**IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES**

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| **UNITED STATES,** *Appellee,* | ) | |
| v. | ) | USCA Dkt. No. 02-0944/AF |
| Technical Sergeant (E-6) **ERIC P. MARCUM** 524-96-3314, USAF, *Appellant.* | ) | Crim. App. No. 34216 |

**BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANT ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, SERVICEMEMBERS LEGAL DEFENSE NETWORK, AND RETIRED MEMBERS OF THE MILITARY**


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**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:**

*Amici Curiae*, the American Civil Liberties Union (ACLU), the American Civil Liberties Union of the National Capital Area (ACLU-NCA), Lambda Legal Defense and Education Fund, Inc. (Lambda Legal), Servicemembers Legal Defense Network (SLDN), and several retired members of the military,[1] respectfully submit this Brief in support of Appellant Technical Sergeant Eric P. Marcum limited to the Supplemental Issue of whether his conviction for violating Article 125 of the Uniform Code of Military Justice ("UCMJ") by engaging in consensual sodomy must be set aside in light of *Lawrence v. Texas,* 123 S. Ct. 2472 (2003).

## INTRODUCTION AND SUMMARY

More than a decade ago, this Court considered whether a conviction under Article 125 for private, consensual sodomy was unconstitutional in the companion cases of *United States v.*

[1] The interests of the organizations were described in the Motion for Leave to File a Brief of *Amici Curiae* and to Participate in Oral Argument, filed September 17, 2003. The Court granted the motion on September 23, 2003. A motion by Retired Members of the Military to join this Brief of A*mici Curiae* is submitted concurrently with this Brief.

*Fagg*, 34 M.J. 179 (1992), and *United States v. Henderson*, 34 M.J. 174 (1992). This Court provided one justification for upholding the criminal convictions for heterosexual sodomy: the Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). Citing *Bowers*, this Court stated that "we detect no indication from the Supreme Court which permits us to override the intent of Congress," *Fagg*, 34 M.J. at 180, and that "absent authority from the Supreme Court, we cannot declare that there is a right to privacy in the Constitution that invalidates an Act of Congress outlawing [sodomy]," *Henderson*, 34 M.J. at 178.

The Supreme Court has now unequivocally given that authority. Last Term, in *Lawrence,* the Court explicitly overruled *Bowers*, holding that the Constitution protects a fundamental right of consenting adults to make private sexual decisions without interference from the government, and struck down criminal prohibitions on private, consensual sodomy. In absolute and unqualified language that applies only to the most fundamental of liberty interests, the Court stated that the Texas sodomy prohibition was unconstitutional because it infringed a "realm of personal liberty which the government may not enter." 123 S. Ct. at 2484. As in *Lawrence*, TSgt Marcum's conviction at issue here is unconstitutional because it was based solely upon a court-martial finding of private, consensual sodomy.

Although under *Lawrence* "statutory prohibitions on consensual sodomy . . . are unconstitutional," *Doe v. Pryor,* No. 02-14899, 2003 WL 22097758, at *6 (11th Cir. Sept. 11, 2003), the United States argues that Article 125 is exempt from that general rule for two reasons. First, the United States says *Lawrence* did not recognize a "fundamental right to engage in sodomy" and thus requires only the most deferential form of review. Second, it contends that Article 125 should avoid the fate of every civilian sodomy statute under *Lawrence* because the statute regulates the military and judicial deference to Congressional decision-making requires

this Court to uphold the criminal prohibition. The United States misapplies the doctrine of military deference, and its reading of *Lawrence* cannot be squared with what the Supreme Court actually said.

The United States attempts to justify TSgt Marcum's conviction and Article 125 generally as necessary to preserve good order and discipline in the armed forces, and ultimately under the umbrella interest in "national security." Yet the United States points only to particular *relationships* that may be detrimental to military discipline (such as relationships between service members and their direct superiors) and to sexual activity that occurs without one partner's consent. An Article 125 conviction, however, requires proof only of "unnatural carnal copulation" and penetration; the government need not show lack of consent, a superior-subordinate relationship, harm to discipline, or disruption of good order and morale. Moreover, other criminal statutes and regulations address both lack of consent and sex between superiors and subordinates. Article 125 is both overbroad and underinclusive. It is not tailored—narrowly or otherwise—to further the interests the United States now asserts in this litigation.

The doctrine of military deference does not change the due process analysis in this case. As the Supreme Court has made clear, Congress is not "free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause." *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981). Although courts give deference in the constitutional analysis when Congress has made "judgments on military needs and operations," *id.* at 69 n.6, no such judgment was made in enacting Article 125. Congress simply based Article 125 on Maryland's then-existing sodomy statute as part of a codification of common law civilian crimes; a different portion of the UCMJ created the "separate discipline from that of the civilian," *Parker v. Levy*, 417 U.S. 733, 744 (1974), that

reflects uniquely military offenses. And while "courts must give great deference to the professional judgment of military authorities *concerning the relative importance of a particular military interest*," *Goldman v. Weinberger,* 475 U.S. 503, 507-508 (1986) (emphasis added), the importance of good order and discipline or national security is not in dispute here. Article 125, however, is not sufficiently tailored to advance those interests.

## FACTUAL BACKGROUND

### A. Procedural History

TSgt Marcum was tried by a general court-martial comprised of officer members in May 2000 on multiple criminal charges. He was sentenced to a dishonorable discharge, confinement for ten years, reduction to Airman Basic, and total forfeiture of pay and allowances; the convening authority approved the sentence up to confinement for six years. The Air Force Court of Criminal appeals affirmed the findings and sentence on July 15, 2002. TSgt Marcum appealed to this Court, which granted review of this Supplemental Issue on August 29, 2003.

Only one charge against TSgt Marcum—Charge II, Specification 1, which alleged sodomy committed with SrA Robert Harrison—is relevant to the Supplemental Issue. At trial, both TSgt Marcum and SrA Harrison described several sexual encounters between them, all of which took place in TSgt Marcum's private home. Although SrA Harrison admitted that he and TSgt Marcum were very close, had engaged in hugging, kissing and close dancing, and had on previous occasions fallen asleep together after drinking heavily, he ultimately testified that during one incident he woke up to find TSgt Marcum performing oral sex upon him. TSgt Marcum admitted that he made oral contact with SrA Harrison's penis on that occasion, but said that SrA Harrison was awake during the encounter and consented to the conduct. (R. 471-480, 527.) There was no dispute that the alleged sodomy took place in private.

After hearing this testimony, and clearly crediting TSgt Marcum's account of the incident, the court-martial members found TSgt Marcum not guilty of forcible sodomy, but guilty of the lesser included offense of consensual sodomy. (R. 775-76.) Accordingly, TSgt Marcum's conviction and sentence for Charge II, Specification 1 rest solely upon a court-martial finding that he engaged in private, consensual oral sex. The members did *not* find that the sexual activity occurred without consent, violated rules prohibiting sex between a superior and subordinate, was harmful to discipline, or was disruptive to good order and morale.

**B. Article 125's Prohibition on Consensual Oral Sex.**

Article 125 provides:

> Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

10 U.S.C. § 925(a). "Unnatural carnal copulation" is defined as the "tak[ing] into...the mouth or anus the sexual organ of another person . . . or to place that person's sexual organ in the mouth or anus of another person." Manual for Courts-Martial, United States (1995 ed.), Part IV, ¶ 51c; *Henderson*, 34 M.J. at 176. Accordingly, Article 125 prohibits all oral and anal sex—both heterosexual and homosexual. It even covers oral and anal sex between husband and wife. *See United States v. Scoby*, 5 M.J. 160, 165 (C.M.A. 1977). This Court has recognized the breadth of Article 125's scope:

> By its terms, Article 125 prohibits every kind of unnatural carnal intercourse, whether accomplished by force of fraud, or with consent. Similarly, the article does not distinguish between an act committed in the privacy of one's home, with no person present other than the sexual partner, and the same act committed in a public place in front of a group of strangers, who fully apprehend the nature of the act.

*Scoby*, 5 M.J. at 163. A conviction for Article 125 requires proof of two elements: (1) unnatural carnal copulation and (2) penetration. No further findings are required.

The penalties under Article 125 are severe. Consensual sodomy is punishable by "[d]ishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years." Manual for Courts-Martial, United States Pt. IV, ¶51(e)(4). As a result, punishment for sodomy is more severe than the punishment for negligent homicide, extortion, assault upon a child under 16 years, and aggravated assault other than with a loaded firearm. *See* Manual for Courts-Martial, United States Pt. IV, ¶85e, at IV-110; *id.* at ¶53e, at IV-81; *id.* at ¶54e(7), (8), at IV-85.

A vast majority of members of the military engage in the conduct criminalized by Article 125. As one study of military sexual practices noted, "[i]t seems reasonable to assume, based on general population estimates, that a majority of both married and unmarried military personnel engage in oral sexual activity, at least occasionally." *See* RAND, *Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment* 58 (1993) (citing surveys indicating that 88 percent of men and 87 percent of women surveyed considered oral sex to be "very normal" or "all right" and that 79 percent of U.S. men between ages 20-39, including 80 percent of married men, had received oral sex). Several cases pending before military courts of appeals raise challenges to Article 125 convictions for private, consensual sodomy, and most involve defendants accused of engaging in heterosexual sodomy.[2]

### C. The Legislative History of Article 125.

The UCMJ includes two types of crimes: (1) common-law offenses, sometimes called "civil type" offenses, and (2) uniquely military offenses. *See United States v. Harris*, 8 M.J. 52 at 55-56 (C.A.A.F. 1999) (quoting the legislative history of the UCMJ as distinguishing between

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[2] *See, e.g., United States v. Davis*, ACM 3387, USCA Dkt. No. 02-0065/AF (C.A.A.F.); *United States v. Allen*, ACM 34174, USCA Dkt. No. 03-0454/AF (C.A.A.F.); *United States v. Christian*, No. 200100734 (Navy-Marine Corps Court of Criminal Appeals); *United States v. Meno*, No. 20000733 (United States Army Court of Criminal Appeals).

"so-called military offenses" and "civil types of crimes"); 1 Frances A. Giligan & Fredric I. Lederer, *Court-Martial Procedure* 16 (2d ed. 1999); Charles A. Shanor & L. Lynn Hogue, *Military Law in a Nutshell* 184-201 (2d ed. 1996) (describing the distinction between "common law crimes" and "peculiarly military offenses"). The prohibitions against "common law crimes" were enacted to subject service members to basic norms of civil society; in the military and combat offenses, "[t]he Code likewise imposes other sanctions for conduct that in civilian life is not subject to criminal penalties." *Parker*, 417 U.S. at 749.

Article 125 falls in the common-law offense category and traces its history to the wholesale adoption of the British Articles of War by the Continental Congress in 1775. *See* James E. Valle, *Rocks and Shoals: Order and Discipline in the Old Navy 1800-1861*, at 40-41 (1980). The British Articles of War had in turn incorporated, by use and custom, British common law prohibitions against murder, suicide, manslaughter, burglary, arson, robbery, larceny, rape, sodomy and mayhem. *See* William Winthrop, *Military Law and Precedent* 67-72 (2d ed. 1920). Congress first enumerated a number of common-law offenses, including sodomy, as military crimes in 1920 when it amended the Articles of War. *See* Article 93, Army Manual for Courts Martial (1928). Congress enacted the UCMJ in 1950. It continued to criminalize the British common-law felonies listed in the Articles of War, but explicitly defined them based on the civilian laws of Maryland. *See Henderson*, 34 M.J. at 176 ("The range of conduct proscribed by Article 125(a) is consistent with the then-existing laws of Maryland, after which the common-law punitive articles were generally patterned."); House Rep. No. 491 on H.R. 4080, 81st Cong., 1st Sess., p. 35 (1949); Senate Report No. 486 on H.R. 4080, 81st Cong. 1st Sess., p. 32 (1949) ("The civil types of crimes in the Articles of War, as defined by the Manual, are generally based on the common-law definition of the State of Maryland."). As a result, the 1920 one-word

prohibition against "sodomy" was changed to a criminal prohibition against "engag[ing] in unnatural carnal copulation with another person of the same or opposite sex." 10 U.S.C. § 925(a). There is *no* separate legislative history expressing a congressional purpose in prohibiting consensual sodomy through Article 125, other than the general purpose to prohibit the kinds of criminal conduct generally proscribed in civil society. *See Harris*, 8 M.J. at 55. As this Court has said, "[t]he background material on the adoption of the UCMJ indicates Congress made no findings as to the possible harmful consequences of privately performed sexual acts upon the military community." *Scoby*, 5 M.J. at 165.

## ARGUMENT

Like the Texas statute invalidated in *Lawrence*, Article 125 criminalizes private, consensual sexual conduct.[3] Under this Court's own precedent, and in light of the relevant legislative history, the Supreme Court's decision in *Lawrence* should be both the beginning and end of this Court's analysis.

### I. *LAWRENCE* RECOGNIZED A FUNDAMENTAL RIGHT TO MAKE DECISIONS REGARDING PRIVATE, CONSENSUAL SEXUAL CONDUCT.

In *Lawrence*, the Supreme Court overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), and held the Texas sodomy prohibition unconstitutional because the Due Process Clause of the Fourteenth Amendment protects a fundamental right of adults to make decisions regarding private, consensual sexual conduct, including sodomy.[4] *Lawrence* recognized a "due process

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[3] Unlike Article 125, the Texas statute prohibited only sodomy between people of the same sex. Tex. Penal Code Ann. § 21.06(a) (2003). The Supreme Court made clear that it resolved the constitutional question on Due Process rather than Equal Protection grounds so as to leave no doubt that a statute that "prohibit[s] conduct both between same-sex and different-sex participants" is also invalid. *Lawrence*, 123 S. Ct. at 2482.

[4] The Due Process Clause of the Fifth Amendment, like that of the Fourteenth, has a substantive liberty component. *Lawrence*, 123 S. Ct at 2484; *Troxel v. Granville*, 530 U.S. 57, 65 (2000)

right to demand respect for conduct protected by the substantive guarantee of liberty," 123 S. Ct. at 2482, and held that this right of the male petitioners is a "full right" that can be engaged in "without intervention of the government," *id.* at 2484, part of "a realm of personal liberty which the government may not enter," *id.* at 2478. Sodomy is conduct that persons are free "to choose without being punished as criminals," *id.* at 2473, and that the government "cannot demean . . . by making . . . a crime," *id.* at 2484.

*Lawrence* wiped away the sole justification that kept this Court from striking down Article 125 a decade ago. In a pair of cases rejecting pre-*Lawrence* constitutional challenges to Article 125's prohibition on private, consensual sodomy, this Court grounded its decisions entirely upon the now-overruled *Bowers* decision. In *United States v. Henderson*, 34 M.J. 174 (1992), this Court noted that a line of Supreme Court decisions had recognized a zone of private, intimate conduct that is immune from interference by the government. *Henderson,* 34 M.J. at 177. "However," this Court stated in ultimately rejecting the Marine's constitutional challenge, "the High Court's most recent pronouncement in this area, *Bowers v. Hardwick*, may have signaled a significant reversal of this trend." *Id.* And in *United States v. Fagg*, 34 M.J. 179 (1992), this Court—citing only *Bowers*—stated that "we detect no indication from the Supreme Court which permits us to override the intent of Congress." *Fagg,* 34 M.J. at 180. That "indication" has come. As the Supreme Court has now held: "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent." *Lawrence,* 123 S. Ct. at 2484.

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(plurality opinion) (explaining that both the Fifth and Fourteenth Amendments "provide[] heightened protection against government interference with certain fundamental rights and liberty interests.").

The United States concedes that the right recognized by *Lawrence* is the same at issue here. Despite the Court's absolute language, however, the United States seeks to minimize the significance of TSgt Marcum's liberty interest. Its purpose is clear: to avoid searching judicial review of Article 125. The United States deeply misunderstands the Supreme Court's analysis and holding in *Lawrence*.

The Supreme Court did not identify a *new* fundamental right in *Lawrence*. By overruling *Bowers*, it made clear that the long-established right to personal autonomy precludes the criminalization of private, intimate conduct—including consensual heterosexual or homosexual sodomy. Accordingly, *Lawrence* explicitly rejected the way *Bowers* framed the issue as whether there is a fundamental right to engage in homosexual sodomy—the exact framing the United States attempts to resuscitate here. (*See* U.S. Br. at 5 (arguing that *Lawrence* "did not specifically hold there *is* a fundamental right to engage in homosexual sodomy")). That framing, the Court said in *Lawrence,* reflects a "failure to appreciate the extent of the liberty at stake." 123 S. Ct. at 2478. Rather, the Court stated that the issue before it "should be resolved by determining whether the petitioners were free as adults to engage in [that] private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." *Id.* at 2476.

With the issue before the Court properly framed, *Lawrence* turned to resolving that question by first identifying "the most pertinent beginning point" as its "decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965)." *Lawrence*, 123 S. Ct. at 2476. *Griswold* invalidated a Connecticut law against contraception because it violated the "right to privacy" of married couples. *Lawrence* then explained that the right identified in *Griswold* was not limited to its facts, but instead encompassed the "right to make certain fundamental decisions affecting [an

individual's] destiny," relying on its decisions in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Roe v. Wade*, 410 U.S. 113 (1973), and *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977). *Lawrence*, 123 S. Ct. at 2476-81. The Court also quoted at length from its decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), which had emphasized that "matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected the Fourteenth Amendment," *id.* at 851; the Court said the decision in *Bowers* would deny people in homosexual relationships that fundamental liberty, *Lawrence*, 123 S. Ct. at 2481.

The language the Court used to describe *Griswold, Eisenstadt, Roe,* and *Casey*—the cases on which it explicitly based its holding—demonstrate that it was invoking the pre-existing fundamental right.[5] Far from being "the most pertinent beginning," this analysis would have been entirely superfluous had *Lawrence* required only rational basis review. Indeed, when the Supreme Court said its own, previous description of the right at issue in *Bowers* as a "fundamental right . . . to engage in sodomy" had been in error, it did so not on the basis that "the liberty at stake" was *less* than "fundamental," but rather because in describing the right in that way *Bowers* had *understated* its basic character as a right not to be penalized for making intimate personal choices. *Lawrence*, 123 S. Ct. at 2478.

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[5] *See, e.g.*, *Lawrence*, 123 S. Ct. at 2477 (stating that *Roe* "confirmed once more" that the "liberty" protected by the Due Process Clause "has a substantive dimension of *fundamental* significance in defining the rights of the person" (emphasis added)); *id.* (describing the privacy right at issue in *Eisenstadt* as a "*fundamental*" human right[]" (emphasis added); *id.* (noting that the "liberty" interest in *Roe* was entitled to "*real and substantial* protection," something not afforded non-fundamental interests (emphasis added)).

The United States points to two sources *outside* the majority opinion to argue that *Lawrence* requires the least searching form of judicial review: Justice O'Connor's concurrence and Justice Scalia's dissent. (*See* U.S. Br. at 6.) That reliance is misplaced.

First, Justice O'Connor chose the narrowest ground for decision and analyzed the case under the Equal Protection Clause, not the Due Process Clause. *Lawrence*, 123 S. Ct. at 2484. She did so because the Texas statute, unlike Article 125 and the statute in issue in *Bowers*, prohibited only homosexual sodomy. *Id.* at 2485. Ultimately, Justice O'Connor concluded: "A law branding one class of persons as criminal solely based on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review." *Lawrence,* 123 S. Ct. at 2488 (O'Connor, J. concurring). Thus, Justice O'Connor's analysis, which the Majority of the Court said was "tenable" but might have left facially neutral statutes in force, *id.* at 2482, certainly does not support the assertion that *Lawrence* requires only rational basis review when analyzing Article 125 as a violation of a protected due process liberty interest.

Second, the United States points to the reframing of the majority opinion that Justice Scalia offers in his dissent. Justice Scalia isolated language in the majority opinion that the Texas statute "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual," *id.* at 2484, holding it out as supposed proof that the Majority was only applying rational basis review. *Id.* at 2488 (Scalia J., dissenting). But the Majority's statement is not a statement of the rational basis test and must not be taken out of context. The immediately preceding sentence continues the Court's use of broad fundamental rights language, saying that the petitioners' "right to liberty under the Due Process Clause gives them a full right to engage in their conduct without intervention of the government." *Id.* at 2484. Rational basis

review does not apply to infringements of substantive liberty interests. Moreover, Texas did not argue that it had any compelling interests, *see* Brief of Respondent, *Lawrence v. Texas*, No 02-102, 2003 WL 470184, so there was no need to evaluate that issue. By holding that the interests Texas had asserted were *not even legitimate,* the Court also held that they were not compelling.

## II. ARTICLE 125'S CRIMINALIZATION OF PRIVATE CONSENSUAL SODOMY FAILS SCRUTINY UNDER *LAWRENCE*

Recognition of the fundamental liberty interest at stake here does not end the inquiry; the Court must consider any countervailing interests the United States may have in Article 125 and the means used to further those interests. The Supreme Court consistently has given careful consideration to any weighty governmental interests that stands opposed to a fundamental liberty interest, and has looked closely at the degree and nature of the burden on such an interest, before ruling on the constitutionality of a statute or regulation. The Court has said that when a law burdens a fundamental right, a reviewing court must determine whether the particular infringement is "precisely tailored" to a "compelling governmental interest." *Plyler v. Doe*, 457 U.S. 202, 216 (1982). *See also City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (stating that laws that infringe a personal right protected by the Constitution must be "suitably tailored" to a "compelling state interest"). In other cases, the Court has looked to whether a state's regulation places an "undue burden"—that is, whether the restriction's "purpose or effect is to place a substantial obstacle"—on the exercise of a fundamental right. *Casey*, 505 U.S. at 849-51. *See also Troxel*, 530 U.S. at 67 (plurality opinion) (declaring unconstitutional an infringement of a fundamental right under statute that was "breathtakingly broad"); *id.* at 95 (Kennedy, J., dissenting); *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 280-81 (1990).

In this case, there is no doubt that Article 125 imposes a significant burden on a fundamental liberty interest: Article 125 criminalizes private, consensual sodomy, authorizing incarceration for a violation of the offense for up to five years. In support of the statute, the United States contends that the "rational basis" for this burden is provided by "a very real need to prevent negative impact to morale and discipline" (U.S. Br. at 7) and "[t]he needs of good order and discipline, the needs of unit cohesion, and the need to avoid bringing discredit on the military" (*id.* at 11). Later, the United States also identifies "the need of military commanders to maintain good order and discipline" as a "compelling governmental interest" (*id.* at 12) which in turn is related to "the compelling governmental interest. . . of national security" (*id.* at 13).

These asserted interests in morale, good order, discipline, and national security cannot justify Article 125's infringement on fundamental liberty interests for two reasons. First, Article 125 bears no relation—rational or otherwise—to the interests the United States now advances and therefore cannot justify its significant burdens on constitutionally protected conduct. Second, the interests put forward by the United States in this litigation are *post hoc* rationalizations distinct from Congress' actual motivation in passing Article 125.

### A. Article 125 Is Not Tailored In Any Way to the Interests Asserted By the United States.

*Amici* do not dispute that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise," *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955), or that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty," *Parker*, 417 U.S. at 744 (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion)). Yet Article 125 bears no genuine connection to those demands. Article 125 is both overbroad and underinclusive according to the United States' own rationale.

### 1. The United States Identifies No Harm From Sodomy Itself That Justifies Singling Out This Act for Punishment.

The United States never explains how *sodomy* threatens good order and discipline or unit cohesion, or discredits the military service. The reason for this omission is clear: It does not. The acts prohibited by Article 125 are widely practiced by members of the armed forces. *See* RAND, *Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment* 58 (1993) (concluding it is likely that "a majority of both married and unmarried military personnel engage in oral sexual activity, at least occasionally"). This Court has alluded to this fact, recognizing changing attitudes towards private, consensual oral sex. *See Henderson*, 34 M.J. at 178.

If anything, the available evidence suggests Article 125 *harms* rather than advances the interests asserted here by the United States. Article 125 undermines morale and discipline by criminalizing sexual acts that are widely practiced, thereby forcing military personnel to dissemble about their sexual conduct. The result is an obsolete and hypocritical criminal prohibition that is subject to the abuses of selective enforcement. Indeed, the Commission on the 50th Anniversary of the UCMJ (commonly known as the Cox Commission) recommended the repeal of Article 125's criminal prohibitions against consensual sodomy, consistent with the majority of comments it received on this issue. *See Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice* (2001) (sponsored by the National Institute of Military Justice). In doing so, the Cox Commission noted:

> [T]he well-known fact that most adulterous or sodomitical acts committed by consenting and often married (to each other) military personnel are not prosecuted at court-martial creates a powerful perception that prosecution of this sexual behavior is treated in an arbitrary, even vindictive manner.

*Id.* at III.D.[6]

Nor may the United States contend that harm to good order and discipline is inherent in an Article 125 conviction merely because it is conduct criminalized in the UCMJ. Conduct can harm good order and discipline as a matter of law only if it is illegal in the civilian context. *Cf. United States v. Davis,* 26 M.J. 445, 448 (C.M.A. 1988) (discussing discredit upon the military). The United States relies on *United States v. McFarlin*, 19 M.J. 790 (A.C.M.R. 1985), as a counterexample. (*See* U.S. Br. at 13-15.) But at the time *McFarlin* was decided, sodomy was against civilian law in most states, so the Army Court of Military Review arrived at its conclusion that sodomy harmed military discipline without comment.[7] After *Lawrence*, private and consensual sodomy is not against the law in any state. Civilian law now recognizes that persons who choose private and consensual sodomy cannot "be[] punished as criminals." *Lawrence* 123 S. Ct. at 2478. The United States is not excused from having to specifically prove harm to good order and discipline merely because TSgt Marcum's sexual activity was sodomy.

**2. Article 125 Is Not Tailored to the Problems the United States Identifies.**

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[6] Similarly, the Supreme Court in *Lawrence* cited to the American Law Institute's Model Penal Code and related commentary disapproving criminal penalties for private, consensual sexual relations on the basis that "(1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail." 123 S. Ct. at 2480 (*citing* A.L.I., *Model Penal Code* § 213.2, Cmt. 2, p. 372 (1980) and A.L.I., *Model Penal Code,* Commentary 277-280 (Tent. Draft No. 4, 1955)).

[7] The same court had earlier acknowledged that "the opinions of the United States Supreme Court are binding on the military" but held that, "[u]ntil such time as the United States Supreme Court may decide that the criminal statutes regulating private consensual sexual behavior are unconstitutional . . . this Court is bound to the precedent . . . that Article 125, UCMJ, does not trench upon the constitutional rights of privacy." *United States v. Jones*, 14 M.J. 1008, 1010-11 (A.C.M.R.1982)

Unable to articulate a justification for Article 125's prohibition on consensual sodomy alone, the United States seeks to read into the statute certain "aggravating factors" that accompany some, but not all, sodomy (as well as some, but not all, instances of other types of sexual activity). The United States suggests that the military has an interest in criminalizing sodomy where it occurs between superiors and subordinates or where it is non-consensual. Article 125 makes no such distinctions. It criminalizes sodomy regardless of the defendant's partner, treating adulterers and spouses as equivalents. It criminalizes sodomy regardless of where it occurs, treating public parks and locked bedrooms as equivalents. It criminalizes sodomy regardless of the partner's consent, treating rape and wedding-night consummations as equivalents. Article 125 does *not* specifically criminalize sexual relationships that can harm good order and discipline.

Just as "an order which is broadly restrictive of a private right is arbitrary and illegal in the absence of circumstances demonstrating a connection to a military need," *United States v. Smith,* 1 M.J. 156, 158 (C.M.A. 1975), when a criminal statute burdens a fundamental liberty interest, both overbroad and underinclusive prohibitions are equally fatal. On the one hand, "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *United States v. Reese*, 92 U.S. 214, 221 (1875). As a result, "[a] criminal statute or regulation is overbroad if, in addition to prohibiting conduct which is properly subject to governmental control, it also proscribes activities which are constitutionally protected or otherwise innocent." *United States v. Sweeney*, 48 C.M.R. 476, 478 (A.C.M.R. 1974); *see also Smith,* 1 M.J. at 158. On the other hand, "[a] State may no more create an underinclusive statute, one that fails truly to promote its purported compelling interest, than it may create an

overinclusive statute, one that encompasses more protected conduct than necessary to achieve its goal." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 578 (1993) (Blackmun, J. concurring); *Zablocki v. Redhail*, 434 U.S. 374, 374 (1978) (striking down infringement on fundamental right to marry after holding the statute is both underinclusive and overinclusive). Article 125 suffers from both of these defects.

a) **Relationships Between Service Members.**

The United States argues that discipline is threatened "when superiors and subordinates engage in *sexual activity*." (U.S. Br. at 11 (emphasis added).) As the United States concedes by using "sexual activity" rather than "sodomy" in that sentence, the threat to discipline is from the superior-subordinate relationship, not from the particular sexual technique they use. Thus, the United States claims that in this case "[p]rejudice to good order and discipline was *inherent in the relationship* between Appellant and this senior airman"—not inherent to the sexual technique they employed. (*Id.* (emphasis added).) An interest in preventing disruptive relationships among service members cannot justify a law that does not have this as an element. Article 125 sweeps in much protected sexual activity between partners who are not superiors and subordinates, and it fails to criminalize other forms of intimate contact—such as kissing, vaginal intercourse, or mutual masturbation—that would be just as potentially disruptive as sodomy if engaged in between superiors and subordinates.

This Court has rejected attempts by the military to justify a similarly overbroad and underinclusive prohibition. In *United States v. Smith*, this Court reversed a conviction for violating a naval regulation proscribing the making of all loans for profit, stating:

> We have, over the years, upheld convictions for violating orders or regulations where a sufficient connection between the military's duty to protect the morale, discipline and usefulness of its members and the infringement of an individual's rights has been established. Where such a connection has not been demonstrated, however, we have not

> hesitated to reverse . . . . While the military has a legitimate concern in prohibiting the charging of usurious interest rates, or loans between subordinates and superiors, the regulation in question makes no such distinctions for, under it, all rates and all loans between any person in the Navy and any member of the armed forces are subject to the arbitrary control of the commanding officer.

1 M.J. at 157-58; *see also United States v. Wilson*, 30 C.M.R. 165, 166-67 (1961) (reversing a conviction based on failure to follow an order prohibiting consumption of alcoholic beverages in all places and on all occasions).

The military, of course, has effective means other than Article 125 to address harms to good order and discipline that result from sex between service members at different levels of the chain of command, such as the prohibition on superior/subordinate relationships in Article 134.[8] The existence of these "less restrictive means" to achieve the interests asserted by the United States without burdening other constitutionally protected conduct demonstrates that Article 125 is not narrowly tailored. *See Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 274 n.4 (1986) (defining "narrow tailoring" to include inquiry into whether there are "less restrictive means"). Moreover, in order to convict a service member of fraternization under Article 134, a court-martial must find as an element of the offense that "under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces." Para. 83b, Part IV, Manual for Courts-Martial, Article 134.[9] Thus, intercourse, *even between a superior and subordinate*, is not criminally prohibited

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[8] Fraternization is limited to relationships between officers and enlisted members, but regulations, directives and orders on a service-wide and local basis may also govern conduct between enlisted personnel, as the conduct here was. Violations of such regulations, directives and orders may be punishable under UCMJ Article 92. *See* Para. 83b, Part IV, Manual for Courts-Martial, Article 134.

[9] Moreover, fraternization and comparable convictions carry less severe criminal penalties than Article 125 convictions for private, consensual sodomy. Para. 83e, Part IV, Manual for Courts-Martial, Article 134.

under Article 134 without a showing of such harms. *United States v. Fox*, 34 M.J. 99, 101 (C.M.A. 1992) (listing elements of fraternization under Article 134); *see also Johanns*, 20 M.J. at 159 (holding that "fornication in the absence of aggravating circumstances is recognized as not an offense under military law"). Whether the conduct harms those interests is a question of fact for the court-martial to decide. *Id.; see United States v. Saunders,* 59 M.J. 1, 11 (C.A.A.F. 2003) (discussing discredit upon the military).

TSgt Marcum, of course, was not charged with violating any prohibition on having a relationship with SrA Harrison. Nor did his court-martial members make any findings related to appropriateness of Appellant's relationship with the senior airman. They were not asked to decide whether TSgt Marcum's conduct harmed morale, or good order and discipline. Yet the United States is impermissibly attempting to defend TSgt Marcum's Article 125 conviction as if it were a conviction for a superior/subordinate relationship that harmed morale and discipline. *Cf. United States v. Mance*, 26 M.J. 244, 254 (C.M.A. 1988) (stating that court-martial members must be advised to find "each element of any offense which the accused is charged or which is included therein"); *United States v. Brice*, 38 C.M.R. 134 (C.M.A. 1967) (finding a specification insufficient if it does not contain the elements of the offense to be charged).

b) **Lack of Consent**

Faced with TSgt Marcum's acquittal on the charge of forcible sodomy, the United States suggests that because personal autonomy in the military is restricted, it inherently creates "relationships where consent might not be easily refused," especially between superiors and subordinates. (U.S. Br. at 11-12.) This is not an argument for prohibiting consensual sodomy; it is an argument that "consensual" sexual relationships do not exist in the military context. But this Court has rejected the notion that a lack of consent can be inferred from a disparity in rank.

In *United States v. Fuller,* 54 M.J. 107, 111 (C.A.A.F. 2000), this Court found "no indication" that a Private First Class was coerced into sex with a sergeant.

The United States also seeks to revive the forcible sodomy charge against TSgt Marcum, stating that "although the members found the sodomy was consensual, that finding could have been a result of the senior airman's conduct after the offense." (*See* U.S. Br. at 11.) This attempt by the United States to override the explicit findings of the court-martial members is obviously impermissible—elements of a crime must be tried and found by a court-martial. *See, e.g., Mance*, 26 M.J. 244; *Brice*, 38 C.M.R. 134. When lack of consent has been appropriately charged and proved beyond a reasonable doubt, court-martial members will find defendants guilty of that charge. But in this case the members found TSgt Marcum *not guilty* of forcible sodomy on Charge II, Specification 1. Adopting the reasoning of the United States would be a circumvention of the court-martial process and of TSgt Marcum's basic constitutional rights. *See Middendorf v. Henry,* 425 U.S. 25, 43 (1976) (recognizing due process rights in court-martials).

### B. Article 125 Fails Scrutiny Under *Lawrence* Because the Interests Asserted By the United States Are Post Hoc Rationalizations Unrelated to Article 125.

*Amici* do not dispute that the interests asserted by the United States—maintaining good order and discipline, and national security—are important. However, "the mere recitation of a benign . . . purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975). And this Court "need not . . . accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Id.* at n.16. An examination into Article 125's

history and purpose reveals that the purposes given for Article 125 in this litigation were not the purposes that motivated Congress when it adopted the provision.

The United States makes no reference to the most relevant source for determining Congress' purpose in passing legislation: the legislative history of Article 125. That history conclusively demonstrates that Congress' purpose in passing Article 125 was to make the "common law offense" in the UCMJ mirror the sodomy prohibitions in effect in Maryland in 1950, which in turn were derived from the British common law.[10] (*See supra* at 7.) It is beyond question that, after *Lawrence*, the 1950 sodomy prohibition from Maryland would no longer pass constitutional scrutiny were it still in effect.[11] Moreover, when it adopted Article 125, "Congress made no findings as to the possible harmful consequences of privately performed sexual acts upon the military community." *Scoby,* 5 M.J. at 165. Congress prohibited consensual sodomy because Congress simply chose to incorporate into Article 125 the common law on sodomy (and many other offenses) at the time. *See United States v. Harris,* 8 M.J. 52, 55-58 (C.M.A. 1979); *United States v. Morgan,* 24 C.M.R. 151, 154 (C.M.A. 1957). Because the common-law

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[10] The United States cites *Parker* for the proposition that "the UCMJ cannot be equated to a civilian criminal code." (U.S. Br. at 8.) In fact, *Parker* was making the precise point made here: The UCMJ's military and combat offenses are what distinguish the UCMJ from civilian codes. The provisions in the UCMJ that incorporate civilian code prohibitions, such as Article 125, are obviously not what distinguish the UCMJ from civilian codes.

[11] Md. Code Ann. § 3-222. In the wake of *Lawrence,* several state Attorneys General have publicly acknowledged, either to the press or in court filings, that their states' sodomy statutes are wholly or partly unconstitutional. *See, e.g, Doe v. Pryor,* No. 02-14899, 2003 WL 22097758, *6 (11th Cir. Sept. 11, 2003); John Hanna, *Teen Sodomy Case Returns to Kansas Courts,* Wichita Eagle, June 28, 2003, at 3; Charles Lane, *Justices Overturn Texas Sodomy Ban; Ruling Is Landmark Victory for Gay Rights,* Wash. Post, June 27, 2003, at A1; Elizabeth Neff, *Laws on Consensual Sodomy, Premarital Sex Targets of Suit,* Salt Lake Trib., July 17, 2003, at C3 ; Alan Sayre, *Ieyoub: High Court Ruling Makes Louisiana Sodomy Law Partly Unenforceable,* Baton Rouge Advoc., June 27, 2003, at 6A; *see also Limon v. Kansas,* 123 S. Ct. 2638 (2003) (mem.) (remanding a conviction under Kansas' sodomy statute for further proceedings in light of *Lawrence*).

prohibition is unconstitutional, and because Article 125 lacks any other foundation, Article 125 is unconstitutional, and would be even under the standard of review urged by the United States.

Rather than cite the legislative history of Article 125 to support its assertions of congressional findings, the United States points to findings Congress made forty-three years later when it passed "Don't Ask, Don't Tell," the current "[p]olicy concerning homosexuality in the armed forces," 10 U.S.C. § 654. (U.S. Br. at 6-7, 10-11.) Reliance on "Don't Ask, Don't Tell" is misplaced for several reasons. First, as this Court has explicitly stated in interpreting Article 125, "[t]he question is: in 1950 when the Uniform Code was enacted" what did Congress intend? *Henderson*, 34 M.J. at 174. Findings made in another context decades later are not relevant to that inquiry.

Second, "Don't Ask, Don't Tell" authorizes only separation from the Armed Forces—not any criminal penalties. *See* 10 U.S.C. § 654(b). The Supreme Court has recognized that the military regulates its members in many different ways: "[T]he relationship of the Government to members of the military . . . is not only that of lawgiver to citizen, but also that of employer to employee. Indeed, unlike the civilian situation, the Government is often employer, landlord, provisioner, and lawgiver rolled into one." *Parker*, 417 U.S. at 751. Nothing about the "Don't Ask, Don't Tell" findings suggests that Congress intended them to support anything other than administrative procedures. Indeed, the Senate Report for "Don't Ask Don't Tell" disclaimed that the findings were meant to serve as anything other than "the basis for the policy" on discharges implemented by the statute. *See* S. Rep. 103-112, at 293 (1993). The invocation of the findings is irrelevant to this Court's "evaluation [of] whether military needs justify [the] *particular restriction*," *Goldman*, 475 U.S. at 507 (emphasis added), which here is the *incarceration* of service members who privately engage in either heterosexual or homosexual conduct.

Third, Article 125 and "Don't Ask, Don't Tell" have different scopes. Though the United States suggests otherwise, the word "sodomy" appears nowhere in the "Don't Ask, Don't Tell" statute.[12] Instead, *homosexual* sodomy is a small part of the broadly defined term—"homosexual act"—that also includes conduct totally unrelated to Article 125, such as holding hands. *See* 10 U.S.C. § 654(f)(3)(A) & (B). "Homosexual acts," as well as statements of homosexual or bisexual orientation, warrant discharge regardless of whether they qualify as "unnatural carnal copulation" under Article 125. *See* 10 U.S.C. § 654(b); *Able v. United States,* 968 F. Supp. 850, 857 (E.D.N.Y. 1997), *rev'd,* 155 F.3d 628 (2d. Cir. 1998) ("[T]he Act enables the Armed Forces to dismiss someone who, for example, kisses or holds hands off base and in private."). Conversely, most "copulation" prohibited by Article 125—including heterosexual sodomy—does not warrant discharge under "Don't Ask, Don't Tell." *See United States v. Phillips*, 52 M.J. 268, 273 (C.A.A.F. 2000) (Effron J. dissenting) ("There is no requirement to discharge service members who engage in adultery, heterosexual sodomy, [or] fraternization").

## III. DEFERENCE DOES NOT CHANGE THE DUE PROCESS ANALYSIS OF ARTICLE 125 UNDER *LAWRENCE*.

As this Court has noted, "Congress made [this Court] responsible for 'the protection and preservation of the Constitutional rights of persons in the armed forces.' " *United States v. Matthews*, 16 M.J. 354, 367 (C.M.A. 1983) (quoting *United States v. Frisscholz*, 16 U.S.C.C.M.A 150, 152 (1966)). The United States nevertheless argues that Article 125's

[12] The United States, purporting to quote 10 U.S.C. § 654(a)(15), claims that "Congress has specifically found that sodomy 'creates an unacceptable risk. . .' " to morale and discipline. (U.S. Br. at 6, 10-11). Congress "specifically found" nothing of the sort. Congress' actual finding was that "*[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts* would create an unacceptable risk" to morale and discipline, regardless of whether those persons actually engaged in "homosexual acts." 10 U.S.C. § 654(a)(15) (emphasis added). By substituting "sodomy" for that key phrase, the United States seeks to transform "Don't Ask, Don't Tell" from a personnel policy into a criminal law.

prohibition of consensual sodomy should survive judicial scrutiny because this Court should defer to a military judgment. While courts have recognized the importance of military deference, they have also been very clear about what deference does and does not do. Deference does not change either the level of due process review or the requirement that the United States show that a statute's infringement on liberty actually serves its stated interests. Instead, deference is appropriate in two specific contexts: reviewing courts are to give due regard to policy choices by Congress (where one has been made) and to military judgments about the *importance* of an interest (as opposed to the appropriateness of a statute or regulation). Because Article 125 bears no relation to the interests the United States asserts in this litigation, and because those interests did not support Article 125 at the time of its passage, the principles of military deference cannot sustain TSgt Marcum's conviction under Article 125.

### A. Military Deference Does Not Change the Application of Due Process or the Need for Judicial Scrutiny.

"Our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes," *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (citation omitted), and "[t]he protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces," *United States v. Tulloch*, 47 M.J. 283, 285 (C.A.A.F. 1997). Congress is not "free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause." *Rostker v. Goldberg,* 453 U.S. 57, 67 (1981); *see also Weiss v. United States,* 510 U.S. 163, 176 (1994) ("Congress, of course, is subject to the requirements of the Due Process Clause [even] when legislating in the area of military affairs."); *Middendorf,* 425 U.S. at 43 (stating that service members "are entitled to the due process of law guaranteed by the Fifth Amendment"); *United States v. Graf*, 35 M.J. 450, 460 (C.M.A. 1992)

("A service member at a general court-martial is entitled to the protection of the due process of law guaranteed by the Fifth Amendment.").

Although the Supreme Court has recognized the need for "deference to legislative and executive judgments in the area of military affairs," *Rostker*, 453 U.S. at 66, "deference" does not mean "abdication," *id.* at 67, and "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit," *United States v. Robel,* 389 U.S. 258, 263-64 (1967).

Even when deferring to military judgments, the Supreme Court applies heightened scrutiny to infringements of fundamental rights. While the United States insists members of the military are protected by the Fifth Amendment in a "different" way than civilians (U.S. Br. at 8), the Supreme Court has rejected that argument. In *Rostker,* the Supreme Court considered and rejected the argument that military deference requires the use of a more deferential standard of review than would be used in the civilian context. There, the United States asked the Court to apply mere rational basis review to an Act of Congress that required registration of men but not women for the Selective Service, even though gender-based discrimination normally warrants a stricter level of review. *Id.* at 69. The Court rejected that argument, noting that when it is necessary "to decide whether Congress [has] transgressed an explicit guarantee of individual rights," *id.* at 70, "[s]imply labeling the legislative decision 'military' " does not "automatically guide a court to the correct constitutional result." *Id.* The Court also noted that another of its cases, *Schlesinger v. Ballard,* 419 U.S. 498 (1975), "did not purport to apply a different equal protection test because of the military context." *Rostker,* 453 U.S. at 71. Thus, courts—including military courts—can and do apply heightened scrutiny to military laws passed by Congress. *See, e.g., United States v. Bygrave,* 46 M.J. 491, 497 (C.A.A.F. 1997) (finding "the

United States has sufficiently compelling interests" to infringe a right without reaching the question of whether the right was fundamental); *United States v. McFarlin*, 19 M.J. 790, 792 (A.C.M.R.1985) (finding that "the fundamental necessity for discipline" is a compelling interest that "can be" sufficient to justify a restriction of the right of privacy).

Just as military deference does not insulate Acts of Congress from judicial scrutiny, it also does not excuse the United States from failing to explain how Article 125's specific criminal prohibition for private, consensual sodomy adequately serves any legitimate military interest. In every case in which the Supreme Court has "deferred" to decisions by Congress governing the military (or to internal rules and orders within the military), it has done so because the United States established the existence of an interest justifying an infringement of a constitutional right related to the "particular restriction." *Goldman,* 475 U.S. at 507. For example, the Court upheld a regulation prohibiting the wearing of yarmulkes in public only because "the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission," *id.* at 508. In cases involving conflicts between service members' right of free expression and military need for discipline, the Court held that speech could be curtailed if the "fundamental necessity for obedience, and the consequent necessity for imposition of discipline" required it. *Parker,* 417 U.S. at 758; *see also Brown v. Glines,* 444 U.S. 348, 354 (1980); *Greer v. Spock,* 424 U.S. 828, 837 (1976). Similarly, although the military has an interest in registering only men for the draft because "[m]en and women . . . are simply not similarly situated for purposes of a draft or registration for a draft," *Rostker,* 453 U.S. at 78-79, no amount of deference permits Congress to establish "an all-black or all-white, or an all-Catholic or all-Lutheran, or an all-Republican or all-Democratic registration," *id.* 78, because no military interest could support such distinctions. *See also Ryder*

*v. United States,* 515 U.S. 177, 185 n.4 (1995) (dismissing out of hand the argument that it should "defer" to the military's decision to have a service member's appeal heard by appellate judges appointed in violation of the Appointments Clause).

### B. Deference to Studied Choices of Congress and to the Relative Importance of Military Interests Does Not Save Article 125 Under the *Lawrence* Analysis.

None of this is to say that the doctrine of military deference is toothless. Deference is owed to considered military policy choices made by Congress and to the military's evaluation of the importance of an interest. But those concerns do not come into play in this case. Consequently, the doctrine of military deference does not alter the outcome of the due process analysis.

#### 1. Congress Made No Studied Choices on Military Policy in Enacting Article 125, So No Deference Is Owed.

The doctrine of military deference recognizes that Congress has a "broad constitutional power" to determine "how best our Armed Forces shall attend to" its business of "fight[ing] or be[ing] ready to fight wars should the occasion arise." *Rostker,* 453 U.S. at 70-71, *quoting Schlesinger v. Ballard,* 419 U.S. 498, 510 (1975). This grant of authority in Article I combined with "the lack of competence on the part of the courts" in making military decisions, *id.* at 65, has led the Supreme Court to announce that it will use "deference to legislative and executive judgments in the area of military affairs," *id.* at 66. In practice, that means that when Congress had made a "studied choice of one alternative in preference to another," *Rostker*, 453 U.S. at 72, or has "recognized that its decision. . . involved judgments on military needs and operations," *id.* at 69 n.6, the Supreme Court will be reluctant to find that choice unconstitutional.

The United States suggests that Article 125 was such a "studied choice" of Congress. But Article 125's legislative history contains no indication that Congress was motivated by any military policy judgment. (*See supra* at Part II.A.) None of the United States' asserted interests

can be found in Article 125's text or the Manual for Courts-Martial, nor did Congress make any judgments on the harmful effects of private, consensual sodomy.

### 2. Deference to the United States' Judgment That Good Order and Discipline and National Security are Important Interests Does Not Change the Due Process Analysis.

Unable to point to any military policy choices by Congress requiring deference, the United States can only ask for deference to its conclusory assertion that Article 125 does not improperly infringe service members' fundamental rights. But the Supreme Court has defined what deference requires in such a situation: "courts must give great deference to the professional judgment of military authorities *concerning the relative importance of a particular military interest*." *Goldman,* 475 U.S. at 507-508 (emphasis added).[13]

Deference to the importance of the interests asserted by the United States is meaningless here. Neither TSgt Marcum, nor these *amici,* dispute that the interests in good order and discipline, and in national security, are important. But the importance of those interests is irrelevant, because there is simply no basis to conclude that they are even rationally related to Article 125, let alone sufficiently advanced by that law to justify its onerous burdens on the "full right" to engage in "conduct protected by the substantive guarantee of liberty." *Lawrence*, 123

[13] Born in civilian Article III courts, it is not clear just how or why the doctrine of military deference would apply in military courts. Certainly, an Article I court logically cannot defer "to the judgment of other branches [Articles I and II] in the area of military affairs," *Rostker,* 453 U.S. at 66, because it is impossible to defer to one's self. Indeed, because Congress entrusted this Court with the responsibility of insuring that the operation of the military justice system conforms with acts of Congress and with the Constitution, this Court can rely on its own "professional military judgment" to review, and when necessary reject, implausible claims of military necessity. The Supreme Court appears to expect this Court to review military claims of necessity without deference—indeed, the Supreme Court in certain circumstances defers to *this Court's* judgments about military necessity. *See Middendorf,* 425 U.S. at 43 ("Dealing with areas of law peculiar to the military branches, the Court of Military Appeals' judgments are normally entitled to great deference.").

S. Ct. at 2484. (*See supra* Part II.A.) It follows that for due process purposes Article 125 is indistinguishable from a civilian statute criminalizing private, consensual, adult sodomy.

## CONCLUSION

For the reasons stated above, Appellant's conviction for violating Article 125 by engaging in consensual sodomy should be reversed in light of *Lawrence v. Texas*.

Respectfully submitted,

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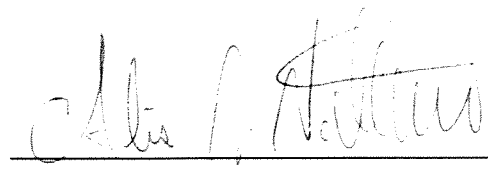
## CERTIFICATE OF FILING AND SERVICE

I certify that the original and seven copies of the foregoing were delivered to the Court on October 2, 2003 and that a copy of the foregoing was sent by fedex to LeEllen Coacher, Chief, United States Trial and Appellate Counsel Division and to Frank Spinner, Lead Appellate Defense Counsel on October 2, 2003.



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