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July 6, 2011

**RE: Oppose Burton Amendment (#19), Foxx Amendment (#61), and Burton Amendment (#63)—Amendments Are Unnecessary and Impediments to "Don't Ask, Don't Tell" (DADT) Repeal**

Dear Representative:

On behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to the principles of individual liberty and justice embodied in the U.S. Constitution, we are writing to urge you to oppose the Burton Amendment (#19), the Foxx Amendment (#61), and the Burton Amendment (#63) to H.R. 2219, the Fiscal Year 2012 Department of Defense Appropriations bill.

*Burton Amendment (#19)*
This amendment would prohibit funds from being used to perform marriage or civil union ceremonies unless these marriages or civil unions meet the definition of marriage in the "Defense of Marriage Act" (DOMA). The amendment is unnecessary and an unwarranted expansion of a law the Obama Administration has determined to be unconstitutional.

Contrary to proponents' claims, the amendment is unnecessary to protect the religious liberty of military chaplains. Military chaplains, whose duty is to care for all service members and facilitate the religious requirements of personnel of all faiths, are nonetheless protected by the Free Exercise Clause of the First Amendment. They are not required to engage in practices that are contrary to their religious beliefs when performing their denomination's or faith's religious observances and ceremonies. Regardless of whether this amendment is adopted, *no* military chaplain would be *required* by any law or government official to perform *any* marriage ceremony—including any marriage ceremony that does not comply with the teachings and tenets of the military chaplain's denomination or faith.

Moreover, this amendment would actually impede the ability of some military chaplains to follow the dictates of their faith. Many religious denominations and faiths—including sponsors of military chaplains—authorize their clergy members to perform marriage ceremonies for same-sex couples or religious ceremonies blessing civil unions. And, Army regulations, for example, permit military chaplains to perform marriage ceremonies (in accordance with state law), explaining that chaplains' participation in these ceremonies "is in keeping with individual conscience and distinctive faith requirements." Yet, this amendment would interfere

with those faith requirements by prohibiting military chaplains whose denominations and faiths permit marriage or civil union ceremonies for same-sex couples from performing these religious ceremonies.

Also, this amendment would, at a time when numerous federal courts are considering the constitutionality of DOMA, expand the reach of this discriminatory law. While DOMA prohibits federal *recognition* of certain state-sanctioned marriages, it does not prevent anyone from performing marriage or civil union ceremonies that are legal and valid under the laws of numerous states and the District of Columbia. Solemnizing a marriage or civil union is not equivalent to granting federal recognition of or benefits to the partners in that marriage or civil union. Furthermore, the statute does not apply to—or even mention the term—"civil unions" at all. Yet the Burton Amendment would expand DOMA's reach to prevent performances of civil union ceremonies that did not satisfy DOMA's discriminatory definition of marriage.

Finally, the Burton Amendment would deny service members permission to use federal property under the Department of Defense's jurisdiction for marriage or civil union ceremonies based solely on their sexual orientation. If the government opens its property to eligible personnel generally for such ceremonies, it cannot discriminate against one particular group by excluding them. This proposition runs counter to the recent bipartisan legislative repeal of DADT and would undermine the transition to open service.

*Foxx Amendment (#61)*
This amendment would prohibit funds from being used in contravention of DOMA. No amendment is necessary, however, to ensure that funds appropriated by this measure are only used in ways that are consistent with federal law.

*Burton Amendment (#63)*
This amendment is yet another attempt to delay or derail "Don't Ask, Don't Tell" (DADT) repeal implementation and the transition to open service. Late last year, the House and Senate, with wide and bipartisan majorities in each chamber, passed legislation providing for the orderly repeal of the discriminatory and unconstitutional DADT policy, which has barred lesbian, gay and bisexual service members from serving openly. This legislation, which was signed into law (Public Law 111-321) by President Obama, will not take effect *until* President Obama, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff certify that the new law will not have a negative impact on readiness, recruitment, retention, and other key factors affecting the military.

All indications point to a smooth and orderly transition currently underway to open service for lesbian, gay and bisexual service members. In testimony before the House Armed Services Committee on April 7, the service chiefs testified to that effect. For example, Marine Corps Commandant, General James F. Amos, stated:

> And I'm looking specifically for issues that might arise coming out of the . . . training. And to be honest with you, Chairman, we have not seen it. [T]here hasn't been the recalcitrant push-back. There's not been the anxiety over it from the forces in the field. I will tell you that I asked specifically this morning from

> Major General [John A.] Toolan. I said, "John, what are you seeing in the young Marines that are out there?" He said, "Sir, quite honestly, they're focused on the enemy."

Many if not most of the troops in combat zones have already been through training related to DADT repeal. There is no reason for Congress to step in now to delay or reverse the current process of moving to open service. Its time has come. As Joint Chiefs Chairman, Admiral Mike Mullen, eloquently stated in his testimony before the Senate Armed Services Committee in December 2010:

> You do not have to agree with me on this issue. But don't think for one moment that I haven't carefully considered the impact of the advice I give on those who will have to live with the decisions that advice informs. I would not recommend repeal of this law if I did not believe in my soul that it was the right thing to do for our military, for our nation and for our collective honor.

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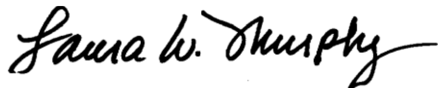
The ACLU has profound respect for and a long history of defending religious liberty as well as the rights of lesbian, gay, bisexual, and transgender (LGBT) individuals. Establishing equality for all people who want to serve our country does not infringe upon military chaplains' constitutional Free Exercise rights. These amendments are unnecessary and will only impede implementation of the DADT repeal.

Sincerely,



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