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14 UNITED STATES DISTRICT COURT

15 NORTHERN DISTRICT OF CALIFORNIA

16 MICHAEL D. ALMY, JASON D. KNIGHT,
 and ANTHONY J. LOVERDE,

17 Plaintiffs,

18 v.

19 UNITED STATES DEPARTMENT OF
 20 DEFENSE; ROBERT M. GATES, Secretary
 of Defense; DEPARTMENT OF THE AIR
 21 FORCE; MICHAEL B. DONLEY, Secretary,
 Department of the Air Force; DEPARTMENT
 22 OF THE NAVY; and RAY MABUS,
 Secretary, Department of the Navy,

23 Defendants.
 24

Case No. 10-cv-05627-RS

**PLAINTIFFS' NOTICE OF MOTION
 AND MOTION FOR PARTIAL
 SUMMARY JUDGMENT**

Date: September 1, 2011
 Time: 1:30 p.m.
 Courtroom: 3, 17th Floor
 Judge: Hon. Richard Seeborg

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NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on September 1, 2001 at 1:30 p.m. or as soon thereafter as the matter may be heard before the Honorable Richard Seeborg, in the District Court for the Northern District of California, in Courtroom 3 – 17th Floor, Plaintiffs Michael D. Almy, Jason D. Knight, and Anthony J. Loverde (collectively, “Plaintiffs”) will and hereby do move for partial summary judgment as to their first, second, and third causes of action, under Federal Rule of Civil Procedure 56(a).

RELIEF SOUGHT

Plaintiffs respectfully seek the following relief from this Court: summary judgment in favor of Plaintiffs on the first, second, and third causes of action in their First Amended Complaint; and an order reinstating Plaintiffs to active duty in their respective branches of the military.

1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
2 **PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

3 **I. INTRODUCTION**

4 This action arises out of the unlawful discharges of plaintiffs Michael D. Almy and
5 Anthony J. Loverde from the U.S. Air Force, and plaintiff Jason D. Knight from the U.S. Navy,
6 under the federal law commonly referred to as “Don’t Ask, Don’t Tell” (“DADT”).¹ Plaintiffs
7 are highly-decorated veterans who served for a combined 25 years before they were discharged:
8 Mr. Almy in 2006, Mr. Loverde in 2008, and Mr. Knight in both 2005 and 2007.

9 In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court recognized a protected
10 substantive due process right to engage in private consensual sexual conduct with any adult,
11 including one of the same gender, without government intervention. The discharge of a service
12 member under DADT impairs this right. The Ninth Circuit held in *Witt v. Dep’t of the Air Force*,
13 527 F.3d 806 (9th Cir. 2008), that in order to discharge any service member under DADT,
14 *Lawrence* placed the burden on the military to prove that the discharge significantly furthers, and
15 is necessary to further, the military’s interest in maintaining morale, good order and discipline,
16 and unit cohesion. The undisputed material facts demonstrate that the military ended Plaintiffs’
17 careers without making this constitutionally-required showing. Plaintiffs’ discharge proceedings
18 and subsequent discharges violated their substantive due process rights. Plaintiffs therefore
19 request that this Court grant partial summary judgment on their as-applied substantive due
20 process claims.

21 Plaintiffs further request that the Court enter an order reinstating them to active duty in
22 their respective branches of the military.

23
24
25 _____
26 ¹ Under the Repeal Act, which became law late last year, DADT will be repealed on
27 September 20, 2011. This repeal will not moot this case. Although there will no longer be a bar
28 to gays and lesbians serving openly in the armed forces, the Department of Defense has indicated
that it will not necessarily readmit service members who were discharged under that law.

1 **II. STATEMENT OF FACTS**

2 **A. Plaintiff Michael D. Almy**

3 **1. Mr. Almy’s Record of Service**

4 In 1992, Mr. Almy graduated from Air Force ROTC as a distinguished graduate, in the
5 top ten percent of all graduates nationwide, and entered active duty the following year. (Almy
6 Decl. ¶¶ 2-3.) In 1998, Mr. Almy was named officer of the year for his unit of nearly 1,000
7 people. (*Id.* ¶ 5.)

8 In September of 1998, Mr. Almy began the first of his four deployments to the Middle
9 East, where he supported Operations Desert Fox, Southern Watch, and Iraqi Freedom. (*Id.* ¶¶ 6,
10 7, 11.) During his third deployment to the Middle East, Mr. Almy was directly responsible for
11 facilitating communication activation at newly established bases throughout the theater in Jordan,
12 Saudi Arabia, and Iraq. (*Id.* ¶ 9.)

13 When he returned from Saudi Arabia in 2003, Mr. Almy was promoted to the rank of
14 Major and accepted a position as the Chief of Maintenance at the 606th Air Control Squadron
15 (“ACS”), where he was in charge of a directorate of 180 troops. (*Id.* ¶ 10.) In September 2004,
16 Mr. Almy’s unit deployed to three locations in Iraq in support of Operation Iraqi Freedom. (*Id.*
17 ¶ 11.) During this deployment, Mr. Almy’s unit controlled the airspace over two-thirds of Iraq,
18 and his troops maintained the communications systems necessary for that mission. This included
19 air support for the liberation of Fallujah, Iraq. Mr. Almy’s base came under daily mortar attacks,
20 one of which struck one of his Airmen and also caused significant damage to their equipment.
21 (*Id.*) Towards the end of this deployment to Iraq, Mr. Almy received the Leo Marquez Field
22 Grade Officer of the Year Award, which recognized Mr. Almy as one of the top officers in his
23 career field for the entire Air Force. (*Id.* ¶ 12.)

24 Mr. Almy received numerous other military awards and decorations during his service in
25 the Air Force. These accolades include the Joint Service Commendation Medal, three Air Force
26 Commendation Medals, the Air Force Achievement Medal, the Air Force Outstanding Unit
27 Award, the Air Force Organizational Excellence Award, the Combat Readiness Medal, the
28 National Defense Service Medal, the Armed Forces Expeditionary Medal, the Iraq Campaign

1 Medal, the Global War on Terrorism Expeditionary Medal, the Global War on Terrorism Service
2 Medal, the Humanitarian Service Medal, the Air Force Overseas Long Tour Ribbon, the Air
3 Force Longevity Service Award, the Small Arms Expert Marksmanship Ribbon, the Air Force
4 Training Ribbon, the Company Grade Officer of the Year award, the Senior Communications and
5 Information Badge, and a recognition as Distinguished Air Force ROTC Graduate. (*Id.* ¶ 13.)

6 Mr. Almy also received uniformly high praise from his military superiors and evaluators
7 during performance evaluations and promotion recommendations. For example, when Mr. Almy
8 served as the Chief of Maintenance in the 606th ACS at Spangdahlem Air Base, a supervisor
9 commented about Mr. Almy: “Outstanding leader of my largest directorate; immediate impact on
10 morale/mission—maintenance never stronger . . . Complete leader . . . Superb leader ready for
11 command; simply incredible results in every endeavor.” (*Id.* ¶ 14.)

12 2. The Air Force Searches Mr. Almy’s Personal Computer Files

13 During Mr. Almy’s fourth deployment in Iraq that began in 2004, the Air Force prohibited
14 Airmen from using private email accounts. (*Id.* ¶ 15.) Airmen in Iraq were forced to use
15 government-provided computers and email accounts for personal correspondence. (*Id.*)
16 Specifically, AFI 33-119 authorized service members to use their government email accounts for
17 personal correspondence for “morale, health, and welfare purposes.” (*Id.*) Mr. Almy therefore
18 used his Air Force email account for personal emails. (*Id.*) Nonetheless, Mr. Almy took steps to
19 segregate his work and personal correspondence. (*Id.*)

20 Shortly after Mr. Almy left Iraq in January 2005, during a purportedly “routine” review of
21 his computer files, another member of the Air Force found personal emails in a separate folder
22 labeled “Friends,” including at least one email from Mr. Almy to another man discussing same-
23 sex conduct. (*Id.* ¶ 16.) The search was conducted by someone outside Mr. Almy’s chain of
24 command. (*Id.*) In March 2005, these emails were brought to the attention of Mr. Almy’s
25 commander. (*Id.*)

26 A few days later, the commander confronted Mr. Almy with the emails, read him the
27 DADT law, and pressured him to acknowledge that he is gay. (*Id.* ¶ 17.) By mid-June 2005, the
28

1 Air Force had circulated a Discharge for Cause memorandum indicating that Mr. Almy was being
2 considered for discharge under DADT. (*Id.* ¶ 18.)

3 Mr. Almy subsequently was relieved of his duties, his security clearance—Sensitive
4 Compartmented Information, one of the highest level security clearances available in the
5 military—was suspended, and part of his pay was terminated. (*Id.* ¶¶ 19, 20.) Approximately a
6 year after Mr. Almy was relieved of his command duties, his Wing Commander formally
7 recommended to the Air Force promotion board that Mr. Almy be promoted to Lieutenant
8 Colonel “below promotion zone”—in other words, ahead of his peers—even though the Air Force
9 was actively pursuing Mr. Almy’s discharge. (*Id.* ¶ 28.)

10 3. Discharge Proceedings

11 On July 7, 2005, Mr. Almy was sent a notification of a Show-Cause Action Initiated under
12 AFI 36-3206. This notification required Mr. Almy to establish why he should be retained on
13 Active Duty. In February 2006, Mr. Almy received formal notice that administrative board
14 proceedings would be held to determine whether to recommend a discharge under DADT. (*Id.* ¶
15 21.) When Mr. Almy was notified that a Board of Inquiry was being convened, he decided to
16 conditionally waive his rights to this Board because the decision of the Board would be reviewed
17 by the same person who would have the ultimate deciding authority even without the hearing.
18 (*Id.* ¶ 22.) Mr. Almy requested that he be allowed to submit statements on his own behalf as part
19 of the conditional waiver. (*Id.* ¶ 23)

20 Along with a personal statement, Mr. Almy submitted letters written by many of his
21 colleagues—both superiors and subordinates—who resoundingly supported his retention. (*Id.* ¶
22 24.) For instance, a retired Army Colonel wrote: “My view is that Major Almy has been, and
23 will continue to be an excellent officer.” (*Id.* ¶ 26.) The Lieutenant Colonel who was Mr.
24 Almy’s squadron commander during the discharge process also wrote: “I am convinced the Air
25 Force, its personnel, mission and tradition remains unchanged and unharmed despite his alleged
26 [violations of DADT].” (*Id.*)

1 At the end of the administrative separation proceedings, the Air Force discharged Mr.
2 Almy under DADT based on the contents of his personal emails. He received an Honorable
3 Discharge dated July 21, 2006. (*Id.* ¶ 30.)

4 Mr. Almy was discharged from the Air Force against his will. (*Id.* ¶ 31.) Had he not been
5 discharged under DADT, he would have remained on active duty in the Air Force to this day.
6 (*Id.*) Mr. Almy wishes to be reinstated into active duty in the Air Force so he can once again
7 serve his country and fulfill the commitment he made to the Air Force. (*Id.*)

8 **B. Plaintiff Anthony J. Loverde**

9 **1. Mr. Loverde’s Record of Service**

10 Mr. Loverde enlisted in the Air Force in February 2001 and served from 2001 to 2004 in
11 the 86th Maintenance Squadron. (Loverde Decl. ¶ 2.) During this time, he was stationed in
12 Germany and calibrated weapons systems for the squadron as a Precision Measurement
13 Equipment Laboratory Technician. (*Id.*) After fulfilling his initial commitment to the Air Force,
14 Mr. Loverde reenlisted in 2006 and opted to retrain as a C-130 Loadmaster. (*Id.* ¶ 3.) In this new
15 role, Mr. Loverde joined the 37th Airlift Squadron at Ramstein Air Force Base in Germany. (*Id.*)
16 Mr. Loverde deployed with his squadron in 2007 as part of the troop “surge” in support of
17 Operation Iraqi Freedom. (*Id.*)

18 During Mr. Loverde’s service in the Air Force, his military superiors and evaluators
19 provided uniformly high assessments of him in his annual performance evaluations and
20 promotion recommendations. For example, one former supervisor made the following comment
21 about Mr. Loverde:

22 Unmatched support on channel [mission] . . . key to mission
23 success . . . superior knowledge/abilities guaranteed readiness . . .
24 pressing ahead of peers academically . . . agile in body & mind[.]
25 Earned Distinguished Graduate award from Basic Loadmaster
26 course . . . Hard charger . . . Airdropped 87 Army & Italian special
27 forces; critical to joint training exercise—fostered combat
effectiveness . . . Sincere humanitarian; visited injured soldiers at
LRMC w/Red Cross pet program—lifted hopes/sped recovery[.]
Excels in all facets of his duties, consistently improving knowledge
level and loadmaster skills—promote now.

28 (*Id.* ¶ 5.)

1 Mr. Loverde also received numerous military awards and decorations. These accolades
2 include the Air Medal, the Air Force Commendation Medal, the Air Force Outstanding Unit
3 Award, the Air Force Good Conduct Medal, the National Defense Service Medal, the Global War
4 on Terrorism Service Medal, the Air Force Overseas Ribbon, the Air Force Expeditionary Service
5 Ribbon, the Air Force Longevity Service Ribbon, the Air Force NCO PME Graduate Ribbon, the
6 Small Arms Expert Marksmanship Ribbon, and the Air Force Training Ribbon. (*Id.* ¶ 4.)

7 **2. Adhering to Air Force Core Values, Mr. Loverde Tells His**
8 **Superior Officers He Is Gay**

9 During Mr. Loverde's deployment to Ali Al Salem Air Force Base in 2007, it became
10 clear to Mr. Loverde that he could no longer continue pretending to be someone he was not. (*Id.*
11 ¶ 6.) Other service members talked about loved ones back home and leaned on each other for
12 support, but because Mr. Loverde is gay, he found himself avoiding interaction with his fellow
13 troops so as not to deceive them. (*Id.*)

14 Upon his return from deployment in April 2008, Mr. Loverde emailed two of his superior
15 officers to let them know that he is gay. (*Id.* ¶ 7.) Mr. Loverde was mindful of what the Air
16 Force has described as "Air Force Core Values," which are "Integrity first, Service before self,
17 and Excellence in all we do." (*Id.*) He told his superior officers that although he would like to
18 continue to serve, he could not do so if it also meant continuing to conceal his sexual orientation.
19 (*Id.*)

20 **3. Discharge Proceedings**

21 On or about April 24, 2008, Master Sergeant Welch telephoned Mr. Loverde to request a
22 meeting with him and Lt. Col. Brian Yates, Mr. Loverde's commander. The purpose of the
23 meeting was to discuss the email that Mr. Loverde had sent regarding his sexual orientation. The
24 following day, Lt. Col. Yates asked Mr. Loverde to acknowledge the printed email dated April
25 22, 2008, and to confirm that Mr. Loverde sent the email and was not coerced to do so. Lt. Col.
26 Yates said that he would contact the Air Force legal department for further instruction and his
27 official recommendation would be made according to the legal department's recommendation.
28 (*Id.* ¶ 8.)

1 The following day, April 25, 2008, Mr. Loverde’s commander informed him that the legal
2 department recommended discharge. On May 13, 2008, Lt. Col. Yates sent an official
3 memorandum to the legal department regarding the April 22, 2008 email that stated:

4 It is not my opinion that SSgt Loverde made this statement for the
5 sole purpose of avoiding military service. He recently returned
6 from a four-month deployment, so the timing of this statement is
7 not suspect. In addition, SSgt Loverde showed interest in finishing
8 out his enlistment. SSgt Loverde’s military record and performance
9 has been nothing less than honorable.

10 (*Id.* ¶ 10.)

11 On or about June 9, 2008, Mr. Loverde received a memorandum from the Air Force
12 informing him that he was being recommended for discharge under DADT. (*Id.* ¶ 11.) Like Mr.
13 Almy, Mr. Loverde decided to waive his rights to a Board hearing, but he actively sought
14 retention through other means. (*Id.* ¶¶ 12-15.) For example, Mr. Loverde sent an email to his
15 commanders seeking the heightened level of scrutiny applied by the Ninth Circuit in *Witt v. Dep’t*
16 *of the Air Force*, 527 F.3d 806 (9th Cir. 2008). (*Id.* ¶ 15.)

17 Mr. Loverde also provided numerous character references to support the fact that his
18 discharge would not meet the “heightened standard” described in *Witt*. (*Id.* ¶ 16.) These
19 supporters noted that Mr. Loverde “always produced high quality work” and could be counted on
20 “to get the job done right.” (*Id.*) Based on personal experience working with Mr. Loverde, one
21 former superior officer wrote: “I fully recommend that you consider retaining him in the Air
22 Force. He has the potential to go very far in whatever endeavor he pursues . . . I hope that
23 includes continued service to our nation.” (*Id.*) Another former superior officer wrote: “If I ever
24 had the opportunity to build my ‘dream team’ for work, I would take an entire crew of SSgt
25 Loverdes over most other workers I have encountered.” (*Id.*)

26 Nonetheless, around June 19, 2008, Mr. Loverde received a “Discharge Legal Review”
27 memorandum that recommended discharge under DADT. (*Id.* ¶ 17.) The memorandum
28 explicitly declined to apply the *Witt* standard, stating that *Witt* did not apply to Mr. Loverde’s
case. (*Id.*) The memorandum offered no evidence that Mr. Loverde’s discharge would promote
morale, good order and discipline, and unit cohesion. (*Id.*) At the conclusion of Air Force

1 administrative separation proceedings, Mr. Loverde was discharged under DADT for making a
2 statement that he is gay. (*Id.* ¶ 20.) He received an Honorable Discharge dated July 13, 2008.
3 (*Id.*)

4 Ironically, Mr. Loverde was awarded the Air Medal in August 2008 for his “superior
5 ability in the presence of perilous conditions” during his deployment in support of Operation Iraqi
6 Freedom—the deployment that ultimately brought Mr. Loverde to the decision to come out as gay
7 to the Air Force. (*Id.* ¶ 19.) The Air Medal Citation noted that “the professional ability and
8 outstanding aerial accomplishments of Sergeant Loverde reflect great credit upon himself and the
9 United States Air Force.” (*Id.*)

10 Mr. Loverde was discharged from the Air Force against his will. (*Id.* ¶ 20.) Had he not
11 been discharged under DADT, he would have remained on active duty in the Air Force to this
12 day. (*Id.*) Mr. Loverde wishes to be reinstated into active duty in the Air Force so he can once
13 again serve his country and fulfill the commitment he made to the Air Force. (*Id.*)

14 **C. Plaintiff Jason D. Knight**

15 **1. Mr. Knight’s Record of Service**

16 Mr. Knight enlisted in the Navy in April 2001. (Knight Decl. ¶ 1.) He served from 2001
17 to 2003 in the Navy Ceremonial Guard in Washington, D.C. (*Id.*) During his service in the
18 Ceremonial Guard, he represented the United States at official White House ceremonies and
19 during state and military funerals at Arlington National Cemetery and the Tomb of the Unknown
20 Soldier. (*Id.*) He was present at more than 1,500 military funerals as part of the firing party
21 rendering the 21-gun salute. (*Id.*)

22 In July 2003, following his service in the Ceremonial Guard, Mr. Knight began training as
23 a Hebrew Linguist—formally, a Cryptological Technician Interpretive (CTI) Linguist—at the
24 Defense Language Institute in Monterey, California. (*Id.* ¶ 2.) After his graduation in December
25 2004, he reported for duty at Fort Gordon, Georgia, where he attained the rank of Petty Officer
26 Third Class. (*Id.*)

1 CTI2 Knight consistently performed his duties in an exemplary and
2 professional manner. He excelled in the coordination, logistics and
3 transportation requirements for over 100 personnel for Customs
4 Romeo and FWD Echo [Morale, Welfare and Recreation] trips to
5 Kuwait City. His attention to detail directly contributed to the
6 extraordinary success of the mission. CTI2 Knight's exceptional
7 professionalism, unrelenting perseverance, and loyal devotion to
8 duty reflected credit upon him and were in keeping with the highest
9 traditions of the United States Naval Service.

10 (*Id.* ¶ 9.)

11 During his service, Mr. Knight's military superiors and evaluators also provided
12 consistently positive assessments of him in his annual performance evaluations and promotion
13 recommendations, including those performance evaluations and promotion recommendations
14 issued during the time when Mr. Knight was serving openly. (*Id.* ¶¶ 10, 12.)

15 **4. Second Round of Discharge Proceedings**

16 In March 2007, after General Peter Pace, Chairman of the Joint Chiefs of Staff, publicly
17 expressed his personal views of homosexuality as "immoral," Mr. Knight wrote a letter to the
18 editor of the *Stars & Stripes*, a military newspaper, responding to General Pace's comments. (*Id.*
19 ¶ 11.) In May 2007, Mr. Knight was the subject of an article in the *Stars & Stripes* regarding his
20 service in Kuwait while openly gay. (*Id.* ¶ 12.)

21 A few days after the article ran, the Navy ordered Mr. Knight to report to the Naval
22 Station San Diego to begin discharge proceedings under DADT. (*Id.* ¶ 13.) Mr. Knight was not
23 given the choice to present evidence at an Administrative Board, to dispute the claim, or to seek
24 outside guidance. (*Id.*) The discharge proceedings were not administered through his parent
25 command, nor were they initiated by his parent command. (*Id.* ¶ 14.)

26 At the end of this process, Mr. Knight received discharge papers dated May 18, 2007, that
27 stated he was discharged for a "Homosexual Statement." These papers contained a RE-4
28 reenlistment code barring him from future service. (*Id.* ¶ 15.) Based on yet another clerical error,
the next day Mr. Knight received a second set of discharge papers with a RE-1 reenlistment code
allowing for future service. (*Id.*) Both of these discharge papers were signed by the same person.

(*Id.*)

1 Mr. Knight was discharged from the Navy twice against his will. (*Id.* ¶ 16.) Had he not
2 been discharged either time under DADT, he would have remained on active duty in the Navy to
3 this day. (*Id.*) Mr. Knight wishes to be reinstated into active duty in the Navy so he can once
4 again serve his country and fulfill the commitment he made to the Navy. (*Id.*)

5 III. LEGAL STANDARD

6 Summary judgment or partial summary judgment should be granted if the Court finds
7 “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as
8 a matter of law.” Fed. R. Civ. P. 56(a). To prevail on a motion for summary judgment, the
9 moving party must show that there are no triable issues of fact as to matters upon which it has the
10 burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The “mere
11 existence of some alleged factual dispute between the parties will not defeat an otherwise
12 properly supported motion for summary judgment; the requirement is that there be no genuine
13 issue of material fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis
14 omitted).

15 Once the moving party has met its initial burden, an opposing party must set forth facts
16 showing the existence of a genuine dispute of material fact. *See* Fed. R. Civ. P. 56(c)(1); *see also*
17 *Celotex*, 477 U.S. at 322 n.3. While the Court must construe all evidence and reasonable
18 inferences drawn from the evidence in favor of the non-moving party, *see Anderson*, 477 U.S. at
19 261 n.2; *Brookside Assocs. v. Rifkin*, 49 F.3d 490, 492-93 (9th Cir. 1995), mere disagreement or
20 the bald assertion that a genuine issue of material fact exists does not preclude the use of
21 summary judgment. *See Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989).

22 IV. PLAINTIFFS’ DISCHARGES UNDER “DON’T ASK, DON’T TELL” 23 VIOLATED THEIR SUBSTANTIVE DUE PROCESS RIGHTS

24 To discharge any service member under DADT, the military must prove that the
25 application of DADT in that specific instance significantly furthers, and is necessary to further,
26 the government’s interest in maintaining military morale, good order and discipline, and unit
27 cohesion. Here, the undisputed facts show that the military discharged each Plaintiff without
28

1 making the constitutionally-required showing. The discharges therefore violated Plaintiffs'
2 substantive due process rights as a matter of law.

3 **A. The Substantive Due Process Analysis**

4 **1. Heightened Scrutiny Applies to Discharges Under DADT**

5 In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court recognized a
6 constitutional right to engage in private, consensual sexual conduct with any adult, including one
7 of the same gender, without government interference. *Id.* at 578. This substantive due process
8 right reflects the “promise of the Constitution that there is a realm of personal liberty which the
9 government may not enter.” *Id.* (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 847
10 (1992)). Having recognized this right, the *Lawrence* Court struck down a Texas statute that made
11 consensual homosexual sodomy a crime because the law “furthers no legitimate state interest
12 which can justify its intrusion into the personal and private life of the individual.” *Lawrence*, 539
13 U.S. at 578.

14 As the Ninth Circuit explained in *Witt v. Dep’t of the Air Force*, “the Supreme Court
15 applied a heightened level of scrutiny in *Lawrence*.” 527 F.3d 806, 817 (9th Cir. 2008). Under
16 this heightened scrutiny analysis,

17 when the government attempts to intrude upon the personal and
18 private lives of homosexuals, in a manner that implicates the rights
19 identified in *Lawrence*, [1] the government must advance an
20 important governmental interest, [2] the intrusion must significantly
21 further that interest, and [3] the intrusion must be necessary to
22 further that interest. In other words, for the third factor, a less
23 intrusive means must be unlikely to achieve substantially the
24 government’s interest.

25 *Id.* at 819.

26 Any discharge of a service member under DADT must receive this heightened level of
27 scrutiny because it “implicates the rights identified in *Lawrence*.” *Id.* Furthermore, the inquiry
28 “is as-applied rather than facial.” *Id.* at 819. A court must decide “not whether DADT has some
hypothetical, post hoc rationalization in general, but whether a justification exists for the
application of the policy” to the individual service member. *Id.*

1 **2. Applying Heightened Scrutiny, the Government Cannot**
2 **Discharge a Service Member Under DADT Without Showing**
3 **That the Specific Discharge Significantly Furthers, and Is**
4 **Necessary to Further, Morale, Good Order and Discipline, and**
5 **Unit Cohesion**

6 With respect to the first prong of the heightened scrutiny analysis, 10 U.S.C. § 654 clearly
7 states the governmental interest advanced in support of DADT: protection of “the high standards
8 of morale, good order and discipline, and unit cohesion that are the essence of military
9 capability.” 10 U.S.C. § 654(a)(15). *Witt* acknowledged “that the government advances an
10 important governmental interest” because “DADT concerns the management of the military.”
11 527 F.3d at 821. Accordingly, the inquiry focuses on the second and third prongs. The
12 government may not discharge a service member under DADT absent a showing that “the
13 application of DADT *specifically* to” the service member significantly furthers, and is necessary
14 to further, the government’s stated interest in morale, good order and discipline, and unit
15 cohesion. *Id.* (emphasis added). A discharge under DADT is unconstitutional if the government
16 does not meet this burden. In discharging each of the three Plaintiffs, the military failed to offer
17 any evidence to satisfy its burden.

18 **B. Mr. Almy’s Discharge Under DADT Violated His Substantive Due**
19 **Process Rights**

20 The undisputed material facts demonstrate that Mr. Almy’s discharge under DADT cannot
21 survive heightened scrutiny. At no point prior to the 2006 discharge did the Air Force meet, or
22 even attempt to meet, its burden of proving that the discharge significantly furthered, and was
23 necessary to further, the government’s interests in morale, good order and discipline, and unit
24 cohesion. Rather, the Air Force impermissibly placed the burden on Mr. Almy to show that he
25 should have been retained through its policies generally and through a Show-Cause Action
26 initiated under AFI 36-3206, specifically. (*See* Almy Decl. ¶ 21.)

27 The Air Force ignored evidence that Mr. Almy’s discharge would actually *harm* the
28 government’s interests in maintaining morale, good order and discipline, and unit cohesion.
29 Although the United States Constitution did not require Mr. Almy to demonstrate that he was an
30 asset to the Air Force, the numerous references attached to his Conditional Waiver showed that

1 Mr. Almy’s peers and superiors firmly believed that he was an exceptional Air Force officer.
2 (*See id.* ¶ 26.) For example, one senior Air Force officer wrote that he was convinced “the Air
3 Force, its personnel, mission and tradition remains unchanged and unharmed despite his alleged
4 [violations of DADT].” (*Id.*) Evidence like this submitted on behalf of Mr. Almy establishes that
5 Mr. Almy’s discharge could not have furthered the government’s interests. The Air Force offered
6 no evidence to the contrary.

7 More tellingly, perhaps, is the fact that, during the deployment when the allegedly harmful
8 emails were sent, Mr. Almy received the Leo Marquez Field Grade Officer of the Year Award,
9 which recognized Mr. Almy as one of the top officers in his career field for the entire Air Force.
10 (Almy Decl. ¶ 12.) Similarly, Mr. Almy’s Wing Commander formally recommended Mr. Almy
11 for a promotion—even while discharge proceedings were pending—above his peers. (*See id.* ¶
12 28.) The evidence demonstrates that the Air Force believed that Mr. Almy was a stellar officer,
13 and that he was an asset, rather than a detriment, to its interests.

14 The Air Force therefore failed to meet its constitutional burden under *Lawrence*. *See Witt*,
15 527 F.3d at 821. As a result, the discharge proceedings and subsequent discharge of Mr. Almy
16 violated his right to substantive due process as a matter of law.

17 **C. Mr. Loverde’s Discharge Under DADT Violated His Substantive Due**
18 **Process Rights**

19 The undisputed material facts also demonstrate that Mr. Loverde’s discharge under DADT
20 cannot survive heightened scrutiny. At no point prior to the 2008 discharge did the Air Force
21 meet, or even attempt to meet, its burden of proving that the discharge significantly furthered, and
22 was necessary to further, the government’s interests in morale, good order and discipline, and unit
23 cohesion. Although it was not his constitutional burden to do so, by producing numerous letters
24 from co-workers and superiors in support of his retention, Mr. Loverde brought forth an
25 abundance of evidence demonstrating that his discharge would actually harm these interests.
26 (Loverde Decl. ¶ 16.) For example, one superior officer “fully recommend[ed] that you consider
27 retaining him in the Air Force. He has the potential to go very far in whatever endeavor he
28 pursues...I hope that includes continued service to our nation.” (*Id.*)

1 The Air Force, in contrast, produced no evidence to establish that Mr. Loverde’s discharge
2 would further the government’s stated interests. (*Id.* ¶ 15.) In fact, the Air Force specifically
3 refused to apply the *Witt* standard to Mr. Loverde’s case. (*Id.*) Of course, the Air Force could not
4 have met this standard if it had tried to apply *Witt*. Within weeks of his discharge under DADT,
5 the Air Force bestowed an award on Mr. Loverde that recognized his “superior ability in the
6 presence of perilous conditions.” (*Id.* ¶ 19.)

7 Having failed to show that Mr. Loverde’s discharge furthered government interests, the
8 Air Force, therefore, failed to meet its constitutional burden under *Lawrence*. See *Witt*, 527 F.3d
9 at 821. The discharge proceedings and subsequent discharge of Mr. Loverde violated his right to
10 substantive due process as a matter of law.

11 **D. Mr. Knight’s Discharges Under DADT Violated His Substantive Due**
12 **Process Rights**

13 As with Mr. Almy and Mr. Loverde, the undisputed material facts show that neither of
14 Mr. Knight’s two discharges under DADT can withstand heightened scrutiny. At no point prior
15 to either the 2005 or the 2007 discharge did the Navy meet, or even attempt to meet, its burden of
16 proving that the discharge significantly furthered, and was necessary to further, the government’s
17 interests in morale, good order and discipline, and unit cohesion.

18 Indeed, when the Navy discharged Mr. Knight for the second time, the whole process took
19 less than two weeks. (*See Knight Decl.* ¶¶ 12-14.) The article appeared in the *Stars & Stripes* on
20 May 6, 2007, and by May 18, 2007, Mr. Knight was discharged. During this short period, Mr.
21 Knight was not given an opportunity to present evidence at an Administrative Board, to dispute
22 the claim, or to seek outside guidance. (*See id.* ¶ 13.) More importantly, however, the Navy did
23 not attempt to show how Mr. Knight’s discharge furthered the government’s interests in morale,
24 good order and discipline, and unit cohesion. (*See id.* ¶ 14.)

25 In fact, the Navy ignored evidence that the discharges of Mr. Knight would actually harm
26 these interests. The *Stars & Stripes* article, based upon which the Navy began the second set of
27 discharge proceedings, highlighted the fact that Mr. Knight’s openly gay service in the Navy was
28

1 not an issue. Moreover, Mr. Knight’s performance reviews and promotions during this period
2 when Mr. Knight served as an openly gay sailor established that he was an asset to the Navy.

3 The Navy, therefore, could not have met its constitutional burden under *Lawrence*, but it
4 did not even try to do so. *See Witt*, 527 F.3d at 821. As a result, the discharge proceedings and
5 subsequent discharge of Mr. Knight violated his right to substantive due process as a matter of
6 law.

7 **V. PLAINTIFFS SHOULD BE REINSTATED TO ACTIVE DUTY STATUS**
8 **INTO THEIR RESPECTIVE BRANCHES OF THE MILITARY**

9 As demonstrated above, the undisputed material facts establish that Plaintiffs were
10 unconstitutionally discharged under DADT. The remedy they seek for these constitutional
11 violations is reinstatement to active duty status in their respective branches of the military.

12 Judicial relief for military service members who have been wrongfully discharged is
13 premised on the central principle of making the injured service members “whole.” *Dilley v.*
14 *Alexander*, 627 F.2d 407, 413 (D.C. Cir. 1980). A court’s remedy must attempt to return
15 successful plaintiffs to the position they would have occupied “but for” their illegal release from
16 duty. *See id.* Here, but for their illegal release from duty, Plaintiffs would still be serving in the
17 military and would have continued to do so in the future. (Almy Decl. ¶ 31; Loverde Decl. ¶ 20;
18 Knight Decl. ¶ 16.) They now intend to resume their military service at the earliest possible
19 opportunity. (Almy Decl. ¶ 31; Loverde Decl. ¶ 20; Knight Decl. ¶ 16.) Accordingly, Plaintiffs
20 should be reinstated into active duty. *See Meinhold v. Dep’t of Defense*, 34 F.3d 1469, 1480 (9th
21 Cir. 1994) (reinstating wrongfully-discharged officer to the Navy); *Washington v. Garrett*, 10
22 F.3d 1421, 1431 (9th Cir. 1993) (ordering reinstatement with back pay and benefits); *Witt v.*
23 *Dep’t of the Air Force*, No. C06-5195-RBL, Docket No. 164 (Findings of Fact and Conclusions
24 of Law) (W.D. Wash. Sept. 24, 2010) (ordering reinstatement for wrongful discharge under
25 DADT).

26 **VI. CONCLUSION**

27 The undisputed material facts demonstrate that the military discharged Plaintiffs under
28 DADT without proving that each discharge significantly furthered, and was necessary to further,

1 the government's interest in maintaining morale, good order and discipline, and unit cohesion.
2 The absence of this constitutionally-required showing violated Plaintiffs' substantive due process
3 rights under the Fifth Amendment to the U.S. Constitution, as recognized in *Lawrence*. Plaintiffs
4 therefore respectfully request that the Court grant their motion for partial summary judgment and
5 order that they be reinstated to active duty in their respective branches of the military.

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