IN THE UNITED STATES COURT OF FEDERAL CLAIMS

RICHARD COLLINS, individually and on behalf of a class of all those similarly situated, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	:	Case No. 10-778C (Judge Christine O.C. Miller)

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Laura Schauer Ives*†
Staff Attorney
ACLU of New Mexico
P.O. Box 566
Albuquerque, NM 87103-0566

Matt Garcia*†
Co-Legal Director of
ACLU of New Mexico
Bach & Garcia LLC
300 Central SW, Suite 2000 East
Albuquerque, NM 87102

George Bach*†
Cooperating Attorney for
ACLU of New Mexico
Bach & Garcia LLC
300 Central SW, Suite 2000 East
Albuquerque, NM 87102

Joshua A. Block
Attorney of Record
Leslie Cooper*†
LGBT and AIDS Project
ACLU Foundation
125 Broad Street, Floor 18
New York, New York 10004
(212) 549-2600

Sara Berger*
Freedman Boyd Hollander Goldberg
Ives & Duncan, PA
Cooperating Attorney for
ACLU of New Mexico
20 First Plaza, Suite 700
Albuquerque, NM 87102
(505) 842-9960
Facsimile (505) 842-0761
skb@fbdlaw.com

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* Of Counsel
† *Pro Hac Vice* Motion to Follow
Attorneys for Plaintiff

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulations

Statutes

Other Authorities

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Plaintiff Richard Collins, individually and on behalf of a class of all those similarly situated, respectfully submits the following response in opposition to Defendant's motion to dismiss dated May 10, 2011.

In order to ease service members' transition to civilian life, Congress has provided separation pay for long-serving members who are involuntarily separated from service. Since 1991, however, the Department of Defense has implemented a discriminatory separation-pay policy that cuts former service members' separation pay in half if they have been discharged for "[h]omosexuality." During the period from November 10, 2004 to November 10, 2010, the Department of Defense used that discriminatory policy to cut in half the separation pay of 142 honorably discharged veterans solely because those veterans were discharged for "homosexual conduct" pursuant to 10 U.S.C. § 654, the policy commonly known as "Don't Ask, Don't Tell." *See* Defendant's Objection and Response to Plaintiff's Discovery Request at 2 (attached as Ex.

A). In total, the Department of Defense has withheld $2,138,949 from these honorably discharged veterans. *Id.*[1]

Mr. Collins was one of the 142 honorably discharged service members whose separation pay was cut in half because he was discharged under the "Don't Ask, Don't Tell" statute. He brings this class-action suit on behalf of himself and the rest of the 142 service members alleging that the equal protection and substantive due process guarantees of the Fifth Amendment prohibit the government from using "homosexuality" or "homosexual conduct" as a reason for cutting separation pay in half. Mr. Collins further argues that in order to defend the separation-pay policy, the government has the burden of submitting evidence showing that the policy meets the rigorous requirements of heightened scrutiny.

Instead of attempting to defend the constitutionality of the separation-pay policy on the merits in its motion to dismiss, the government argues that, even if the policy is unconstitutional, this Court cannot provide any relief to Mr. Collins and the class of service members he represents. According to the government, a grab-bag of jurisdictional and prudential doctrines prevent the Court from adjudicating this case and awarding these 142 service members the separation pay they are constitutionally entitled to receive.

The government is wrong. Indeed, many of the government's arguments are flatly contradicted by controlling Federal Circuit precedent. The Court should deny the government's motion to dismiss and set an expeditious schedule for discovery so Mr. Collins and the class he represents can proceed on their claims without additional delay.

[1] On December 22, 2010, the President signed the Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010). Pursuant to the statute, the military is currently undergoing training for the repeal of "Don't Ask, Don't Tell."

STATEMENT OF THE ISSUES

1. Whether 10 U.S.C. § 1174 and its implementing regulations are "money-mandating" for purposes of conferring jurisdiction under the Tucker Act.

2. Whether Mr. Collins's constitutional challenge to the discriminatory separation-pay policy is justiciable pursuant to *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989).

3. Whether -- if Mr. Collins ultimately prevails on the merits of his constitutional claims -- traditional severability analysis authorizes this Court to extend full separation pay to Mr. Collins and the class he represents in order to remedy the constitutional violation, pursuant to, *inter alia*, *Califano v. Westcott*, 443 U.S. 76 (1979); *Gentry v. United States*, 546 F.2d 343 (Ct. Cl. 1976), and *Britell v. United States*, 372 F.3d 1370 (Fed. Cir. 2004).

STATEMENT OF THE CASE

The Separation Pay Statute and Implementing Regulations

"[S]eparation pay is designed to compensate career oriented service members who have been denied a career opportunity because of circumstances beyond their control." H.R. Rep. No. 101-665, at 135 (1990), reprinted in 1990 U.S.C.C.A.N. 2931, 2995. Before 1990, separation pay was available for regular and reserve officers and reserve enlisted members, but not for regular enlisted members. *Id.* As part of the Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, §501(a)-(d), 104 Stat. 1485, 1549-50 (1990), Congress sought to redress "this inequity" in "transition assistance benefits" by extending separation pay to regular enlisted members and adjusted the formula for awarding separation pay to offset the effects of inflation. H.R. Rep. No. 101-665, at 135, reprinted in 1990 U.S.C.C.A.N. at 2995.

Under 10 U.S.C. § 1174, service members are entitled to separation pay if they have completed more than six but less than 20 years of service immediately before their discharge.

See id. at §§ 1174(a)(1)-(2) (separation pay for officers), *id.* at §1174(b)(1) (separation pay for regular enlisted members), *id.* at §1174(c) (separation pay for other members). In the statute, Congress provided detailed and mandatory instructions for the military to follow in calculating service members' years of service and the separation pay they are entitled to receive. *See id.* at §§ 1174(c), 1174(d), 1174(f).

The statute also authorizes the Department of Defense to establish criteria under which a discharged service member's separation pay may be cut in half or denied entirely. *Id.* at §§ 1174(a)(2), 1174(b)(1)-(2), 1174(c)(1)-(2). But instead of allowing the Department of Defense to pick and choose who is entitled to separation pay on an ad hoc basis, Congress instructed the Secretary of Defense to "prescribe regulations, which shall be uniform for the Army, Navy, Air Force, and Marine Corps, for the administration of [separation pay]." *Id.* at § 1174(j). The Department of Defense codified those regulations as Department of Defense Instruction 1332.29 (the "DODI").

Although the statute makes no reference to service members' sexual orientation, the DODI lists "[h]omosexuality" as a basis for cutting a service member's separation pay in half. In section 3.1 of the DODI, the Department of Defense established "four conditions" that a service member must satisfy in order to receive full separation pay. First, the service member must have served more than six but less than 20 years, as mandated by the statute. *See* DODI 1332.29 § 3.1.1. Second, the service member must have received an honorable discharge. *See* DODI 1332.29 § 3.1.2. Third, the service member must have entered into a written agreement to serve with the ready reserve, as required by statute. *See* DODI 1332.29 § 3.1.4.[2]

[2] The DODI notes that service members may satisfy this requirement by signing an agreement affirming their willingness to serve in the ready reserve even if they do not meet the eligibility criteria for enlistment: "A member who enters into this written agreement and who is not

The fourth condition for receiving full separation pay is set forth as follows:

> 3.1.3. The Service member is being involuntarily separated by the Military Service concerned through either the denial of reenlistment or the denial of continuation on AD or full-time National Guard duty, under one of the following specific conditions:
>
> 3.1.3.1. ***The member is fully qualified for retention, but is denied reenlistment or continuation by the Military Service concerned. This includes*** a Service member who is eligible for promotion as established by the Secretary of the Military Department concerned, but is denied reenlistment or continuation on AD by the Military Service concerned under established promotion or high year of tenure policies.
>
> 3.1.3.2. The member is fully qualified for retention and is being involuntarily separated under a reduction in force by authority designated by the Secretary of the Military Department concerned as authorized under 10 U.S.C (reference (d)).
>
> 3.1.3.3. The member is a Regular officer, commissioned or warrant, who is being separated under Chapter 36 or Section 564, 1165, or 6383 of reference (d); a Reserve commissioned officer, other than a commissioned warrant officer, separated or transferred to the Retired Reserve under Chapters 361, 363, 573, 861, or 863 of reference (d); or a Reserve commissioned officer on the AD list or a Reserve warrant officer who is separated for similar reasons under Service policies.
>
> 3.1.3.4. The member, having been denied reenlistment or continuation on AD or full-time National Guard duty by the Military Service concerned under subparagraphs 3.1.3.1. through 3.1.3.3., above, accepts an earlier separation from AD.

DODI 1332.29 § 3.1.3 (emphasis added). The term "fully qualified for retention" is not defined in the statute or DODI. But the next section of the DODI lists several criteria that would render a service member "not fully qualified for retention" and eligible for only half separation pay. According to section 3.2.3.1, a service member receives only half separation pay if:

> The member is not fully qualified for retention and is denied reenlistment or continuation by the Military Service concerned as provided for in reference (e) or DoD Directive 1332.30 (reference (f)) under any of the following conditions:
>
> 3.2,3.1.1. Expiration of service obligation.
>
> 3.2.3.1.2. Selected changes in service obligation.
>
> 3.2.3.1.3. Convenience of the Government.

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qualified for appointment or enlistment in the Ready Reserves need not be enlisted or appointed by the Military Service concerned to be considered to have met this condition of eligibility for separation pay." DODI 1332.29 § 3.1.4.2.

3.2.3.1.4. ***Homosexuality***.
3.2.3.1.5. Drug abuse rehabilitation failure.
3.2.3.1.6. Alcohol abuse rehabilitation failure.
3.2.3.1.7. Security.

DODI 1332.29 § 3.2.3.1 (emphasis added). The interrelating provisions of the DODI thus indicate that a service member who is involuntarily separated for "[h]omosexuality" is deemed "not fully qualified for retention" and therefore not entitled to the full separation pay that the service member would have otherwise received. *See* (Gov't Mot. at 3) ("Under DoDI 1332.29, members who may be entitled to half separation pay include those 'not fully qualified for retention' due to 'Homosexuality.'")

Although the DODI instructs the secretaries of the military departments to establish implementing regulations that "are consistent with the policies in this Instruction," *see* DODI 1332.29 § 4.3.2, the separation-pay instruction promulgated by the Department of Air Force is structured differently than the DODI. *See* Air Force Instruction 36-3208, Ch. 9, Separation Pay (the "AFI"). The AFI's generally applicable requirements for receiving separation pay regardless of the reason for involuntary discharge are set forth in section 9.1. The types of discharges that receive full separation pay are then listed in section 9.2, and the types of discharges that receive only half separation pay are listed in section 9.3.

Section 9.1 of the AFI lists the "the basic criteria . . . defining eligibility for separation pay." These criteria are: the member must be on active duty and have completed between 6 and 20 years of service, AFI § 9.1.1; the member must not have requested separation, AFI § 9.1.2; the member must have completed his or her initial term of enlistment, AFI § 9.1.3; the member must not have been dropped from the Air Force rolls and must not be eligible for retirement, AFI § 9.1.4; the member must not have been separated for misconduct or unsatisfactory performance, AFI § 9.1.5; the member must not have been separated because of a court martial sentence, AFI

§ 9.1.6; the member must not have been separated with a discharge under other than honorable conditions, AFI § 9.1.7; and the member must agree in writing to serve in the Ready Reserve, AFI § 9.1.8. Mr. Collins satisfied all of these "basic criteria" set forth by the AFI.

After 9.1 announces the criteria for separation pay, section 9.2 of the AFI lists the types of discharges that receive full separation pay, and section 9.3 of the AFI lists the types of discharges that receive half separation pay. Involuntary separations that result from (1) an early release program, (2) a high-year tenure policy, or (3) a reduction in force receive full separation pay under section 9.2 of the AFI. In contrast, separations based on (4) expiration of service obligation, (5) convenience of the government, (6) drug abuse treatment failure, (7) alcohol abuse treatment failure, (8) homosexuality, or (9) national security receive half separation pay under section 9.3.

The AFI substantively departs from the DODI in one relevant respect. Section 9.2 of the AFI provides that service members are entitled to full separation pay if:

> 9.2.1. The member's characterization of service is "honorable" ***and the member is fully qualified for retention***, but is being involuntarily separated by denial of reenlistment or continuation on AD under one of the following specific conditions:
>
> 9.2.1.1. Member is denied reenlistment under an Early Release/Date of Separation rollback program.
>
> 9.2.1.2. Member is denied reenlistment under High Year of Tenure (HYT) policy. This applies only to the E-4 HYT program since members have 20 years or more of service in all other HYT programs.
>
> 9.2.1.3. Member is being involuntarily separated under a reduction in force program.

AFI § 9.2.1 (emphasis added). The DODI describes the high year of tenure policy as merely one example of ways that a service member could be "fully qualified for retention" and eligible for full separation pay. In contrast, section 9.2 of the AFI appears to provide that discharges

through an early release program, a high-year tenure policy, or a reduction in force are the sole bases for receiving full separation pay.

The Relationship Between the Separation-Pay Policy and "Don't Ask, Don't Tell"

The government apparently interprets the DODI to mean that if a service member is discharged for "homosexual conduct" pursuant to 10 U.S.C. § 654, the service member has been separated because of "[h]omosexuality" and is therefore "not full qualified for retention" for purposes of receiving full separation pay. But the separation-pay statute and implementing regulations are entirely distinct from the "Don't Ask, Don't Tell" statute and implementing regulations. Indeed, the relevant portions of the DODI were promulgated on June 20, 1991 -- several years *before* the enactment of the "Don't Ask, Don't Tell" statute, which significantly altered the military's previous ban on "homosexuality."

Far from implementing the "Don't Ask, Don't Tell" statute, the DODI reflects an outdated policy of equating sexual orientation with misconduct. The DODI thus lists "[h]omosexuality" alongside "[d]rug abuse rehabilitation failure" and "[a]lcohol abuse rehabilitation failure" as conditions that prevent a service member from being "fully qualified for retention." Presumably, this decision was based on the notion that service members who are discharged because of "[h]omosexuality" have not "been denied a career opportunity because of circumstances beyond their control," and should therefore have their separation pay reduced to reflect that alleged misconduct. H.R. Rep. No. 101-665, at 135, reprinted in 1990 U.S.C.C.A.N. at 2995. The separation-pay policy also refers to "[h]omosexuality" instead of "homosexual conduct," which reflects the Department of Defense's view in 1991 that a service member's private sexual orientation could itself be grounds for separation.

Mr. Collins's Class-Action Complaint

On March 10, 2006, Mr. Collins was involuntarily separated from the Air Force pursuant to "Don't Ask, Don't Tell" with an honorable discharge. (Compl. ¶¶ 1, 31.) The separation proceedings were initiated after a civilian co-worker saw Mr. Collins exchange a kiss with his boyfriend while off-duty, off-base, and out of uniform. (*Id.* at ¶¶ 1, 26.) Based on his compensation and years of service, Mr. Collins expected to receive $25,702.48 in separation pay after he was discharged. (*Id.* at ¶ 32.) On March 10, 2006, however, when Mr. Collins visited the Relocations & Employment Office, he learned for the first time that his separation pay had been cut in half -- from $25,702.48 to $12,851.24 -- because of "[h]omosexuality." (*Id.*)

On November 10, 2010, Mr. Collins filed a class action complaint in this Court on behalf of himself and all other service members who were honorably discharged between November 10, 2004 and November 10, 2010 but received only half separation pay because of "[h]omosexuality." The class-action complaint alleges that the Department of Defense's policy to use "[h]omosexuality" or "homosexual conduct" as a basis for cutting separation pay in half violates the equal protection and substantive due process guarantees of the Fifth Amendment. (*Id.* at ¶¶ 5, 42-57.)

With respect to his equal protection claim, Mr. Collins argues that the separation-pay policy subjects former service members to disparate treatment based on their sexual orientation. (*Id.* at ¶ 45.) Mr. Collins further argues that sexual orientation is a suspect classification and discrimination based on sexual orientation must be subjected to heightened scrutiny. (*Id.* at ¶ 47.) Although the Federal Circuit in *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), rejected the argument that sexual orientation is a suspect classification, that decision was based on the discredited decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and is no longer

good law. As the Attorney General has explained, *Woodward* is one of several cases based on the reasoning that "if consensual same-sex sodomy may be criminalized under *Bowers v. Hardwick*, then it follows that no heightened review is appropriate -- a line of reasoning that does not survive the overruling of *Bowers* in *Lawrence v. Texas*, 538 U.S. 558 (2003)." Letter from Attorney General to Congress re Litigation Involving the Defense of Marriage Act (Feb. 23, 2011)), available online at http://www.justice.gov/opa/pr/2011/February/11-ag-223.html. Now that *Bowers* has been overruled, discrimination based on sexual orientation must be subjected to heightened scrutiny.[3]

With respect to his substantive due process claim, Mr. Collins argues that cutting in half a service member's separation pay because his or her discharge was based on "[h]omosexuality" burdens the service member's fundamental rights and protected liberty interests in intimate association and private consensual sexual conduct. (Compl. ¶ 53.) In order to justify that burden, "the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest." *Witt v. U.S. Dep't of Air Force*, 527 F.3d 806, 819 (9th Cir. 2008); *see also Cook v. Gates*, 528 F.3d 42, 55-56 (1st Cir. 2008). "Under this review, [the court] must determine not whether [the policy] has some hypothetical, post hoc rationalization in general, but whether a justification exists for the application of the policy as applied to [Mr. Collins and the class he represents]." *Witt*, 527 F.3d at 819.

[3] *See, e.g.*, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 426-62 (Conn. 2008) (analyzing federal precedent when interpreting state constitution); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009) (same); *In re Marriage Cases*, 183 P.3d 384, 442-44 (Cal. 2008) (analyzing factors similar to the federal test); *see also Collins v. Brewer*, 727 F. Supp. 2d 797, 804 (D. Ariz. 2010) (invalidating statute under rational basis review but noting that heightened scrutiny may be appropriate).

Subsequent Developments

Shortly after Mr. Collins filed his class-action complaint, the Department of Defense issued a comprehensive study demonstrating that the "Don't Ask, Don't Tell" policy serves no legitimate governmental interests whatsoever. The report concluded that the repeal of "Don't Ask, Don't Tell" presented only a low risk of affecting military readiness or unit cohesion, and that in the unlikely event that such a risk materialized, the impact would be isolated and fleeting. *See* U.S. Dep't of Def., Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell" (Nov. 30, 2010), available online at http://www.defense.gov/home/features/2010/0610_gatesdadt/DADTReport_FINAL_20101130(secure-hires).pdf. As Army Chief of Staff Gen. George W. Casey, Jr. explained when testifying before the Senate Armed Services Committee: "As I read through the report, it seemed to me that the report called into question the basic presumption that underpins the law. That is that the presence of a gay or lesbian servicemember creates an unacceptable risk to good order and discipline." *See* C. Todd Lopez, *Casey Supports Repeal, But Not During War*, American Forces Press Service, Dec. 3, 2010, available online at http://www.defense.gov/news/newsarticle.aspx?id=61951.

If the government is unable to point to a legitimate interest served by involuntarily separating Mr. Collins and the rest of the 142 honorably discharged service members pursuant to "Don't Ask, Don't Tell," it is difficult to imagine what legitimate interest could be served by the Department of Defense's policy of gratuitously cutting those service members' separation pay in half after discharge has been completed. And it is impossible to conceive of an interest that would be important enough and tailored enough to satisfy the requirements of heightened scrutiny.

Yet, instead of providing these 142 veterans with the separation pay that was unconstitutionally withheld from them, the government has chosen to employ a series of delay tactics. The government requested and received two 60-day extensions of time to respond to the complaint filed by Mr. Collins, bringing its total allotted response time to 180 days. On May 10, 2011, after those extensions elapsed, the government filed the pending motion to dismiss.

ARGUMENT

To date, the government has refused to supply any substantive reason for cutting an honorably discharged service member's separation pay in half because of "[h]omosexuality." And the government does not purport to provide such a justification in its motion to dismiss. Instead, the government spins out a variety of theories for why, even if the constitutional rights of Mr. Collins and the rest of the 142 class members were violated, this Court lacks the power to provide any relief. Each of these theories boils down to the tautological assertion that Mr. Collins and the class he represents are not entitled to separation pay because the Department of Defense has passed a policy saying that they are not entitled to separation pay.

The government's tautology is wrong. Indeed, it is flatly contradicted by controlling precedent. This Court should deny the government's motion to dismiss and allow this case to proceed to the merits.

I. 10 U.S.C. § 1174 and Its Accompanying Regulations Are "Money-Mandating."

Two separate decisions of this Court have already explicitly recognized that 10 U.S.C. § 1174 is a money-mandating statute for purposes of establishing jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1). *See Siemietkowski v. United States*, 86 Fed. Cl. 193, 197 (2009); *Toon v. United States*, 96 Fed. Cl. 288, 300 (2010). In numerous other cases, this Court has

implicitly assumed that 10 U.S.C. § 1174 is money-mandating.[4] Yet, against the weight of all available precedent, the government now asserts that those decisions were wrongly decided.

Establishing that a statute is money-mandating is not an onerous task. A statute or regulation is "money mandating" if it "can fairly be interpreted as mandating compensation for damages sustained as a result of the breach of the duties it imposes." *Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005) (en banc) (internal quotation marks and brackets omitted). Identifying a money-mandating statute, "'demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity.'" *Id.* (quoting *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003)). "'It is enough . . . that a statute creating a Tucker Act right be *reasonably amenable* to the reading that it mandates a right of recovery in damages.'" *Id.* at 1173-74 (quoting *White Mountain*, 537 U.S. at 472-73).

Critically, for purposes of establishing jurisdiction, a plaintiff does not have to show that the statute or regulation mandates damages for his or her claim in particular. In *Fisher*, the Federal Circuit clarified that for jurisdictional purposes, the question is whether the statute as a general matter provides successful plaintiffs with a right to money damages. Whether or not the plaintiff is within the class of persons who are ultimately entitled to receive those money damages is a separate issue that goes to the merits of the claim, not to the court's jurisdiction over the case. *See Fisher*, 402 F.3d at 1175 (rejecting the government's argument that a statute "is money-mandating only for service members who qualify for benefits under the statute"). As

[4] *See, e.g.*, *Martinez v. United States*, 77 Fed. Cl. 318, 330 (2007) (affirming denial of separation pay on the merits); *Loeh v. United States*, 74 Fed. Cl. 106, 109-10 (2006) (same); *Elliott v. United States*, 61 Fed. Cl. 185, 186-87 (2004) (dismissing claim under statute of limitations); *Eisenhuth v. United States*, 59 Fed. Cl. 460, 467 (2004) (affirming denial of separation pay on the merits); *McMullen v. United States*, 50 Fed. Cl. 718, 726-27 (2001) (same); *Watson v. United States*, 49 Fed. Cl. 728 (2001) (rejecting motion to dismiss); *Hanes v. United States*, 44 Fed. Cl. 441, 445 (1999) (affirming denial of separation pay on the merits).

Fisher explained: if "the plaintiff's cause rests on a money-mandating source," but "plaintiff's case does not fit within the scope of the source," then "plaintiff loses on the merits for failing to state a claim on which relief can be granted" -- not for lack of jurisdiction. *Id.* at 1175-76; *see also Britell v. United States*, 372 F.3d 1370, 1378-79 (Fed. Cir. 2004) (finding that plaintiff's claim for reimbursement of costs of abortion was based on a money-mandating source of law for purpose of establishing jurisdiction even though "both the statute and regulations specifically *disallow payment* for abortions").

10 U.S.C. § 1174 has all the hallmarks of a money-mandating statute. First, the statute provides that certain service members are "entitled" to separation pay. For example, 10 U.S.C. § 1174(b) provides that:

> (1) A regular enlisted member of an armed force who is discharged involuntarily or as the result of the denial of the reenlistment of the member and who has completed six or more, but less than 20, years of active service immediately before that discharge ***is entitled*** to separation pay computed under subsection (d) unless the Secretary concerned determines that the conditions under which the member is discharged do not warrant payment of such pay.

10 U.S.C. § 1174(b) (emphasis added); *accord id.* at §§ 1174(a)(1), 1174(a)(2), 1174(c) (using the phrase "is entitled"). As the Federal Circuit has recognized, a statute's use of the phrase "is entitled" strongly supports a finding that the statute is money-mandating. *See Agwiak v. United States*, 347 F.3d 1375, 1380 (Fed. Cir. 2003). For example, it has long been established that the Military Pay Act, 37 U.S.C. § 204, is a money-mandating statute because it provides that "[t]he following persons are entitled to the basic pay of the pay grade to which assigned or distributed." 37 U.S.C. § 204(a); *see Metz v. United States*, 466 F.3d 991, 998 (Fed. Cir. 2006) (emphasizing the Military Pay Act's use of the word "entitled"); *Agwiak*, 347 F.3d at 1380 (same). Similarly, the statute providing for remote-duty pay is money-mandating because it provides that, under some circumstances, an employee "is entitled, in addition to pay otherwise due him, to an

allowance of not to exceed $10 a day." 5 U.S.C. § 5942(a); *see Agwiak*, 347 F.3d at 1380 (emphasizing use of the word "entitled" in remote-duty pay act). As with these other statutes, the repeated use of the word "entitled" in 10 U.S.C. § 1174 is powerful evidence that the statute is money-mandating for purposes of establishing jurisdiction under the Tucker Act.

In addition, 10 U.S.C. § 1174's repeated use of the word "shall" further demonstrates that it is a money-mandating statute. *See* 10 U.S.C. § 1174(b)(2) (stating that separation pay "shall" be calculated pursuant to statutory formula); *id.* at § 1174(c)(4)(A)-(B) (establishing criteria for when a separation "shall" be considered voluntary); *id.* at § 1174(e)(1) (A)-(B) (stating that service members "shall" agree to serve in Ready Reserve in order to receive separation pay); *id.* at § 1174(i) (establishing special rules that "shall" apply in the case of "sole survivorship" separations). The Federal Circuit has "repeatedly recognized that the use of the word 'shall' generally makes a statute money-mandating." *Agwiak*, 347 F.3d at 1380; *accord Britell*, 372 F.3d at 1378 ("This and other courts have repeatedly held that this type of mandatory language, e.g., 'will pay' or 'shall pay,' creates the necessary 'money-mandate' for Tucker Act purposes.").

Despite the statute's use of the terms "entitled" and "shall," the government argues that 10 U.S.C. § 1174 is not money-mandating because it delegates authority to the Secretary to determine whether "the conditions under which the member is discharged do not warrant payment of such pay." 10 U.S.C. § 1174(b)(1); *accord id.* at §§ 1174(a)(2), 1174(b)(2), 1174(c)(1). According to the government, this delegation of authority transforms what would otherwise be a statutory "entitle[ment]" into a wholly discretionary decision.

But the limited discretion afforded to the government under the statute is hardly sufficient to negate the money-mandating nature of the statutory scheme. Any discretion delegated to the Secretary of Defense is tightly confined by the rest of the statute and must be exercised within

the guidelines set by Congress. *See Doe v. United States*, 100 F.3d 1576, 1582 (Fed. Cir. 1996) ("The fact that the Secretary retains some discretion to determine the amount of an award, within prescribed limits, does not preclude the statute from being money mandating."); *Bradley v. United States*, 870 F.2d 1578, 1580 (Fed. Cir. 1989) (although Government retained broad discretion in determining wage increases under "prevailing rates" legislation, "[i]nasmuch as discretion is not unlimited, the statute must be deemed to be a pay-mandating statute"). In this particular statute, Congress took special care to micromanage an array of details about when separation pay should and should not be awarded. Among other things, the statute dictates the number of years of active duty service that a service member must serve in order to receive separation pay, 10 U.S.C. §§ 1174(a)(1)-(2), 1174(b)(1), 1174(c)(1), what constitutes a period of continuous active duty for purposes of receiving separation pay, *id.* at § 1174(c)(3), the statutory formula that must be used when calculating separation pay, *id.* at §§ 1174(d)(1)-(2), a requirement that service members receiving separation pay must sign an agreement stating they are willing to serve in the Ready Reserve, *id.* at § 1174(e), a statutory formula for how fractional years of service should be counted, *id* at § 1774(f), a formula for offsetting separation pay when a service member also receives disability compensation, *id.* at § 1174(h), and special rules to apply when a service member receives a "sole survivorship" discharge, *id.* at § 1174(i). Congress's attention to all of these details undercuts the government's argument that Congress simply delegated separation pay to be doled out at the whim of the Secretary of Defense.

The government's argument also ignores 10 U.S.C. § 1174(j), in which Congress specifically required the Secretary of Defense to "prescribe regulations, which shall be uniform for the Army, Navy, Air Force, and Marine Corps, for the administration of [separation pay]."

The whole purpose of requiring the executive to promulgate regulations is to "limit the military's discretion," *Fisher*, 402 F.3d at 1177, by establishing consistent standards and procedures that the military will be bound to follow. The instruction to promulgate regulations for uniform enforcement provides additional evidence that Congress did not delegate to the Secretary of Defense unfettered discretion to grant or withhold separation pay without any enforceable standards.

Although the government fails to address any of the money-mandating features of 10 U.S.C. § 1174, even the government concedes that the statute would be money-mandating if it were to (1) provide "clear standards for paying" money to recipients; or (2) state the "precise amounts" that must be paid; or (3) as interpreted, compel payment on satisfaction of certain conditions. *Samish Indian Nation v. United States*, 419 F.3d 1355, 1364-65 (Fed. Cir. 2005); (Gov't Mot. at 10). 10 U.S.C. § 1174 easily satisfies all three of these conditions.

First, the DODI and the AFI promulgated by the Department of Defense and Air Force provide clear standards for determining whether a service member is entitled to full separation pay or half separation pay.[5] Those regulations distribute full or half separation pay based on a pre-established checklist of factors -- and even include a grid of boxes and "x" marks to consult in order to determine whether full or half separation pay should be awarded. *See* AFI tbl. 9.1[6]

[5] For jurisdictional purposes, it does not matter whether the "clear standards" are set forth in a statute or in an implementing regulation "because the Court of Federal Claims has jurisdiction over money claims founded not only on statutes, but also on 'any regulation of an executive department.'" *Brodowy v. United States*, 482 F.3d 1370, 1375 (Fed. Cir. 2007) (quoting 28 U.S.C. § 1491); *see also Britell*, 372 F.3d at 1378 (concluding that even though underlying statute did "not provide the requisite money-mandate," court still had jurisdiction because regulations contained "money-mandating language sufficient to bring [plaintiff's] claim within the sovereign immunity waiver").

[6] In light of these clearly defined standards, it makes no difference that the Air Force Instruction uses the word "may" instead of "shall." *See McBryde v. United States*, 299 F.3d 1357, 1362

Second, the separation-pay statute states the "precise amounts" that must be paid when a service member receives separation pay. Full separation pay and half separation pay must be awarded according to a statutory formula. *See* 10 U.S.C. § 1174(d)(1)-(2). The Secretary's options are limited to awarding the full amount of the formula, half the amount of the formula, or no separation pay at all. The Secretary has no discretion to deviate from that formula or to provide "one-third" or "three-quarters" separation pay.

Third, the separation-pay statute compels payment once certain conditions have been met. If a service member satisfies the eligibility criteria established by the Department of Defense, then the government "shall" provide the separation pay. *See* 10 U.S.C. § 1174(b)(2). Under Federal Circuit precedent, this statutory language is sufficient to create a money-mandating statute for purposes of establishing jurisdiction. *See Doe v. United States*, 463 F.3d 1314, 1325 (Fed. Cir. 2006) (holding that statute is money-mandating because "once the agency makes a determination that a particular position is entitled to AUO pay, the employee 'shall' receive premium pay under the statute").

As noted above, there is no requirement at the jurisdictional stage for Mr. Collins to demonstrate that he in particular -- or the class he represents -- satisfies the statutory requirements or the clear standards established by the DODI and AFI. Indeed, Mr. Collins's fundamental claim is that the DODI unconstitutionally *excludes* him and the class he represents from receiving the full separation pay they seek. *Cf. Britell*, 372 F.3d at 1379. In order to establish jurisdiction, all Mr. Collins needs to show is that the statute in general contemplates the award of money damages. *See Fisher*, 402 F.3d at 1175-76. Whether Mr. Collins and the class

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(Fed. Cir. 2002) ("[T]he use of the word 'may' does not, by itself, render a statute wholly discretionary, and thus not money-mandating.").

he represents are entitled to receive those money damages depends on the merits of their constitutional claims and the severability of the statute (discussed *infra* in sections III and IV).

Because 10 U.S.C. § 1174 is "reasonably amenable to the reading that it mandates a right of recovery in damages," *Fisher*, 402 F.3d at1173-74 (quoting *White Mountain*, 537 U.S. at 472-73) (emphasis omitted), the government's motion to dismiss for lack of jurisdiction must be rejected.

II. The Unconstitutional Denial of Separation Pay Is a Justiciable Controversy.

The government's half-hearted assertion that this case is non-justiciable is completely without merit. Even though 10 U.S.C. § 1174 delegates some discretion to the Secretary of Defense to establish the criteria for awarding half separation pay, "Congress cannot authorize, nor can the [executive branch] promulgate, a regulation that violates the Constitution." *Preminger v. Sec'y of Veterans Affairs*, 517 F.3d 1299, 1306 (Fed. Cir. 2008); *see also Koster v. United States*, 685 F.2d 407, 412 (Ct. Cl. 1982) (holding that "executive discretion must be subject at least to constitutional review"). Indeed, because it would raise grave constitutional concerns if a statute entirely eliminated review of constitutional claims, a statute must be interpreted to preserve the courts' authority to review such claims even when the text of the statute purports to vest unreviewable discretion in the hands of the executive. *See Webster v. Doe*, 486 U.S. 592, 603 (1988); *Padula v. Webster*, 822 F.2d 97, 101 (D.C. Cir.1987). In light of these principles, the Federal Circuit has repeatedly reviewed military decisions to ensure that they comport with constitutional requirements. *See, e.g.*, *Adkins v. United States*, 68 F.3d 1317, 1323 (Fed Cir. 1995); *Holley v. United States*, 124 F.3d 1462, 1465-66 (Fed. Cir. 1997); *Berkley v. United States*, 287 F.3d 1076, 1091 (Fed. Cir. 2002).

In a striking omission, the government never mentions the Federal Circuit's holding in *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), which flatly contradicts the government's argument that this case is nonjusticiable. *Woodward* held that -- even though questions of military fitness are usually nonjusticiable -- the courts should still review a constitutional challenge to the military's policy of discharging gay and lesbian service members because of the importance of providing judicial review for constitutional claims. Like the government in this case, the government in *Woodward* argued that the decision whether to discharge service members is committed to the executive's discretion and cannot be reviewed by courts. *Id.* at 1072. But the Federal Circuit soundly rejected that argument and explained that "employment actions claimed to be based on constitutionally infirm grounds are nevertheless subject to judicial review." *Id; see also Wilkins v. United States*, 279 F.3d 782, 788 n.4 (9th Cir. 2002) (noting that as of 2002, five circuits had considered the merits of constitutional challenges to "Don't Ask, Don't Tell" without dismissing for lack of justiciability).

Woodward removes any doubt that Mr. Collins's constitutional claims present a justiciable controversy for the courts. This Court has the power and responsibility to decide Mr. Collins's constitutional claims.

III. Under Traditional Severability Analysis, 10 U.S.C. § 1174 Authorizes Courts to Extend Separation-Pay Benefits to Mr. Collins and the Class He Represents to Remedy a Constitutional Violation.

If the Court finds that the Constitution prohibits the government from withholding full separation pay based on "[h]omosexuality," the Court has the power under traditional tools of statutory construction to remedy that violation by providing full separation pay to Mr. Collins and the class he represents. "Where a statute is defective because of underinclusion . . . there exist two remedial alternatives: a court may either declare the statute a nullity and order that its

benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion." *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (internal quotation marks and brackets omitted); *accord Obadele v. United States*, 52 Fed. Cl. 432, 442 (2002). In deciding whether extension or nullification is appropriate, the court must be guided by its prediction of legislative intent, which requires the court to "measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." *Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1979) (internal quotation marks and citations omitted). Because invalidating the entire statute would often frustrate congressional intent, "ordinarily extension, rather than nullification, is the proper course." *Id.* (internal quotation marks and citations omitted).[7]

These principles apply with equal force when a plaintiff brings claims pursuant to the Tucker Act. In *Gentry v. United States*, 546 F.2d 343 (Ct. Cl. 1976), this Court's predecessor,

[7] The government asserts that this Court cannot award full separation pay to Mr. Collins and the class he represents because doing so would order disbursement of funds that have not been appropriated by Congress. *See* (Gov't Br. at 9) (citing *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414 (1990)). But, as *Richmond* itself acknowledged, Congress has already appropriated the funds necessary to pay any damage award based on a money-mandating statute under the Tucker Act. *See Richmond*, 496 U.S. at 431 ("Congress has, of course, made a general appropriation of funds to pay judgments against the United States rendered under its various authorizations for suits against the Government, such as the Tucker Act and the FTCA."); *see also* 31 U.S.C. § 1304.

Moreover, the *Richmond* decision -- which simply held that a plaintiff may not invoke estoppel based on faulty advice from a government employee -- has nothing to do with whether damages may be awarded to cure a constitutional violation. *See Richmond*, 496 U.S. at 435 (White, J., concurring) (noting that the majority opinion "does not state that statutory restrictions on appropriations may never fall even if they violate a command of the Constitution"). As explained above, it is well-established that the courts have the power to extend statutory benefits to cure constitutional violations as part of traditional severability analysis. *See Califano*, 443 U.S. at 89-90 (collecting examples); *Rochester Pure Waters Dist. v. EPA*, 960 F.2d 180, 184 n.2 (D.C. Cir. 1992) (suggesting that *Richmond* does not apply in cases such as *Califano* "where a court orders expenditures for constitutional reasons").

the U.S. Court of Claims, confronted a statute that awarded survivor benefits to the children of deceased civil-service employees but specifically excluded children who had not lived in the father's home. The Court concluded that the "lived with" requirement violated the equal protection guarantee of the Fifth Amendment by unconstitutionally discriminating against illegitimate children. Having decided that the "lived with" requirement was unconstitutional, the court then severed the unconstitutional portion of the statute and extended benefits to children who did not satisfy the "lived with" requirement instead of invalidating the entire statutory scheme (which would have deprived all children of survivor benefits). *See id.* at 347.

The government in *Gentry* accused the court of trying to "re-write" the statute and creating an unauthorized monetary remedy, but the court explained that its decision to extend benefits to the unconstitutionally excluded recipients simply used traditional severability analysis to effect to Congress's intent in light of the constitutional holding:

> The question of severability is answered by a practical inquiry into the legislature's intent on the internal relation of the various statutory provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

Id. (internal quotation marks and citations omitted). The court concluded that the "live with" requirement was severable because the "dominant purpose" of the statute was "to provide benefits for survivors dependent or likely to be dependent upon the deceased annuitant" and "it would be absurd to say no part of the legislation would have been enacted without the requirement." *Id.*

Following *Gentry*, the U.S. Court of Claims and the Federal Circuit have repeatedly held that they had jurisdiction[8] to review equal protection claims to money-mandating statutes -- and to award damages -- when a class of claimants alleged that they had been unconstitutionally excluded from the statute or regulations. In *Sam v. United States*, 682 F.2d 925 (Ct. Cl. 1982), the plaintiff alleged that 5 U.S.C. §§ 5333(b) and 5334(a) and their implementing regulations violated equal protection by providing a cost-of-living adjustment to some employees but not others. Even though the statute and regulations did not authorize a cost-of-living adjustment for the plaintiffs, the court explained that it still had the power to resolve their equal protection claim:

> Plaintiffs' claim for money damages is based upon 5 U.S.C. §§ 5333(b) and 5334(a). Plaintiffs' equal protection challenge is based upon the Navy's interpretation of these statutes. Or put another way, plaintiffs' claim that the subject statutes, if correctly construed according to the [F]ifth [A]mendment, require this court to award money damages. This is precisely the type of claim over which this court has jurisdiction.

Id. at 935 (citing *Gentry*); *see also Wheeler v. United States*, 3 Cl. Ct. 686, 690 (Cl. Ct. 1983) (applying *Sam* to adjudicate equal protection challenge to statute and regulations concerning the wage scale for similarly situated federal employees).

The Federal Circuit has also reaffirmed *Gentry* and made clear that its reasoning also applies when a plaintiff's constitutional claim is based on substantive due process. *See Britell*, 372 F.3d at 1378-79.[9] The plaintiff in *Britell* was the wife of a captain in the Air National Guard who terminated her pregnancy after the fetus was diagnosed with a fatal condition called

[8] The courts in *Gentry* and its progeny analyzed the statutes' severability as part of their discussion of whether they had jurisdiction over the case. The Federal Circuit has since clarified that it now asks whether a remedy is available after severance as part of analyzing the merits of the claim, not as a question of jurisdiction. *See Fisher*, 402 F.3d at 1175; (Gov't Mot. at 16 n.5.)

[9] The government attempts to imply that *Gentry* has somehow been overruled because it was decided before *Richmond*, *see* (Gov't Mot. at 15), but *Britell* was decided after *Richmond* and makes clear that *Gentry* is still good law.

anencephaly. The plaintiff's insurer, the Civilian Health and Medical Program ("CHAMPUS"), refused to cover the cost of the abortion because it was explicitly barred by federal statute and regulation from paying for abortions except when the pregnancy endangers the life of the mother. The plaintiff sued under the Little Tucker Act, arguing that the ban on covering abortions violated the Fifth Amendment's guarantee of substantive due process in the case of a fetus with a fatal medical condition. Applying *Gentry,* the Federal Circuit held that it had the power to order that plaintiff be reimbursed because the statutory bar on funding abortions was severable from the remainder of the statute. The court explained that the ban on funding abortions could be severed because "[t]he CHAMPUS statute and regulations were enacted to 'create and maintain high morale in the uniformed services by providing an improved and uniform program of medical and dental care for members and certain former members of those services, and for their dependents,' 10 U.S.C. § 1071, a purpose completely unrelated to the funding (or non-funding) of abortions." *Britell*, 372 F.3d at 1379.

Applying these traditional principles of severability analysis, it is clear that if the Court finds that the separation-pay regulations are unconstitutional, the Court should sever the unconstitutional regulations and extend full separation pay to Mr. Collins and the class he represents instead of invalidating the entire statutory scheme and denying benefits to everyone. "[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Carnival Cruise Lines, Inc. v. United States*, 200 F.3d 1361, 1367 (Fed. Cir. 2000) (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987)). The dominant purpose of 10 U.S.C. § 1174 is to provide severance pay to ease service members' transition to civilian life -- not to regulate service members' sexual conduct or impose penalties on gay or lesbian service members. Indeed, the statutory text does not reference gay

and lesbian soldiers at all. There is no basis to conclude, and the government does not appear to argue, that Congress would have chosen to deny separation pay benefits to all other involuntarily discharged service members in order to avoid paying those benefits to service members discharged because of "[h]omosexuality."[10] Severability, not nullification, is therefore the remedial option that is most consistent with congressional intent.

Because severance instead of nullification is the remedy most consistent with traditional severability analysis and congressional intent, Mr. Collins and the class he represents will be entitled to the money-mandating remedy of full separation pay under 10 U.S.C. § 1174 if he prevails on the merits of his constitutional claims.

IV. Once the Unconstitutional Provisions of the Separation-Pay Policy Are Severed, the Remainder of the 10 U.S.C. § 1174, the DODI, and the AFI Entitle Mr. Collins and the Class to Full Separation Pay.

A. 10 U.S.C. § 1174 Authorizes Full Separation Pay Once the Unconstitutional Regulations Are Invalidated and Severed.

The government does not seriously contest that Congress would still have enacted the separation pay statute even if it had to extend those benefits to service members discharged for "[h]omosexuality." Instead, the government argues that it would be mechanically impossible to sever the unconstitutional portions of the DODI and AFI from the statutory scheme without re-writing the regulations entirely.

The basic flaw in the government's argument is that it improperly focuses on whether the unconstitutional portions of the regulations can be severed from the remainder of the regulations -- not on whether the unconstitutional regulations can be severed from the remainder of 10

[10] To the extent that the government intends to argue that Congress would have preferred the Court to nullify the entire separation-pay statute instead of providing benefits to Mr. Collins and the class he represents, that assertion would require an extensive factual inquiry into the history of the separation-pay policy and cannot be resolved on a motion to dismiss.

U.S.C. § 1174. If the government is correct, and the unconstitutional portions of regulations cannot be severed without rewriting the entire DODI and AFI, then the regulations must be struck down in their entirety as applied to service members discharged under "Don't Ask, Don't Tell." But the text of 10 U.S.C. § 1174 would continue to authorize full separation pay for Mr. Collins and the class he represents even in the absence of any valid regulations.

For regular enlisted service members covered by 10 U.S.C. § 1174(b), the default under the statute is that service members are entitled to full separation pay unless the Secretary of Defense promulgates regulations saying otherwise. *See id.* at § 1174(b)(2) ("Separation pay of an enlisted member shall be computed under paragraph (1) of subsection (d) [providing full separation pay], except that such pay shall be computed under paragraph (2) of such subsection [providing half separation pay] in the case of a member who is discharged under criteria prescribed by the Secretary of Defense."). If there are no constitutional regulations to apply, then enlisted service members who meet the other statutory conditions -- including service members discharged pursuant to "Don't Ask, Don't Tell" -- are by default entitled to full separation pay.

Regular officers and other service members covered by 10 U.S.C. §§ 1174(a) and 1174(c) would also be entitled to full separation pay under the statute if the regulations were invalidated in their entirety. The statute provides that such service members are "entitled to separation pay computed under subsection (d)(1) [full pay] or (d)(2) [half pay], as determined by the Secretary of the military department concerned." 10 U.S.C. §§ 1174(a)(1), 1174(a)(2), 1174(c)(1). The statute thus authorizes the Department of Defense to select whether the separation pay should be full pay or half pay, but in the absence of regulations from the Secretary of Defense, both types of pay are authorized by the statute (and fully appropriated by Congress). As a result, if the

Court determines that the equal protection and substantive due process guarantees of the Fifth Amendment prohibit the government from using "[h]omosexuality" or a "Don't Ask, Don't Tell" discharge as a basis for cutting service members' separation pay in half, then the Court has the power under the statute to remedy that violation by providing full pay to Mr. Collins and the class he represents.

B. The DODI Authorizes Full Separation Pay Once the Unconstitutional Portions of the DODI Are Invalidated and Severed.

Although it is not necessary to sever the unconstitutional portions of the regulations from the constitutional ones, such severance is mechanically possible.[11] The unconstitutional portions of the DODI can easily be severed from the constitutional portions. DODI sets out "four conditions" for receiving full separation pay. DODI 1332.29 § 3.1. There is no dispute that Mr. Collins and the class satisfy all of the conditions other than being "fully qualified for retention." *Id.* at § 3.1.3. The term "fully qualified for retention" is not defined in the statute or regulations. But the next section of the DODI lists several criteria -- including "[h]omosexuality" -- that would render a service member "not fully qualified" for retention and eligible for only half separation pay. *Id.* at § 3.2.3.1.4.

The unconstitutional portions of the DODI can therefore be severed simply by striking the reference to "Homosexuality" in section 3.2.3.1.4 from the remainder of the DODI. The government argues that Mr. Collins and the class he represents would still not be "fully qualified for retention" because they were discharged pursuant to "Don't Ask, Don't Tell," but there is no reason why the DODI -- which was enacted before the "Don't Ask, Don't Tell" statute -- should

[11] The government attempts to cast doubt on the court's ability to apply severability analysis to military regulations instead of statutes. (Gov't Mot. at 16.) But the Federal Circuit has made clear that traditional severability analysis applies when interpreting regulations, including regulations implicating the military. *See Preminger*, 517 F.3d at 1310 (holding that the same principles of severability apply to statutes and to regulations).

be interpreted to retroactively incorporate the "Don't Ask, Don't Tell" policy as part of what it means to be "fully qualified for retention" with respect to separation pay. If the fact that a service member was lawfully discharged from the military was enough to render the service member not "fully qualified for retention," then no service member would receive separation pay. The phrase "fully qualified for retention" should be read in light of the statute's purpose of "compensat[ing] career oriented service members who have been denied a career opportunity because of circumstances beyond their control." H.R. Rep. No. 101-665, at 135, reprinted in 1990 U.S.C.C.A.N. at 2995. When read in light of that statutory purpose and the requirements of the Fifth Amendment, service members discharged pursuant to "Don't Ask, Don't Tell" are as "fully qualified for retention" as any other involuntarily discharged service member and should receive full separation pay under the remaining portions of the DODI.

If, alternatively, the Court concludes that the phrase "fully qualified for retention" must be interpreted to exclude all service members who are discharged pursuant to "Don't Ask, Don't Tell," then section 3.1.3, which contains the "fully qualified for retention" requirement, can itself be invalidated as unconstitutional as applied to Mr. Collins and the class he represents and can be severed from the rest of the "four conditions" for receiving full separation pay under the DODI. Once section 3.1.3 is severed, Mr. Collins and the class he represents would satisfy the remaining criteria under the DODI and be entitled to full separation pay.

C. The AFI Authorizes Full Separation Pay Once the Unconstitutional Portions of the AFI Are Invalidated and Severed.

The government prefers to focus on the AFI instead of the DODI. Unlike the DODI, which lists a "high year of tenure" discharge as merely one example of a type of discharge in which a service member would be fully qualified for retention, the AFI moves the reference to "fully qualified for retention" into a different subsection. By reshuffling the elements of the

DODI, the AFI appears to require that, in order to receive full separation pay, a service member must both be (1) fully qualified for retention and (2) discharged pursuant to (a) an early release program, (b) a high tenure policy, or (c) a reduction in force program. *See* AFI § 9.2.1. The government thus argues that even if Mr. Collins and the class he represents are deemed "fully qualified for retention," they will not have satisfied the other purported requirements of the AFI.

The short response to this argument is that to the extent that the AFI conflicts with the DODI, the DODI controls. "It is well established that if regulations promulgated by a service chief conflict with those issued by the Secretary of Defense or the relevant Secretary of a military service, the former are invalid when, and to the extent, that they conflict with regulations issued by a superior in the chain of command." *Strickland v. United States*, 69 Fed. Cl. 684, 703 (2006); *accord Peoples v. United States*, 87 Fed. Cl. 553, 572 n.17 (2009). The DODI states that a service member is entitled to separation pay if he or she is fully qualified for retention, and lists the high tenure policy as one example of how a service member could be deemed fully qualified for retention. To the extent that the AFI purports to add additional requirements beyond being "fully qualified for retention," the AFI conflicts with the clear language of the DODI and is unenforceable.

An additional answer is that the types of discharges listed in section 9.2 of the AFI are not additional "requirements" for receiving full separation-pay. They are simply a list of which types of discharges have been selected for full separation pay. In the context of deciding which types of separations qualify for full separation pay, the decision by the Department of Defense to leave "[h]omosexuality" off the list of discharges that qualify for full separation pay under section 9.2 is the same thing as a decision to put "[h]omosexuality" on the list of discharges that qualify for only half pay under section 9.3. Regardless of how the AFI is drafted, it is

unconstitutional to exclude honorably discharged service members from receiving full separation pay solely because they were discharged for "[h]omosexuality" or pursuant to "Don't Ask, Don't Tell" and not for some other reason. If Mr. Collins prevails on the merits of his claims, then the AFI's attempt to restrict full separation pay to the types of discharges listed in section 9.2 is unconstitutional as applied to service members who are honorably discharged pursuant to "Don't Ask, Don't Tell," and sections 9.2.1 through 9.2.3 should be severed from the remainder of the AFI.

Whether the DODI and AFI are saved through severance or whether they are invalidated in their entirety, the remainder of 10 U.S.C. § 1174 can plainly be severed from the unconstitutional regulations, and those remaining provisions entitle Mr. Collins and the class he represents to the full separation pay they seek.

V. Mr. Collins Can Challenge the Constitutionality of the Separation-Pay Policy Without Also Challenging the Constitutionality of "Don't Ask, Don't Tell."

At the very end of its motion, the government briefly asserts that because Mr. Collins does not challenge his discharge pursuant to "Don't Ask, Don't Tell," he and the class of people he represents cannot challenge the military's decision to cut their separation pay in half. (Gov't Br. at 16-17.) But the constitutionality of a service member's discharge is an entirely separate question from the constitutionality of reducing separation pay after the discharge is complete. Nothing in 10 U.S.C. § 654 or any other statute requires the Department of Defense to cut separation pay in half for service members who are involuntarily separated pursuant to "Don't Ask, Don't Tell." Even if gay and lesbian service members could have been constitutionally discharged under "Don't Ask, Don't Tell," -- *but see Witt v. U.S. Dep't of Air Force*, 739 F. Supp. 2d 1308 (W.D. Wash. 2010) (declaring policy unconstitutional); *Log Cabin Republicans v.*

United States, 716 F. Supp. 2d 884 (C.D. Cal. 2010) (same) -- that does not automatically justify a separate policy of gratuitously cutting their separation pay in half.

This Court addressed this very distinction in *Watson v. United States*, 49 Fed. Cl. 728 (Fed. Cl. 2001). The plaintiff in *Watson* had brought an unsuccessful case in the Ninth Circuit challenging the constitutionality of his discharge under "Don't Ask, Don't Tell." After losing that case, the plaintiff brought a separate lawsuit in this Court challenging the constitutionality of the separation-pay policy. This Court held that the lawsuit could proceed despite the unsuccessful Ninth Circuit case and explained that "a conclusion about the constitutionality of a discharge under DADT does not require a conclusion about halving separation pay." *Id.* at 732.

This distinction also reflects the fact that none of the policy rationales for "Don't Ask, Don't Tell" apply in the context of awarding separation pay. Congress has cited the promotion of unit cohesion and military efficiency as justifications for "Don't Ask, Don't Tell."[12] Even assuming the validity of those justifications in the context of removing gay and lesbian service members from the military, cutting separation pay in half cannot have any effect on unit cohesion or military efficiency because those members have already been separated from service. *See Watson*, 49 Fed. Cl. at 732 (noting that halving separation pay "is only done under the Separation Pay Policy after discharge").

Moreover, different constitutional standards apply when the government allocates separation pay after discharge than when it makes the initial decision to discharge a service member. The Federal Circuit has noted that "[s]pecial deference must be given by a court to the

[12] The Department of Defense has now admitted that those justifications are meritless. See U.S. Dep't of Def., Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell" (Nov. 30, 2010), available online at http://www.defense.gov/home/features/2010/0610_gatesdadt/DADTReport_FINAL_20101130(secure-hires).pdf.

military when adjudicating matters involving their decisions on discipline, morale, composition and the like," *Woodward*, 871 F.2d at 1077, but the court has also held that these concerns do not apply when "the issue is not the composition of the military, but the society's legal obligations to those who are no longer within the military forces," *Fisher*, 402 F.3d at 1182. This distinction accords with courts' long-standing practice of reviewing military benefits decisions without the same deference given to other military matters. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (invalidating discriminatory military pay policy without extending any deference to military context). As the Seventh Circuit has explained: "In *Frontiero*, the High Court considered the constitutionality of a statute governing receipt of medical and dental benefits by members of the armed services, without even mentioning the need to weigh special military concerns and apply a different level of scrutiny. Thus, not all review of constitutional claims that are somehow related to the military requires application of a different and more permissive standard." *Ogden v. United States*, 758 F.2d 1168, 1180 n.8 (7th Cir. 1985) (citation omitted); *see also Schumacher v. Aldridge*, 665 F. Supp. 41, 52 (D.D.C. 1987) (rejecting government's argument that military must be accorded "heightened deference" in deciding whether to pay benefits to former merchant marines and explaining: "The issues in this case do not touch upon matters of national security or military preparedness, but go merely to the administration of public benefits. Under this circumstance, no special deference is appropriate.").

142 service members were honorably discharged between November 10, 2004 and November 10, 2010 pursuant to "Don't Ask, Don't Tell." Whether or not the "Don't Ask, Don't Tell" policy was unconstitutional, the government admits the policy was unfair and un-American. *See* Remarks by the President and Vice President at Signing of the Don't Ask, Don't Tell Repeal Act of 2010 (Dec. 22, 2010) ("For we are not a nation that says, 'don't ask, don't

tell.' We are a nation that says, 'Out of many, we are one.' We are a nation that welcomes the service of every patriot. We are a nation that believes that all men and women are created equal. Those are the ideals that generations have fought for. Those are the ideals that we uphold today."), available online at http://www.whitehouse.gov/the-press-office/2010/12/22/remarks-president-and-vice-president-signing-dont-ask-dont-tell-repeal-a. This lawsuit does not purport to seek relief for those 142 service members' involuntary discharge, but it does challenge the government's gratuitous decision to "rely on the effects of this past discrimination as a justification for heaping on additional economic disadvantages" upon gay and lesbian service members with respect to their separation pay. *Frontiero,* 411 U.S. at 689 n.22. The government has moved to dismiss but fails to provide any explanation for how the discriminatory separation-pay policy is constitutional or serves any legitimate governmental interest at all. This Court should deny the government's motion and allow this case to be decided on the merits.

CONCLUSION

For all these reasons, the government's motion to dismiss should be denied.

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Respectfully submitted,

s/ Joshua A. Block

Joshua A. Block
Attorney of Record
Leslie Cooper*†
LGBT and AIDS Project
ACLU Foundation
125 Broad Street, Floor 18
New York, New York 10004
(212) 549-2600
Facsimile (212) 549-2650
jblock@aclu.org
lcooper@aclu.org

Laura Schauer Ives*†
Staff Attorney
ACLU of New Mexico
P.O. Box 566
Albuquerque, NM 87103-0566
(505) 243-0046
Facsimile (505) 266-5916
lives@aclu-nm.org

Matt Garcia*†
Co-Legal Director of
ACLU of New Mexico
Bach & Garcia LLC
300 Central SW, Suite 2000 East
Albuquerque, NM 87102

Sara Berger*
Freedman Boyd Hollander Goldberg
Ives & Duncan, PA

(505) 899-1030
Facsimile (505) 899-1051
matt@bachgarcia.com

George Bach*†
Cooperating Attorney for
ACLU of New Mexico
Bach & Garcia LLC
300 Central SW, Suite 2000 East
Albuquerque, NM 87102
(505) 899-1030
Facsimile (505) 899-1051
george@bachandgarcia.com

Cooperating Attorney for
ACLU of New Mexico
20 First Plaza, Suite 700
Albuquerque, NM 87102
(505) 842-9960
Facsimile (505) 842-0761
skb@fbdlaw.com

* Of Counsel
† *Pro Hac Vice* Motion to Follow

Attorneys for Plaintiff

CERTIFICATE OF FILING

I hereby certify under penalty of perjury that on the 10th day of June, 2011, a copy of the foregoing "Plaintiff's Response to Defendant's Motion to Dismiss" and "Exhibit A" were filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Joshua A. Block