has articulated throughout history to rationalize some of its greatest mistakes. The Government's justifications for excluding lesbian, gay and bisexual persons from the military reflect the same two fears that the military historically has cited to condone discrimination against other minorities:

- Injury to unit cohesion and morale based on presumed prejudice of current service members; and
- Injury to military effectiveness or national security based on presumed inferiority or untrustworthiness of members of the excluded group.

The military has been citing these same fears since the nation's inception to justify discrimination in military service.

During the Revolutionary War, General George Washington forbade African Americans from enlisting based on fears that their presence would impair unit cohesion and Caucasian enlistment.<sup>2</sup> At the outset of the Civil War, the Union

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<sup>2</sup> Minutes of Conference of Delegates of the Continental Congress with General Washington at Cambridge, October 18-24, 1775, Theodore J. Crackel, ed., The Papers of George Washington Digital Edition,

Army mandated the exclusion of African Americans from service based on the same fear.<sup>3</sup> During World War II, Lieutenant General John DeWitt justified his orders requiring the imprisonment of Japanese Americans by appealing to “traits peculiar to citizens of Japanese ancestry” that would make it “impossible to separate the loyal from the disloyal.”<sup>4</sup> For many years, women were excluded from all but a few roles in the military based on fears that they would be a “psychological distraction” that would undermine unit cohesion.<sup>5</sup> Other minorities, too, have faced discrimination in military service for similar reasons.

Every time the military has been forced to incorporate a minority group, U.S. soldiers have proven the Government’s fears to have been baseless phobias. African-American soldiers were commended for their bravery under fire in World War I, and Japanese-American units were among the most decorated in World War II.<sup>6</sup> The military now lauds servicewomen as indispensable.<sup>7</sup> By all post-integration accounts, the incorporation of racial minorities and women has strengthened the military and served as a model of inclusion for the nation. As

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<http://rotunda.upress.virginia.edu/founders/GEWN-03-02-02-0175-0003> (last visited Mar. 30, 2011).

<sup>3</sup> MARTIN BINKIN & MARK J. EITELBERG, *BLACKS AND THE MILITARY* 32 (1982).

<sup>4</sup> *Hirabayashi v. United States*, 828 F.2d 591, 598 (9th Cir. 1987).

<sup>5</sup> Michael Wright, *The Marine Corps Faces the Future*, N.Y. TIMES MAGAZINE, June 20, 1982, at 16.

<sup>6</sup> *See infra* 18-20.

<sup>7</sup> *See infra* 23.

President Truman stated in July 1946 while awarding a citation to Japanese-American troops:

You fought not only the enemy, but you fought prejudice – and you have won. Keep up that fight, and we will continue to win – to make this great Republic stand for just what the Constitution says it stands for: the welfare of all the people all the time.<sup>8</sup>

The Government's articulated fears no more justify excluding lesbian, gay and bisexual individuals from the military than they justified excluding racial minorities and women. In its Opening Brief, the Government offers no factual basis for these fears, despite citing them to justify continued discrimination against lesbian, gay and bisexual troops. Although the Government now asserts a need for an "orderly process" to eliminate DADT, the Government never explains why it must continue to discriminate to ensure that its implementation of anti-discrimination measures is "orderly." Nor does the Government commit to how "temporary" the discrimination will be. History demonstrates that the Government has no justification for continuing to apply DADT.

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<sup>8</sup> President Harry Truman, *Remarks Upon Presenting a Citation to a Nisei Regiment*, <http://trumanlibrary.org/publicpapers/viewpapers.php?pid=1666> (last visited Mar. 30, 2011).

## ARGUMENT

The Government's rationale for DADT is not novel. Congress articulated its basis for excluding lesbian, gay and bisexual persons from military service in 10 U.S.C. § 654(a)(14):

The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

Congress's justification for DADT are the same unfounded fears — unit cohesion and morale, and the untrustworthiness or inferiority of certain groups — the Government historically used to discriminate against racial minorities and women.

As discussed below, the similarity between the Government's past justifications for the military's discrimination against racial minorities and women and its current justification for the DADT policy confirms that the policy is unwarranted and counterproductive.

**I. The Government Relies on the Same Fears to Justify Discrimination in this Case as it Historically Relied Upon to Justify Past Discrimination.**

**A. The Government Repeatedly Has Assumed that Inclusion of Minorities Would Impair the Military's Effectiveness.**

Since its inception, the military has cited "unit cohesion" as a basis to oppose the integration of racial minorities and women. The statute codifying

DADT likewise expressly bases the policy on a fear of harm to “unit cohesion.”

At its core, this fear historically has failed to give due credit to those serving in the military, as it presumes that the prejudices of service members will generate discord — *i.e.*, the harm to “unit cohesion” — that outweighs the contributions of the excluded group.

In 1775, at the outset of the Revolutionary War, General George Washington ordered that African Americans, whether free or slave, “be rejected \* \* \* altogether” for military service.<sup>9</sup> The order was based on a fear that Caucasians would not enlist to fight alongside African Americans.<sup>10</sup> It was noted that “southern troops would not brook an equality [of African Americans] with whites.”<sup>11</sup>

When the Civil War began in 1861, the Union Army similarly excluded African Americans based on a stated fear that recruiting them would suppress Caucasian enlistment.<sup>12</sup> Ohio’s Governor David Tod refused to raise an African-American regiment because “to enlist a Negro soldier would be to drive every white man out of service.”<sup>13</sup> Attrition prompted Congress, in the Militia Act of

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<sup>9</sup> Minutes of Conference of Delegates of the Continental Congress with General Washington at Cambridge, *supra* at 2.

<sup>10</sup> BENJAMIN QUARLES, THE NEGRO IN THE AMERICAN REVOLUTION 14 (1961).

<sup>11</sup> *Id.* at 14, quoting SAMUEL SWETT, NOTES TO HIS SKETCH AT BUNKER HILL-BATTLE 25 (1818).

<sup>12</sup> BINKIN & EITELBERG at 13.

<sup>13</sup> JACK D. FONER, BLACKS AND THE MILITARY IN AMERICAN HISTORY 32 (1974).

July 17, 1862, to authorize President Lincoln “to receive into the service of the United States \* \* \* competent [] persons of African descent.”<sup>14</sup> Still, the fear that integration might deter Caucasians from enlisting persisted, and the Union Army maintained segregated units.<sup>15</sup>

During World War I, African Americans responded in large numbers to their country’s call for volunteers, and four African-American Army regiments were filled to capacity within a week of the call.<sup>16</sup> The military responded by restricting recruitment of African Americans, segregating them into separate units, and assigning them to unskilled service roles.<sup>17</sup>

In 1940, as the United States prepared for imminent war, the Department of War opposed removing enlistment limitations based on “race, creed, or color,” stating that it was not responsible for “solv[ing] national questions relating to the

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<sup>14</sup> 2 MORRIS J. MACGREGOR & BERNARD C. NALTY, *BLACKS IN THE UNITED STATES ARMED FORCES: BASIC DOCUMENTS* 25 (1981), quoting Militia Act of 1862, Pub. L. No. 166 § 12 (1862).

<sup>15</sup> MICHAEL LEE LANNING, *THE AFRICAN AMERICAN SOLDIER: FROM CRISPUS ATTUCKS TO COLIN POWELL* 41 (1997).

<sup>16</sup> FONER at 110.

<sup>17</sup> RICHARD J. STILLMAN II, *INTEGRATION OF THE NEGRO IN THE U.S. ARMED FORCES* 16 (1968), referring to Army staff studies throughout World War I; MORRIS J. MACGREGOR, *INTEGRATION OF THE ARMED FORCES, 1940-1965* at 5 (1985), citing Letter from Rear Admiral C. W. Nimitz, Acting Chief, Bureau of Navigation, to Representative Hamilton Fish (Jun. 17, 1937) (on file with General Records of the Department of the Navy).

social or economic position of the various racial groups composing our Nation.”<sup>18</sup>

The Army’s existing mobilization plans called for maintaining the rigid segregation of troops in place during World War I.<sup>19</sup> Countering demands by the African-American community for greater integration in the force, the White House maintained that a change in policy would “destroy morale and impair preparations for national defense.”<sup>20</sup> Colonel Eugene Householder, Adjutant General of the Army, likewise declared that “[t]he Army is not a sociological laboratory” and that full integration would be “a danger to efficiency, discipline and morale and would result in ultimate defeat.”<sup>21</sup> The Secretary of War argued that allowing African Americans to enlist without limitation would “demoralize and weaken the effect of military units.”<sup>22</sup> An advisory board of senior naval officers asserted that training African Americans for service in any capacity on naval vessels was “not \* \* \* in the best interests of the national defenses.”<sup>23</sup> The policy of enlisting African-

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<sup>18</sup> ULYSSES LEE, *THE EMPLOYMENT OF NEGRO TROOPS* 49 (1966), citing Memorandum from G-1 for Public Relations Bureau G-2 (Oct. 1939).

<sup>19</sup> MACGREGOR at 18, quoting Memorandum from Army Chief of Staff for Chief of Staff, “Employment of Negro Manpower” (Jun. 3, 1940).

<sup>20</sup> MACGREGOR at 18, quoting Memorandum of Adjutant General for Commanding Generals, et al. “War Department Policy in Regard to Negroes” (Oct. 16, 1940).

<sup>21</sup> MACGREGOR at 22-23, quoting Colonel Eugene R. Householder, Speech Before Conference of Negro Editors and Publishers (Dec. 8, 1941).

<sup>22</sup> RICHARD M. DALFUME, *DESEGREGATION OF THE U.S. ARMED FORCES: FIGHTING ON TWO FRONTS, 1939-1953* 30 (1969), quoting PITT. COURIER, June 22, 29, 1940; LEE, *THE EMPLOYMENT OF NEGRO TROOPS* at 68-69.

<sup>23</sup> 6 MACGREGOR & NALTY at 11.

American sailors only for food service was in “the best interests of general ship efficiency.”<sup>24</sup>

As with the codification of DADT, Congress was involved in the prewar debate over service by African Americans and Japanese Americans. In a 1940 debate, Senator John Overton argued that racially mixed units “would be subversive of discipline [and] subversive of morale.”<sup>25</sup>

In response, President Roosevelt adopted a policy in late 1940 requiring the proportion of African Americans in the Army to reflect the proportion of African Americans in the general population.<sup>26</sup> Secretary of War Henry Stimson responded by telling President Roosevelt that the policy’s implementation would cause “disaster and confusion.”<sup>27</sup>

The military likewise restricted Asian-American enlistment in World War II.<sup>28</sup> In a 1941 memorandum addressing the integration of African Americans, Army Chief of Staff General George Marshall maintained that attempting to settle “vexing racial problems” would “complicate the tremendous task of the War Department and thereby jeopardize discipline and morale” and be “fraught with

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<sup>24</sup> *Id.*

<sup>25</sup> 86 CONG. REC. S10890 (daily ed. Aug. 26, 1940) (statement of Sen. Overton).

<sup>26</sup> BINKIN & EITELBERG at 19.

<sup>27</sup> DALFUME at 57, quoting Henry L. Stimson, Diary, September 30, 1940 (unpublished manuscript) (on file with Yale University Library).

<sup>28</sup> ROGER DANIELS, ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850 246-248 (1988).

danger.”<sup>29</sup> During Congressional hearings regarding minority enlistment, Senator Lester Hill argued that allowing racial minorities to enlist without restriction “would permit any Japanese who happens to be American born, even though he was not loyal to America,” to enlist.<sup>30</sup>

The military similarly has cited concerns about unit cohesion to justify discriminating against women. Women first donned military uniforms in the Army Nurse Corps, founded in 1901, and the Navy Nurse Corps, founded in 1908.<sup>31</sup> Although women were enlisted into the Marine Corps in World War I, their roles were limited to clerical workers and telephone operators.<sup>32</sup> Even then, a Marine Corps recruiter complained in 1918 that “[w]omen in the military service, other than the medical branches, are a deterrent to the progress and efficiency of anything military.”<sup>33</sup> The Army flatly refused to enlist women even to such a limited extent.<sup>34</sup> At General John Pershing’s request in November 1917, the Army deployed several hundred women, called “Hello Girls,” to France as telephone

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<sup>29</sup> MACGREGOR at 22, quoting Memorandum from General George Marshall for Henry Stimson, “Report of Judge William H. Hastie, Civilian Aide to the Secretary of War” (Dec. 1, 1941).

<sup>30</sup> 86 CONG. REC. S10889 (daily ed. Aug. 26, 1940) (statement of Sen. Hill).

<sup>31</sup> MARTIN BINKIN & SHIRLEY J. BACH, WOMEN AND THE MILITARY at 5 (1977).

<sup>32</sup> *Id.* at 5, citing PATRICIA J. THOMAS, UTILIZATION OF ENLISTED WOMEN IN THE MILITARY 4 (1975).

<sup>33</sup> LETTIE GAVIN, AMERICAN WOMEN IN WORLD WAR I: THEY ALSO SERVED at 26 (1997), quoting George W. Case, Memoir at 82 (unpublished manuscript) (on file with Marine Corps Historical Center, History and Museums Division, Washington Navy Yard).

<sup>34</sup> BINKIN & BACH at 5.

operators but refused to recognize them as veterans entitled to benefits until Congress mandated it in 1977.<sup>35</sup>

Congress limited women's ability to serve in the Women's Armed Services Integration Act of 1948, which restricted the number of enlisted women to two percent of the military's enlisted population and the number of female officers (excluding nurses) to ten percent of enlisted women.<sup>36</sup> During the debate over the Act, Representative Carl Vinson warned that, without limits, the result would be "an Army of women."<sup>37</sup> Representative Dewey Short noted that female soldiers would become pregnant and be unable to fight, endangering the military's ability to respond in a crisis, and the prohibitive costs of illnesses associated with menopause would be damaging to the military.<sup>38</sup>

The military likewise opposed opening the service academies to women. Addressing a subcommittee of the House Armed Services Committee, Lt. General A.P. Clark, Superintendent of the Air Force Academy warned of the "tragic error"

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<sup>35</sup> GAVIN at 77, 93.

<sup>36</sup> BINKIN & BACH at 11, citing Women's Armed Services Integration Act of 1948, 62 Stat. 357, 360-61.

<sup>37</sup> S. 1641, *To Establish the Women's Army Corps in the Regular Army, To Authorize the Enlistment and Appointment of Women in the Regular Navy and Marine Corps, and for Other Purposes: Hearings Before Subcomm. of H. Armed Services Comm.*, 80th Cong. 5624 (1948) (statement of Rep. Vinson).

<sup>38</sup> 94 CONG. REC. H4717 (Apr. 21, 1948) (statement of Rep. Short).

of exposing women to combat, which he predicted would “invite disaster in battle” and “inevitably weaken our national resolve in war.”<sup>39</sup>

Even today, a 1994 Defense Department policy bars women from assignments to units that take part in direct ground combat.<sup>40</sup> The military’s articulated reasons for excluding women are familiar. For example, the Commandant of the Marine Corps, General Robert Barrow, appealed to the male soldiers’ morale, declaring in 1982 that the presence of women on the battlefield “would be an enormous psychological distraction for the male who wants to think that he’s fighting for that woman somewhere behind him, not up there in the same foxhole with him.”<sup>41</sup>

**B. The Government Justified Historic Discrimination Based on Stereotypes of Minorities as Untrustworthy or Inferior.**

The Government also historically justified discrimination by disparaging the character and capabilities of minorities.

Leading up to World War I, the military asserted that African Americans were “innately inferior” in intelligence, “naturally cowardly,” “hopelessly

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<sup>39</sup> *Admission of Women to the United States Military Academy: Hearing Before Subcomm. 2 of the H. Armed Services Comm.*, 93rd Cong. 136 (1974) (statement of Lt. General A.P. Clark).

<sup>40</sup> Memorandum from Secretary of Defense for Secretary of the Army, Secretary of the Navy, Secretary of the Air Force, Chairman of the Joint Chiefs of Staff, et al., “Direct Ground Combat Definition and Assignment Rule” (Jan. 13, 1994).

<sup>41</sup> Wright at 16.

inferior,” “unpatriotic,” and that “leadership was not imbedded” in their race.<sup>42</sup>

For example, Lieutenant Colonel Allen Greer predicted that African Americans could not succeed in Army leadership roles, stating that African-American troops led by African-American officers “will fail in war.”<sup>43</sup> Further, an Army War College report advised against allowing African Americans to operate artillery because, as stated in 1906, they were “inferior to the white race in intelligence and mental ability.”<sup>44</sup>

The extent of the military’s discrimination against African Americans during World War I is illustrated in a memorandum from General John Pershing’s headquarters to American liaisons to the French forces. The memorandum stressed the importance of warning French officers that African Americans displayed a “want of intelligence, lack of discretion, and lack of civic and professional conscience.”<sup>45</sup> The memorandum predicted that African-American troops would be a “menace of degeneracy \* \* \* given to the loathsome vice of

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<sup>42</sup> DALFIUME at 13, 15 and 57, quoting Stimson Diary, *supra* n.25, September 30, 1940) .

<sup>43</sup> DALFIUME at 15, citing Lieutenant Colonel Allen J. Greer to Assistant Commander, General Staff College, quoted in *The Colored Soldier in the U.S. Army*, 110-112 (May 1942) (unpublished manuscript) (on file with the Office of Chief of Military History).

<sup>44</sup> FONER at 95, quoting *Army War College Report* (1906).

<sup>45</sup> EMMET SCOTT, *AMERICAN NEGRO IN THE WORLD WAR* 443 (1919), citing secret memorandum of General Pershing to American liaison officers in France, August 7, 1918.

criminally assaulting women” if they were allowed to mix freely with the civilian population.<sup>46</sup>

Discrimination against minority groups continued through World War II. Memoranda prepared in 1942 by General Dwight Eisenhower, Assistant Chief of Staff, and General R.W. Crawford stated that African-American troops are “inferior to the performance of white troops, except for the service duties” because of “the inherent psychology of the colored race and their need for leadership.”<sup>47</sup>

For much of this Nation’s history, virtually all racial minorities suffered from discrimination at the hands of the military. One of the most prominent examples of such discrimination is the military’s imprisonment of citizens based solely upon their Japanese ancestry in so-called “assembly and relocation centers” during World War II. *See Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987).

On February 19, 1942, following the attack on Pearl Harbor, President Roosevelt signed an executive order authorizing “the Secretary of War or his designees to prescribe military areas from which any or all persons, citizens as well as aliens, might be excluded.” *Id.* at 595. President Roosevelt further “signed

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<sup>46</sup> DALFIUME at 16, quoting *Documents of the War*, THE CRISIS, (May 1919) 16-21.

<sup>47</sup> DALFIUME at 60, quoting Memorandum from General Dwight D. Eisenhower for the Army Chief of Staff (Mar. 1942); Memorandum, General R.W. Crawford for Eisenhower (Apr. 2. 1942).

legislation making it a misdemeanor to disregard restrictions imposed by a military commander.” *Id.*

Pursuant to a delegation of authority from the Secretary of War, General DeWitt issued a series of proclamations. The initial proclamations, Public Proclamations Nos. 1 and 3, designated “Military Areas” and imposed curfews on “all persons of Japanese ancestry, whether aliens or American citizens, within established military zones” that required those persons to remain within their residence “between 8 p.m. and 6 a.m.” *Id.* General DeWitt subsequently issued Public Proclamation No. 4 and Civilian Restrictive Order No. 1, which required “assembling together and placing under guard all those of Japanese ancestry” and “detention of those of Japanese ancestry in assembly or relocation centers.” *Korematsu v. United States*, 323 U.S. 214, 221 (1944).

In his initial version of a report to the War Department, General DeWitt argued these Orders were necessary because “traits peculiar to citizens of Japanese ancestry” would make it “impossible to separate the loyal from the disloyal and that all would have to be evacuated for the duration of the war.” *Hirabayashi*, 828 F.2d at 598. This Court in *Hirabayashi* detailed the military’s efforts to suppress evidence of General Dewitt’s initial report, including by “the burning of \* \* \* drafts and memorandums of the original report,” replacing the report with a revised report, and withholding all but “only a few selected pages” of the initial report

from the Justice Department during briefing before the Supreme Court regarding the constitutionality of General DeWitt's orders. *Id.* at 597-599.

General DeWitt's Orders resulted in several historically prominent prosecutions of U.S. citizens of Japanese ancestry, including those of Gordon Hirabayashi for a curfew violation and Fred Korematsu for failing to evacuate his home and report to a designated "assembly or relocation center." *Id.* at 595-596; *Korematsu*, 323 U.S. at 221. Ultimately, the Supreme Court upheld both convictions on the ground that "we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained." *Korematsu*, 323 U.S. at 218; *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943).

As this Court recognized in its 1987 decision ordering that Gordon Hirabayashi's convictions be vacated, history counts the Supreme Court's deference to the military in *Korematsu* and *Hirabayashi* among this country's gravest mistakes:

The *Hirabayashi* and *Korematsu* decisions have never occupied an honored place in our history. In the ensuing four and a half decades, journalists and researchers have stocked library shelves with studies of the cases and surrounding events. These materials document historical judgments that the convictions were unjust. **They demonstrate that there could have been no reasonable**

**military assessment of an emergency at the time, that the orders were based on racial stereotypes, and that the orders caused needless suffering and shame for thousands of American citizens.**

*Hirabayashi*, 828 F.2d at 593 (emphasis added).

The military likewise has relied upon stereotypes to discriminate against women. Testifying before the Senate Armed Services Committee in 1947 on pending legislation to integrate women into the military, the Chief of Naval Personnel explained that the military would involuntarily discharge a pregnant servicewoman, as her duty and loyalty would be to her family, not to the military.<sup>48</sup>

Secretary of Defense Harold Brown cited the “physical differences between men and women” that made it “wise \* \* \* that women not be put into combat roles.”<sup>49</sup> Retired General William Westmoreland stated in 1976 that:

Maybe you could find one woman in 10,000 who could lead in combat, but she would be a freak and we’re not running the military academy for freaks \* \* \* They’re asking women to do impossible things. I don’t believe a woman can carry a pack, live in a foxhole, or go a week without taking a bath.<sup>50</sup>

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<sup>48</sup> *Women’s Armed Services Integration Act of 1947: Hearings Before the S. Comm. on Armed Services*, 80th Cong. 67 (1947).

<sup>49</sup> *Fiscal Year 1978 Authorization for Military Procurement, Research and Development, and Active Duty, Selected Reserve and Civilian Personnel Strengths: Hearings Before the S. Comm. on Armed Services*, 95th Cong. 533 (1977).

<sup>50</sup> BINKIN & BACH at 50, quoting WASH. POST, May 30, 1976.

The military also has opposed allowing women to serve in combat roles based on the stereotype of the nature of women as insufficiently aggressive for combat,<sup>51</sup> and of women's greater domestic responsibilities, which preclude full participation in public life.<sup>52</sup>

## **II. Service Members' Valor has Belied the Military's Stated Fears Concerning the Integration of Minority Groups.**

Whether directed toward preventing minorities from service or toward civilian groups wrongly accused of disloyalty, the military consistently has relied upon prejudice and fear to justify its discrimination. Yet, at every point in history, the minority servicepersons that the military has sought to exclude have proven the military's fears unfounded. In each case, the military underestimated both its soldiers' ability to overcome prejudice and the minorities' capabilities.

The valor of African Americans in the military is well documented. During the Civil War, 186,000 African Americans served in the Union Army as soldiers, many with distinction.<sup>53</sup> Sixteen African-American soldiers earned the Congressional Medal of Honor for bravery in battle.<sup>54</sup> At the war's conclusion,

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<sup>51</sup> MONTRECE MCNEILL RANSOM, *The Boy's Club: How "Don't Ask, Don't Tell" Creates a Double-Bind for Military Women*, 252 LAW & PSYCHOL. REV. 161, 168-69 (2001).

<sup>52</sup> JILL ELAINE HASDAY, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 105 (2008).

<sup>53</sup> FONER at 45.

<sup>54</sup> *Id.*

Congress authorized the formation of six African-American regiments in the Army.<sup>55</sup>

During World War I, the exclusively African-American 369th Infantry Regiment was commended by its French commander for its tenacity and bravery under fire, which he considered superior to that of any other American unit.<sup>56</sup> A post-armistice report by the Secretary of War observed that African-American soldiers had remained loyal despite German propaganda attempting to exploit their resentment of their disadvantages in the United States.<sup>57</sup>

African Americans likewise served with distinction in World War II. When a shortage of infantrymen in Europe required the retraining of qualified members of an entirely African-American communications unit for deployment as combat troops, thousands more troops volunteered than could be retrained —some accepting a reduction in rank for the opportunity to enter combat.<sup>58</sup> When combined by necessity with white platoons at the Battle of the Bulge, division commanders were “delighted” with the performance of the African-American soldiers.<sup>59</sup>

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<sup>55</sup> BINKIN & EITELBERG at 15.

<sup>56</sup> *Id.* at 17-18.

<sup>57</sup> *Second Report of the Provost Marshal General to the Secretary of War on the Operations of the Selective Service System to December 20, 1918* (1919) at 195-96.

<sup>58</sup> BINKIN & EITELBERG at 20-21.

<sup>59</sup> *Id.* at 21, quoting LEE NICHOLS, *BREAKTHROUGH ON THE COLOR FRONT* (1954).

Japanese Americans also contributed to the war effort. Just six days after Executive Order 9066 authorized their mass internment based on their presumed disloyalty, an intergovernmental group, the Joint Evacuation Board, composed of both military and civilians, proposed that special efforts “be made to draft or enlist” Japanese Americans into the armed forces.<sup>60</sup> Ultimately, nearly 23,000 Japanese Americans served during World War II, almost equally divided between Europe and the Pacific.<sup>61</sup> More than 1,100 Japanese Americans volunteered from military-imposed internment camps when the military announced it would form a Japanese-American combat unit.<sup>62</sup> That unit became one of the most decorated in World War II. Members of the 442nd Regimental Combat Team, and the 100th Infantry Battalion which it absorbed, collectively earned seven Presidential Unit Citations and 18,143 individual decorations, including a Congressional Medal of Honor (one of only 29 awarded), 47 Distinguished Service Crosses, 350 Silver Stars, and more than 3,600 Purple Hearts.<sup>63</sup>

Members of other racial minority groups, too, have served the U.S. military in prominent and distinguished capacities, including high-ranking leadership roles, and performed with bravery and valor in combat. It is this history of distinguished service that caused General Colin Powell, while reflecting on his appointment as

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<sup>60</sup> DANIELS at 249-50.

<sup>61</sup> *Id.* at 253-54.

<sup>62</sup> *Id.* at 251.

<sup>63</sup> *Id.* at 254.

Chairman of the Joint Chiefs of Staff, to state in 1995 that he wished other American institutions were as open to achievement-based upward mobility as the military.<sup>64</sup> A 1995 study of the efforts to integrate the military stated that “[t]he current leadership views complete racial integration as a military necessity — that is, as a prerequisite to a cohesive, and therefore effective, fighting force. In short, success with the challenge of diversity is critical to national security.”<sup>65</sup>

Women likewise have proven their military value. Although the Army refused to enlist women in World War I, it employed hundreds of members of Britain’s Women’s Auxiliary Army Corps at its headquarters in France.<sup>66</sup> Colonel Parker Hitt, the chief signal officer of the First Army in France, reported to the Secretary of War in 1919 that the use of female telephone operators was “decidedly a success,” that the women operated the telephone equipment more skillfully than the men, and that they contributed to “the smooth and efficient functioning” of the essential military communication system.<sup>67</sup> General Pershing awarded testimonial citations to a dozen female telephone operators and Meritorious Service Citations to fifteen.<sup>68</sup> Military nurses operating near the front

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<sup>64</sup> COLIN POWELL, *MY AMERICAN JOURNEY* 501 (1995).

<sup>65</sup> Department of Justice, *Review of Federal Affirmative Action Programs, Report to the President* (Jul. 19, 1995) § 7.1.

<sup>66</sup> GAVIN at 78.

<sup>67</sup> *Id.* at 94, quoting *Report of the Chief Signal Officer to the Secretary of War* 541 (1919).

<sup>68</sup> GAVIN, citing A. LINCOLN LAVINE, *CIRCUITS OF VICTORY* 610 (1921).

risked their lives, some refusing to be relieved of duty even when wounded or returning to service after being maimed by shrapnel.<sup>69</sup>

World War II also was a turning point in the participation of American women in the Armed Forces. Approximately 350,000 women served in auxiliary units established by each of the services.<sup>70</sup> Roughly 2,000 of them followed combat forces into the Mediterranean theater, including Italy.<sup>71</sup>

An early experiment in the integration of women into a close-knit military environment took place in 1972, when the Navy tested a program designed to measure the impact of the assignment of a limited number of women to a hospital ship. The enlisted women, who composed 12.5 percent of the ship's enlisted complement, were assigned to jobs in each of the ship's departments. After thirteen months, the ship's commanding officer observed not only that the female sailors performed their functions as effectively as the men did,<sup>72</sup> but that the effect on the morale of male sailors was positive, allowing them to experience a more normal social environment than that of an all-male ship.<sup>73</sup>

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<sup>69</sup> DOROTHY SCHNEIDER AND CARL J. SCHNEIDER, *INTO THE BREACH: AMERICAN WOMEN OVERSEAS IN WORLD WAR I* (1991) at 113.

<sup>70</sup> BINKIN & BACH at 7.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 93, citing *Evaluation of Women Aboard the U.S.S. Sanctuary 15-1*, Memorandum from Commanding Officer, U.S.S. Sanctuary [AH-17] for Chief of Naval Personnel (Nov. 19, 1973).

<sup>73</sup> BINKIN & BACH at 94.

Although the repeal of statutory prohibitions against women serving in combat aircraft and aboard combat ships in 1993 and 1994 respectively has not yet led to the complete integration of women, more combat positions have been opened to women.<sup>74</sup> Military officials have emphasized that women's service has become indispensable. Testifying before the House Committee on Armed Services in 2007, General George Casey, Jr., then Commander of Multi-National Forces-Iraq, stated that servicewomen "perform magnificently every day, and *we couldn't do without them in the positions that they are in.*"<sup>75</sup> At his confirmation hearing as Assistant Secretary of the Army for Manpower and Reserve Affairs, Ronald James testified that "women have been and will continue to be an integral part of the Army team, performing exceptionally well in all specialties and positions open to them."<sup>76</sup>

In short, the performance of African Americans, Japanese Americans, women, and other minority groups throughout history has proven the military's reliance upon fears and stereotypes to be unfounded. In each case, minorities have

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<sup>74</sup> HASDAY at 142; *see* Memorandum from Secretary of Defense (Jan. 13, 1994), *supra* at 40.

<sup>75</sup> *Progress of the Iraqi Security Forces: Hearing Before the H. Comm. on Armed Services*, 109TH CONG. 53 (2007) (statement of General George W. Casey, Jr., U.S. Army) (emphasis added).

<sup>76</sup> *Nominations Before the Senate Armed Services Committee, Hearings Before the S. Comm. on Armed Services*, 109TH CONG. 487 (2007) (statement of Ronald J. James).

overcome discrimination to serve with distinction, enhancing the military's ability to carry out its mission.

### **III. The Government Does Not Need to Continue to Discriminate Against Lesbian, Gay and Bisexual Persons for an Indeterminate Period of Time.**

The Government asks the Court to determine that it is constitutional for Congress to maintain DADT temporarily to facilitate an “orderly transition in military policy.”<sup>77</sup> Yet, the Government’s brief conspicuously omits any argument that explains why DADT even is conducive to an orderly transition. Instead, the Government argues only for deference to Congress’s 1993 findings in enacting DADT, stating that “Congress concluded, after considered deliberation, that the Act was necessary to preserve the military’s effectiveness as a fighting force.”<sup>78</sup> Yet, the Government’s brief does not discuss, much less defend, Congress’s 1993 rationale for DADT. That justification is predicated on the same fears — presumed prejudice in the military causing integration to harm unit cohesion and morale, and the untrustworthiness or inferiority of certain groups — that the military historically has used to discriminate against other minority groups.

History has demonstrated these fears to be unfounded in every prior instance. Congress’s statement of necessity in 10 U.S.C. Section 654(a)(15) speaks generally of the military’s need to “exclude *persons* whose presence in the

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<sup>77</sup> Government’s Opening Brief at 38.

<sup>78</sup> *Id.* at 40.

armed forces would create an unacceptable risk.” Although “*persons*” in Section 654 refers to lesbian, gay and bisexual individuals, in the past those “*persons*” were African Americans, Japanese Americans, women, and other minorities.<sup>79</sup>

History has demonstrated that the integration of those “persons” has posed no risk to — and to the contrary, has enhanced — the military’s high standards of morale, good order, discipline, and unit cohesion. The same will be true with respect to lesbian, gay and bisexual soldiers. As the District Court held, the record demonstrates that the effect of DADT “has been, not to advance the Government’s interest of military readiness and cohesion, much less to do so significantly, but to harm that interest.”<sup>80</sup>

DADT is as counterproductive as the military’s past discrimination against other groups. The Department of Defense Comprehensive Review Working Group Report supports that conclusion when it concedes that “the large majority of Service members did not express negative views of repealing” DADT, that disruption would be “isolated,” and that the disruption will not be “widespread or long-lasting.”<sup>81</sup>

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<sup>79</sup> 10 U.S.C. § 654(a)(15) (emphasis added).

<sup>80</sup> Memorandum Opinion at 64.

<sup>81</sup> Government’s Opening Brief at 10-11.

Consistent with the Report, the Secretary of Defense and the Chairman of the Joint Chiefs of Staff have testified before Congress that repeal of DADT will not impair military effectiveness.<sup>82</sup> President Obama has stated that “sacrifice, valor and integrity are no more defined by sexual orientation than they are by race or gender.”<sup>83</sup> Even the Commandant of the Marine Corps, who in December 2010 stated that the “distraction” of lesbian, gay and bisexual soldiers would result in “marines \* \* \* at Bethesda [National Naval Medical Center] with no legs,”<sup>84</sup> has reversed his position. In February 2011, he conceded that repealing DADT would not “be of any magnitude that’s going to cause much more than a blip.”<sup>85</sup> The top Marine Corps official also stated that he has not “had any indication \* \* \* at all” that there would be an exodus from the Corps.<sup>86</sup>

Finally, the Government provides no indication as to how long the military will continue to discriminate against lesbian, gay and bisexual persons. The lack

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<sup>82</sup> *Testimony Regarding Department of Defense’s “Don’t Ask, Don’t Tell” Policy As Delivered by Secretary of Defense, Robert M. Gates and Adm. Mike Mullen, Feb. 2, 2010*, <http://www.jcs.mil/speech.aspx?id=1322> (last visited Mar. 30, 2011).

<sup>83</sup> *The President on the Don’t Ask, Don’t Tell Repeal Act of 2010: “An Historic Step,”* <http://www.whitehouse.gov/blog/2010/12/18/president-don-t-ask-donot-tell-repeal-act-2010-historic-step> (last visited Mar. 31, 2011).

<sup>84</sup> *Marine Chief: ‘don’t ask, don’t tell’ repeal could be deadly distraction,* CSMONITOR.COM (Dec. 14, 2010), <http://www.csmonitor.com/USA/Military/2010/1214/Marine-chief-don-t-ask-don-t-tell-repeal-could-be-deadly-distraction> (last visited Mar. 30, 2011).

<sup>85</sup> *Top Marine Says DADT Repeal Won’t Lead to Exodus in Force*, AOLNEWS.COM (Feb. 18, 2011), <http://www.aolnews.com/2011/02/18/top-marine-says-dadt-repeal-wont-lead-to-exodus-in-force/> (last visited Mar. 30, 2011).

<sup>86</sup> *Id.*

of a time limit is troubling because the military has a history of foot-dragging when forced by the political branches to integrate a minority group.

In 1940, the War Department announced a policy that African-American troops were to be assigned to the combat branches in the same ratio as white soldiers.<sup>87</sup> The policy was not implemented.<sup>88</sup> A memorandum to Under Secretary of War Patterson confirms that “[g]enerally” the policy for utilizing African-American soldiers was not being enforced because of the Army’s “prevailing view” of African-American soldiers.<sup>89</sup>

In 1948, President Truman issued Executive Order 9981, which mandated “equality of treatment and opportunity for all persons in the armed forces, without regard to race, color, religion, or national origin.”<sup>90</sup> The Order required compliance “as rapidly as possible, having due regard to the time required to effectuate any necessary changes without impairing efficiency or morale.”<sup>91</sup>

Seizing on the phrase “without impairing efficiency or morale,” the Army Chief of Staff, Omar Bradley, complained that ordering immediate integration

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<sup>87</sup> DALFIUME at 23.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 59, quoting Memorandum from Judge William Hastie for Under Secretary of War Patterson (Feb. 5, 1942).

<sup>90</sup> Exec. Order No. 9981, 13 Fed. Reg. 4313 (Jul. 28, 1948).

<sup>91</sup> *Id.*

would break down morale and destroy military efficiency.<sup>92</sup> Testifying before the Senate Committee on the Armed Services, General Eisenhower argued that “the Negro is less well educated than his brother citizen that is white and \* \* \* is going to be relegated to the minor jobs \* \* \* because the competition is too rough.”<sup>93</sup>

Two months after the effective date of the President’s order, the Commandant of the Marine Corps protested that the military could not be “an agency for experimentation in civil liberty without detriment to its ability to maintain the efficiency and high state of readiness so essential to national defense.”<sup>94</sup> The Secretary of the Army predicted that integration would undermine military expediency.<sup>95</sup> The Secretary of Defense supported a policy leading to full integration of the services by July 1, 1950, but he did not force the individual services to commit to such a timetable, and the momentum towards integration stalled as the services quibbled over policy (and over which branch might be

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<sup>92</sup> MACGREGOR at 317, citing report of Hanson Baldwin, *Segregation in the Army*, N.Y. TIMES, August 8, 1948.

<sup>93</sup> ADRIAN R. LEWIS, *THE AMERICAN CULTURE OF WAR: THE HISTORY OF U.S. MILITARY FORCE FROM WORLD WAR II TO OPERATION IRAQI FREEDOM* 139 (2007), quoting *Hearings on Universal Military Training, U.S. Senate Comm. on Armed Services*, 80<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 996 (1948).

<sup>94</sup> MACGREGOR at 336, citing Memorandum from Commandant of the Marine Corps for Assistant Secretary of the Navy for Air, “Proposed Directive for the Armed Forces for the Period 1 July 1949 to I July 1950” (Mar. 17, 1949), AO-1, (on file with Marine Corps records).

<sup>95</sup> MACGREGOR at 324.

obligated to absorb more African Americans).<sup>96</sup> It was not until October 30, 1954 that the Secretary of Defense announced that the armed forces were completely racially integrated.<sup>97</sup> The Government has provided no assurances that similar recalcitrance will not unreasonably delay revocation of DADT.

In summary, the military historically has sought to exclude minority groups based on fears that the prejudices of other members of the military will cause integration to harm unit cohesion and that members of those minority groups are inherently untrustworthy or inferior. History repeatedly has proven these fears unfounded. Nevertheless, the Government asks the Court to permit the military to continue to discriminate against lesbian, gay and bisexual persons based on these same fears for an indeterminate period of time. This Nation has committed some of its greatest mistakes when it has deferred to the military's assertion of these fears. The Court should not allow those mistakes to be repeated in this case.

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<sup>96</sup> *Id.* at 344-45.

<sup>97</sup> *Id.* at 473, citing N.Y. TIMES, October 31, 1954. For detailed treatment of the implementation of Truman's order, see MACGREGOR at 315-472.

## CONCLUSION

For the reasons set forth above, *Amici* support the position of Plaintiff-Appellee Log Cabin Republicans.

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April 4, 2011

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Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (check appropriate option):

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s/ Jonathan M. Cohen

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## **CERTIFICATE OF SERVICE**

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. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Jonathan M. Cohen  
Jonathan M. Cohen

**APPENDIX A**  
**List of *Amici Curiae***

**Asian American Justice Center**

The Asian American Justice Center (“AAJC”) is a national nonprofit, nonpartisan organization whose mission is to advance the civil and human rights of Asian Americans and to promote a fair and equitable society for all. Founded in 1991, AAJC is a member of the Asian American Center for Advancing Justice. AAJC engages in litigation, public policy, advocacy, and community education and outreach on a range of civil rights issues, including anti-discrimination. AAJC is committed to challenging barriers to equality for all sectors of our society and has a history of advocating for the rights for the lesbian, gay, bisexual and transgender (“LGBT”) community.

**Asian American Bar Association of the Greater Bay Area**

The Asian American Bar Association of the Greater Bay Area (“AABA”) was founded in 1976 to provide Asian-American attorneys in the San Francisco Bay Area with a vehicle for the unified expression of opinions and positions on matters of concern to all Asian-Pacific Americans. Throughout its history, AABA has led and supported efforts to overturn discrimination against minority communities on all fronts. In particular, AABA members played lead roles in the effort to overturn the war time conviction of Fred Korematsu for defying the internment order in *Korematsu v. United States*. AABA has a special interest in challenging discrimination by and in the military.

**Asian American Institute**

The Asian American Institute (“AAI”) is a pan-Asian, nonpartisan, not-for-profit organization located in Chicago, Illinois, whose mission is to empower the Asian-American community through advocacy, coalition-building, education and research. AAI is a member of the Asian American Center for Advancing Justice. AAI’s programs include community organizing, leadership development and legal advocacy. AAI is deeply concerned about the discrimination and exclusion faced by racial minorities and other marginalized communities, such as lesbian, gay and bisexual individuals. Accordingly, AAI has a strong interest in this case involving the military’s “Don’t Ask, Don’t Tell” policy.

### **Asian Law Caucus**

The Asian Law Caucus (“ALC”) was founded in 1972 as the nation’s first Asian-American legal organization dedicated to defending the civil rights of Asian Americans and Pacific Islanders. A member of the Asian American Center for Advancing Justice, ALC has a long history of promoting and defending the rights of some of the most vulnerable in our community. ALC is committed to ending all forms of discrimination, including unfair treatment of LGBT Americans, and, as such, the outcome of this case is of vital interest to our organization.

### **Asian Pacific American Bar Association of Los Angeles**

The Asian Pacific American Bar Association of Los Angeles County (“APABA-LA”) is comprised of attorneys, judges, commissioners and law students throughout Los Angeles County. APABA-LA provides legal education and assistance to underserved Asian/Pacific-American (APA) communities; sponsors programs in professional development, community education and law student mentorship; and advocates on issues that impact the APA community. As part of its support of civil rights and its advocacy against discrimination, APABA supports the rights of the LGBT community, including the freedom to marry and the right to serve openly in the military.

### **Asian Pacific American Bar Association of Silicon Valley**

The Asian Pacific American Bar Association of Silicon Valley (“APABA-SV”), which was formed more than 20 years ago, serves to foster professional development, advocacy and community involvement for Silicon Valley's Asian/Pacific-American legal community, and to promote justice and equality for all. Many LGBT individuals are Asian American and are affected by this discrimination, thus a stand for LGBT equality is a stand for people within the Asian-American community. APABA-SV therefore has an interest in taking a strong stand against discrimination in the military.

### **Asian Pacific American Legal Center**

The Asian Pacific American Legal Center (“APALC”), a member of Asian American Center for Advancing Justice, is the nation's largest legal services and civil rights organization focused on Asian Americans and Pacific Islanders. Based in Southern California, APALC works to promote racial justice and immigrant rights and is recognized for its coalition and alliance-building work across communities. As part of its mission to advance civil rights, APALC has championed the equal rights of the LGBT community,

including supporting the freedom to marry and opposing Proposition 8. APALC supports this brief because the current DADT policy is based on the same flawed and discriminatory assumptions applied to other minority groups in the past, including Japanese Americans.

**Asian Pacific American Women Lawyers Alliance**

The Asian Pacific American Women Lawyers Alliance (“APAWLA”) is a membership organization comprised of attorneys, judges and law students throughout California. Since its inception in 1993, APAWLA has been devoted to the inclusion, advancement and empowerment of Asian/Pacific-American women by advocating, mentoring and developing leadership within the legal profession and larger community. APAWLA also believes that the legal community should serve as the forefront in protecting and promoting the rights and interests of minorities that are traditionally underrepresented and marginalized. Therefore, APAWLA supports the equal and fundamental rights of everyone, including lesbian, gay and bisexual individuals, to serve in the military.

**API Equality-LA**

API Equality-LA (“APIELA”) recognizes that the long history of discrimination against the API community, especially California's history of anti-miscegenation laws and exclusionary efforts targeted at Asian immigrants, parallels the contemporary exclusion of gays and lesbians from marriage in California. Because APIELA is dedicated to achieving mutual respect and security for all loving families, including those of devoted same sex couples, it has an interest in this litigation and seeks to participate as an *amicus curiae*.

**Asian Pacific Partners for Empowerment, Advocacy and Leadership**

Asian Pacific Partners for Empowerment, Advocacy and Leadership (“APPEAL”) is a national organization whose mission is to champion social justice and achieve parity and empowerment for Asian Americans, Native Hawaiians and other Pacific Islanders by supporting and mobilizing community-led movements through advocacy and leadership development on critical public health issues. APPEAL supports efforts to ensure equity and social justice for LGBT persons.

**California Women’s Law Center**

Founded in 1989, the California Women’s Law Center (“CWLC”) is dedicated to addressing the comprehensive and unique legal needs of women

and girls. Through systemic change, CWLC seeks to ensure that opportunities for women and girls are free from unjust social, economic, and political constraints. CWLC is committed to eradicating invidious discrimination, including eliminating laws that stigmatize nontraditional gender roles.

### **The Charles Houston Bar Association**

The Charles Houston Bar Association (“CHBA”) is a nonprofit organization founded in 1955, representing the interests of African-American attorneys, judges and law students throughout Northern California. The mission of the Association is to improve access to justice; to promote equal protection under the law; to be proactive in increasing diversity within the legal community and to the bench; to bring services to the community; and to support the Association’s judges, attorneys and law students. One of our core values is to eradicate injustice within and throughout the legal community. We strongly believe that “a lawyer is either a social engineer or a parasite on society.” Consequently, we stand behind the effort to challenge the ongoing enforcement of the military’s “Don’t Ask, Don’t Tell” policy.

### **Japanese American Citizens League**

The Japanese American Citizens League (“JACL”), founded in 1929, is the nation’s oldest and largest Asian-American nonprofit, nonpartisan civil rights organization. The mission of JACL is to secure and uphold the civil and human rights of Americans of Japanese Ancestry and of all people. During World War II, JACL successfully lobbied to have Nisei permitted to serve in the armed services. JACL played a prominent role in obtaining redress for Japanese Americans who were interned during World War II and has a special interest in educating against and combating discrimination by the military.

### **Jordan/Rustin Coalition**

The Jordan/Rustin Coalition (“JRC”) exists to build the political power of Black same-gender-loving, LGBT community, and its allies, in the Greater Los Angeles Area through grassroots organizing, political advocacy, public education and community empowerment. JRC advocates for full equality, including marriage, and complete societal acceptance of all persons with regard to race, ethnicity, sexual orientation, gender, gender identity and gender expression. It is because of this commitment to full equality that we support this *amicus* brief.

### **Korean American Bar Association of Northern California**

The Korean American Bar Association of Northern California (“KABA-NC”) has served Korean-American lawyers and the local Korean-American community since the mid-1980s. KABA-NC was founded to encourage and promote the professional growth of Korean-American lawyers and law students in Northern California, to foster networking, support and the exchange of ideas and information among its members, and with the local Korean-American community, and to work with other Asian, minority and community organizations on matters of common concern. KABA-NC joins this *amicus* brief to further the protection of minority rights, including those of gay, lesbian, and bisexual persons.

### **Korean American Bar Association of Southern California**

The Korean American Bar Association of Southern California (“KABA”) is the largest and oldest organization of Korean-American attorneys, judges, professors, law students and community leaders in the country. Since the civil unrest in Los Angeles in 1992, KABA has been a leading advocate for the Korean-American community and has worked tirelessly to promote reconciliation, understanding and peace within the greater Los Angeles region and beyond. KABA supports the effort to ensure justice and equality for all persons.

### **Latino Equality Alliance**

The Latino Equality Alliance (“LEA”) is a broad-based coalition made up of organizations LGBT Latino populations, allied organizations and individuals deeply rooted in both the LGBT and Latino communities. LEA is active in promoting community activism and awareness throughout Los Angeles County. Like all the other organizations supporting this *amicus* brief, LEA is dedicated to ensuring that all Americans, including Latinos, gay men and lesbians, receive equal treatment under the law.

### **Co-Chairs of the Minority Bar Coalition**

The Minority Bar Coalition (“MBC”) is a network of over 25 diverse bar associations dedicated to working in a unified manner to advance the cause of diversity in the legal profession. MBC does this by providing a platform for diverse bar associations to advocate for issues of common concern in efforts for equality. As co-chairs of the MBC, we support initiatives that combat against discrimination.

### **National Asian Pacific American Bar Association**

The National Asian Pacific American Bar Association ("NAPABA") is the national association of Asian/Pacific-American attorneys, judges, law professors, and law students. NAPABA represents the interests of over 40,000 attorneys and 62 local Asian/Pacific-American bar associations, who work variously in solo practices, large firms, corporations, legal services organizations, nonprofit organizations, law schools, and government agencies. Since its inception in 1988, NAPABA has been at the forefront of national and local activities in the areas of civil rights. NAPABA joins *amici* to continue the Asian/Pacific-American community's struggle for equal rights for all before the law.

### **Philippine American Bar Association of Los Angeles**

The Philippine American Bar Association of Los Angeles ("PABA") was formed to address the legal issues confronting the Filipino-American community as well as the professional concerns of Filipino-American lawyers in Southern California. Recognizing that progress in civil rights for insular minorities is most effectively achieved in coalition with the broader community, PABA has endeavored to partner with other civil rights minded organizations in advancing the cause of justice. To this end, PABA, whose membership includes LGBT professionals, is an ardent supporter of equal rights for members of the LGBT community.

### **San Francisco La Raza Lawyers Association**

Since its founding in 1971, San Francisco La Raza Lawyers Association ("SFLRLA") has served the public interest by advancing the science of jurisprudence, promoting reform in the law and facilitating the administration of justice. SFLRLA has a proud history of advocating for equality under the law. SFLRLA continues this tradition in signing this *amicus* brief.

### **Santa Clara County Black Lawyers Association**

Santa Clara County Black Lawyers Association is an advocate for equal opportunity and justice for all citizens of the United States of America. The right to serve our country in the military must be guaranteed to all citizens of the United States without regard to race, gender or sexual orientation.

### **Vietnamese American Bar Association of Northern California**

The Vietnamese American Bar Association of Northern California ("VABANC"), founded in 1998, is the nation's oldest and most established

Vietnamese-American nonprofit bar association. The mission of VABANC is to provide Vietnamese-American attorneys with a vehicle for the unified expression of opinions and positions on matters of concern to all Vietnamese-American attorneys. As such, VABANC has a strong sense of community responsibility. We strive not only to meet the professional needs of our members, but also to use our resources and expertise to serve the public interest. We stand with and support other Asian-American community groups on issues that affect our members and our community.

**Women Lawyers of Alameda County**

Women Lawyers of Alameda County (“WLAC”) has been “a voice for women in the law” since 1980. Born out of necessity to address gender bias and gender discrimination in both the application of law and the practice of law, in our thirty years of existence, WLAC has worked tirelessly to advance the needs, desires, and interests of all women in Alameda County. Drawing upon our core values, and as a member of the Minority Bar Association, WLAC recognizes that discrimination and bias against one is discrimination and bias against all. For that reason, we stand beside our nation's LGBT citizens and call for an end to discrimination against LGBT persons in the Armed Services under "Don't Ask, Don't Tell." We proudly join in this *amicus* brief.