

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

----- -X  
LIEUTENANT COLONEL JANE ABLE, :  
PETTY OFFICER ROBERT HEIGL, :  
FIRST LIEUTENANT KENNETH OSBORN, :  
SERGEANT STEVEN SPENCER, :  
LIEUTENANT RICHARD von WOHLD and :  
SEAMAN WERNER ZEHR, :  
 :  
Plaintiffs, :  
 :  
-against- : CIVIL ACTION  
 : NO. \_\_\_\_\_  
UNITED STATES OF AMERICA and :  
WILLIAM J. PERRY, SECRETARY OF :  
DEFENSE, in his official capacity, :  
 :  
Defendants. :  
----- X

COMPLAINT FOR DECLARATORY JUDGMENT  
AND INJUNCTIVE RELIEF

Plaintiffs Lieutenant Colonel Jane Able, Petty Officer Robert Heigl, First Lieutenant Kenneth Osborn, Sergeant Steven Spencer, Lieutenant Richard von Wohld and Seaman Werner Zehr, for their complaint in this action allege:

NATURE OF THE ACTION

1. This action for declaratory and injunctive relief challenges the recently enacted federal law excluding lesbians and gay men from serving in the United States Armed Forces, Section 571 of the National Defense Authorization Act for the Fiscal Year 1994 ("Policy Concerning Homosexuality in the Armed Forces") (the "Act"), and the Department of Defense Regulations promulgated under the Act (the "DoD Regulations"). The Act and

DoD Regulations profoundly intrude upon two of the most valued principles embodied in the United States Constitution -- that all Americans have the right to be treated equally under the law, judged on the basis of their abilities rather than according to the prejudice of others; and that the government may not restrict the content and viewpoint of the speech and other expression of some Americans based on the prejudices of others.

2. Each of the plaintiffs is a lesbian or gay member of the United States armed services who has served his or her country for years, and in some instances for decades, and has served bravely, honorably and with distinction. The Act and the DoD Regulations impose upon plaintiffs, and all lesbians and gay men in the armed services, a restrictive and punitive set of rules that is unrelated to fitness and ability to serve and to which heterosexual service members are not subject. The Act and the DoD Regulations serve no legitimate and rational government or military interest, but rather are based solely on the presumed prejudices of heterosexual service members and civilians.

3. Plaintiffs seek to continue to serve their country, being judged on their actual abilities and performance, free of the Act's and DoD Regulations' discriminatory regime regarding their speech and behavior. Plaintiffs therefore bring this suit to obtain a declaration from this Court that the Act and the DoD Regulations impermissibly deprive them of rights guaranteed by the United States Constitution and to enjoin enforcement of the Act and the DoD Regulations.

JURISDICTION

4. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331 and 1346.

VENUE

5. Venue lies properly in this District under 28 U.S.C. § 1391(e).

PARTIES

6. Plaintiffs fear that petitioning this Court in their own names will subject them to investigation and discharge pursuant to the Act and the DoD Regulations, as well as to other possible harm. Plaintiff Lieutenant Colonel Jane Able, U.S.A. (Res.), a pseudonym, has, therefore, decided to proceed in this action pseudonymously.

7. Lieutenant Colonel Able, U.S.A. (Res.) commands an Army Reserve battalion. She has served for more than twenty years in the United States Army and the United States Army Reserve. Lieutenant Colonel Able cannot provide additional details about her state citizenship, unit or length of service because to do so would identify her.

8. Plaintiff Petty Officer Robert Heigl, U.S.C.G., has served on active duty as a corpsman at the Governor's Island Coast Guard facility since September 1988. Petty Officer Heigl resides in this District.

9. Plaintiff First Lieutenant Kenneth Osborn, U.S.A. (Res.), a citizen of the State of California, serves with the 155th Corps Support Battalion Headquarters, South El Monte, California. He has been a member of the Army Reserve since 1986. Prior to 1986, Lieutenant Osborn served for approximately one year in the California National Guard and for approximately two and one-half years with the United States Marine Corps Reserve.

10. Plaintiff Sergeant Steven Spencer, U.S.A. (Res.), a citizen of the State of Washington, served from 1990 to 1992 as a combat medic and, since 1992, has served as a licensed practical nurse, with the 164th Mobile Army Surgical Hospital at Camp Murray, Washington. Sergeant Spencer served on active duty with the United States Army from 1987 to 1990.

11. Plaintiff Lieutenant Richard von Wohld, U.S.N. (Res.), is a citizen of the State of California and has served for approximately [ten months] as a naval Flight Officer with Patrol Squadron 91, a reserve squadron at Naval Air Station Moffett Field, California. Lieutenant von Wohld enlisted in the United States Navy in 1979, earned an appointment to the United States Naval Academy in 1981, was commissioned as an Ensign in 1985 and served on active duty in the United States Navy until April 1993.

12. Seaman Werner Zehr, U.S.N., has served for approximately one month with Surface Group 6, Fort Wadsworth, Staten Island, New York. Prior to his recent assignment, Seaman

Zehr had served as a quartermaster on the U.S.S. Clifton Sprague. He enlisted in the United States Navy in November 1991.

13. Defendant Secretary of Defense William J. Perry is sued in his official capacity. In that capacity, he is charged with the supervision of plaintiffs and implementation and enforcement of the Act and the DoD Regulations.

#### FACTS

14. The Act and DoD Regulations establish a new body of law governing the exclusion of lesbians and gay men from service in the United States Armed Forces. In effect, the Act and DoD Regulations require the separation of virtually any gay or lesbian service member whose identity as such becomes known.

15. The Act requires that a member of the armed forces shall be separated from service, or that a potential service member be denied accession to the service, if the service member or potential service member (i) has engaged or attempted to engage in a "homosexual act"; (ii) "has stated that he or she is a homosexual, or words to that effect"; or (iii) has "married or attempted to marry a person known to be of the same biological sex," unless the service member or potential service member can prove, among other facts, that he or she "does not have a propensity or intent to engage in homosexual acts."

16. The DoD Regulations provide that "[h]omosexual conduct is grounds for separation from the Military Service." However, homosexual "conduct" is defined exceedingly broadly to

include a "homosexual act, a statement by a [service] member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage."

17. Moreover, although the DoD Regulations provide that the Uniform Code of Military Justice's (the "UCMJ") prohibition on sexual misconduct be enforced "in an even-handed manner, without regard to whether the alleged sexual misconduct involves homosexual or heterosexual conduct," the speech and behavior proscribed for lesbians and gay men by the Act and DoD Regulations is distinct from and much more expansive than the sexual misconduct (both heterosexual and homosexual) prohibited by the UCMJ. For example, a "homosexual act" expansively and vaguely includes "any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires" or "any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in" such acts.

18. The DoD Regulations establish an elaborate scheme under which investigations and discharge proceedings may be commenced if a commander concludes that there exists "credible evidence" that a service member has engaged in speech or behavior classified by the Act and DoD Regulations as "homosexual conduct." At that point the Act and DoD Regulations require that the service member be separated unless he or she can "present[] evidence that he or she does not engage in homosexual acts or does not have a propensity or intent to do so." Because the Act

and DoD Regulations' define a "homosexual" as someone who "engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts," it is impossible for a lesbian or gay service member to rebut the presumption.

19. The Act and the DoD Regulations erect a distinction between the speech and behavior permissible for heterosexuals and the speech and behavior permissible for plaintiffs and other gay men and lesbians in the armed services. This distinction serves no legitimate and rational government or military interest, but rather is based solely on the prejudices and presumed prejudices of heterosexual service members and civilians.

20. Furthermore, the Act and DoD Regulations proscribe, punish and chill all public and private speech and expressive behavior that would tend to identify plaintiffs as gay men or lesbians, and do so on the basis of the content and viewpoint of such speech and expression. The provisions similarly burden, chill and circumscribe plaintiffs' exercise of their rights of expressive and intimate association.

21. The vague and overbroad Act and DoD Regulations render it impossible for plaintiffs to know what speech or behavior will subject them to a range of sanctions, including discharge proceedings.

22. Plaintiffs have no adequate remedy at law.

FIRST CLAIM FOR RELIEF

VIOLATION OF THE FIFTH AMENDMENT (EQUAL PROTECTION)

23. Plaintiffs repeat and reallege paragraphs 1 - 22 as if set forth herein in full.

24. The Act and the DoD Regulations violate plaintiffs' right to equal protection of the law under the Fifth Amendment to the United States Constitution. The Act and the DoD Regulations intentionally discriminate against gay and lesbian service members, including plaintiffs, and subject them to different and punitive treatment.

25. As a result of the violations of plaintiffs' right to equal protection of the law under the Fifth Amendment, plaintiffs are suffering injury and will suffer further irreparable harm to their constitutional rights if the Act and the DoD Regulations are not declared unconstitutional and defendant Secretary of Defense is not enjoined from enforcing the Act and the DoD Regulations.

SECOND CLAIM FOR RELIEF

VIOLATION OF THE FIRST AMENDMENT  
(FREE SPEECH AND FREE EXPRESSION)

26. Plaintiffs repeat and reallege paragraphs 1 - 25 as if set forth herein in full.

27. Because of the impermissible content-based and viewpoint-based burdens imposed by the Act and the DoD

Regulations, as well as their chilling effect, the Act and the DoD Regulations violate plaintiffs' First Amendment rights of free speech and free expression, as well as the rights of plaintiffs and other service members, whether lesbian and gay or not, to receive the protected speech that the Act and the DoD Regulations impermissibly prohibit, chill and burden.

28. Plaintiffs are already suffering injury and will suffer further irreparable harm to their constitutional rights under the First Amendment if the Act and the DoD Regulations are not declared unconstitutional and defendant Secretary of Defense is not enjoined from enforcing the Act and the DoD Regulations.

#### THIRD CLAIM FOR RELIEF

##### VIOLATION OF THE FIRST AND FIFTH AMENDMENTS (EXPRESSIVE AND INTIMATE ASSOCIATION)

29, Plaintiffs repeat and reallege paragraphs 1 - 28 as if set forth herein in full.

30. By broadly punishing any associational activity that might identify plaintiffs as lesbian or gay service members, the Act and the DoD Regulations violate plaintiffs' rights of expressive and intimate association, as embodied in the First and Fifth Amendments.

31. Plaintiffs are already suffering injury and will suffer further irreparable harm to their constitutional rights under the First and Fifth Amendments if the Act and the DoD Regulations are not declared unconstitutional and defendant

Secretary of Defense is not enjoined from enforcing the Act and the DoD Regulations.

FOURTH CLAIM FOR RELIEF

VIOLATION OF THE FIRST AND FIFTH AMENDMENTS  
(VAGUENESS AND OVERBREADTH)

32. Plaintiffs repeat paragraphs 1 - 31 as if set forth herein in full.

33. The Act and the DoD Regulations are vague, unintelligible, inconsistent and overbroad, and fail to give plaintiffs (and other lesbian and gay service members) adequate notice of what speech, conduct or behavior is proscribed and/or can form the basis for investigation and discharge.

34. The Act and the DoD Regulations therefore violate plaintiffs' rights under the First and Fifth Amendments to the United States Constitution.

35. As a result of the violations of plaintiffs' rights under the First and Fifth Amendments, plaintiffs are already suffering injury and will suffer further irreparable harm to their constitutional rights if the Act and the DoD Regulations are not declared unconstitutional and defendant Secretary of Defense is not enjoined from enforcing the Act and the DoD Regulations.

PRAYER FOR RELIEF

Plaintiffs accordingly demand:

a) a declaration that the Act and the DoD Regulations are unconstitutional on their face and as applied to plaintiffs;

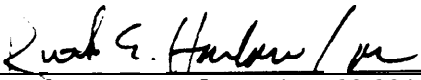
b) a preliminary and permanent injunction enjoining defendant Secretary of Defense from enforcing the Act and the DoD Regulations and;

c) costs, disbursements and attorneys fees related to this action; and

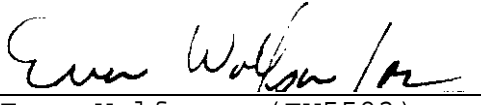
d) any additional further relief this Court deems appropriate.

Dated: New York, New York  
March 7, 1994

Respectfully submitted,


  
Ruth E. Harlow (RH6862)  
William B. Rubenstein  
Marc E. Elovitz

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
132 West 43rd Street  
New York, New York 10036  
(212) 944-9800 (ext. 545)

  
Evan Wolfson (EW5583)  
Beatrice Dohrn

LAMBDA LEGAL DEFENSE &  
EDUCATION FUND  
666 Broadway  
New York, New York 10012  
(212) 995-8585

-and-

  
David H. Braff (DB0761)  
Michael Lacovara (ML9820)  
Penny Shane  
Julie B. Crockett  
Eulalia M. Mack

125 Broad Street  
New York, New York 10004  
(212) 558-4000

Attorneys for Plaintiffs