No. 10-56634, 10-56813

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOG CABIN REPUBLICANS,

Plaintiff-Appellee/Cross-Appellant,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellants/Cross-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF *AMICUS CURIAE* OF FOUNDATION FOR MORAL LAW, ON BEHALF OF DEFENDANTS-APPELLANTS/CROSS-APPELLEES

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March 4, 2011

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Log Cabin Republicans v. United States of America

Nos. 10-56634, 10-56813

Amicus curiae Foundation for Moral Law is a designated Internal Revenue Code 501(c)(3) non-profit corporation. *Amicus* has no parent corporations, and no publicly held company owns ten percent (10%) or more of *amicus*. No other law firm has appeared on behalf of the Foundation in this or any other case in which it has been involved.

s/Benjamin D. DuPré
Benjamin D. DuPré
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March 4, 2011

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus Curiae Foundation for Moral Law (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God and the moral foundation of American law. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the moral foundation of this country's laws and justice system.

The Foundation has an interest in this case because it believes that this nation's laws should reflect the moral basis upon which the nation was founded, and that the ancient roots of the common law, the pronouncements of the legal philosophers from whom this nation's Founders derived their view of law, the views of the Founders themselves, and the views of the American people as a whole from the beginning of American history through the present, have held that homosexual conduct has always been and continues to be immoral and not protected by law. The Foundation also believes this nation's independence and constitutional liberties can be preserved only if the nation has a strong military to defend it. The Foundation believes the presence of homosexuals in the armed forces will weaken the armed forces' ability to defend this nation by admitting into the armed forces people who engage in conduct that is both immoral and

unhealthy, and that the armed forces budget and resources will be strained by having to pay for and treat the many unhealthy conditions that arise out of the homosexual lifestyle. The Foundation believes this constitutes a compelling interest that cannot be achieved by less restrictive means, and certainly constitutes much more than a rational basis for banning homosexuals from the military.

SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29, *Amicus* has consent of all parties to the filing of this *amicus curiae* brief.

AUTHORSHIP STATEMENT OF RULE 29(C)(5)

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

Even though Congress recently repealed the military policy banning homosexuals in the military—a policy commonly referred to since 1993 as "Don't Ask, Don't Tell" (DADT)[1]—Congress and the President should retain the authority to reinstate the policy or a similar policy should future circumstances require. It is therefore of crucial importance that the district court's decision be reversed so it does not bind Congress and the president in the future.

Congress had important, even compelling reasons for instituting the military ban on homosexuals, including protecting armed forces personnel from the well-documented health hazards and medical costs associated with the homosexual lifestyle. Those reasons remain compelling today.

The Constitution contains no express protection of homosexual conduct, and the Framers of the Bill of Rights and of the Fourteenth Amendment would be shocked to see their provisions twisted for that purpose. Homosexual conduct was prohibited by the laws and customs of almost every ancient society, including the Old and New Testaments of Israel and the Church. It was prohibited by the common law traditions of England and America and until recently by the laws of every state. *Lawrence v. Texas,* 539 U.S. 558, 574 (2003), therefore, represents a radical departure from the common law tradition and from previous court

[1] *Amicus* will herein use the phrase "policy banning homosexuals in the military" or the like when referring to the law, 10 U.S.C. § 654, and policy at issue.

decisions. Even so, *Lawrence* did not specify the level of scrutiny to be accorded such cases, nor did *Lawrence* extend its scope to whether homosexual conduct must be permitted in a military context. The rights of service personnel must be analyzed in light of the need for military discipline. Especially in a military setting, this recently-discovered court-created "right" should therefore be construed narrowly and should be analyzed according to the normal "rational basis" standard.

ARGUMENT

I. THE REPEAL OF THE POLICY BANNING HOMOSEXUALS IN THE MILITARY DOES NOT DIMINISH THE IMPORTANCE OF THE ISSUE CURRENTLY BEFORE THE COURT, NOR DOES IT RENDER THE CASE MOOT.

The "Don't Ask, Don't Tell Repeal Act of 2010" (H.R. 2965, S. 4023), was passed by the U.S. House of Representatives on December 15, 2010, and by the U.S. Senate on December 18, 2010, and was signed into law by the President on December 22, 2010. Both Houses passed the bill under intense pressure from the White House and from lobbyists, who knew that the next Congress was very unlikely to pass the bill.

The repeal of this policy does not diminish the importance of the constitutional issue before this Court, nor does it render the case moot. The intense pressure from both sides of the issue demonstrates that the issue of homosexuals in the military is a very controversial issue within the armed forces, within the government, and with the American people as a whole.

In the future, Congress and the President may want to change the policy again sometime in the future, by reinstituting the policy; or by effecting a total ban on homosexuals in the armed forces as was the policy before 1993; or by adopting a different policy such as allowing homosexuals to serve in some capacities but not in others. Should future circumstances so require, Congress and the President

should be free to reinstate the ban on homosexuals in the military or enact another policy, based upon the needs of the armed forces and the nation's defense.

But if the decision of the District Court remains in effect, the hands of Congress and the President will be bound, or perceived so, by this precedent. Even if the repeal of the military ban on homosexuals proves to be utterly disastrous, this decision may be used to prevent Congress and the President from taking action that may be vitally needed for the nation's defense.

Significantly, Article I § 8 of the Constitution delegates certain powers over the armed forces to Congress, and Article II § 2 delegates other powers over the armed forces to the President. Nowhere does the Constitution delegate any power over the armed forces to the judicial branch of government. This does not mean the judiciary has no authority to act when explicitly-recognized constitutional rights of military personnel are violated. But it does mean the Framers did not contemplate the courts taking an active role in formulating military policy, and the courts should therefore be circumspect and deferential to the other branches of government where military policy is concerned.

II. THE CONSTITUTIONALITY OF THE POLICY BANNING HOMOSEXUALS IN THE MILITARY SHOULD BE JUDGED ACCORDING TO THE PLAIN MEANING OF THE UNITED STATES CONSTITUTION AS INTENDED BY ITS FRAMERS.

Our Constitution dictates that the Constitution and all federal laws pursuant thereto are the "supreme Law of the Land." U.S. Const. art. VI. All "judicial

Officers" are "bound by Oath or Affirmation, to support *this Constitution*" and not a person, office, government body, or judicial opinion. *Id.* (emphasis added); *see also* 28 U.S.C. § 453 (oaths of justices and judges). This Constitution and the solemn oath thereto are still relevant today and should control, above all other competing powers and influences, the decisions of federal courts.

As Chief Justice John Marshall observed, the very purpose of a written constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . . . Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

James Madison insisted that "[a]s a guide in expounding and applying the provisions of the Constitution . . . the legitimate meanings of the Instrument must be derived from the text itself." J. Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). "The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself." *Lake County v. Rollins*, 130 U.S. 662, 670 (1889).

A textual reading of the Constitution, according to Madison, requires "resorting to the sense in which the Constitution was accepted and ratified by the nation" because "[i]n that sense alone it is the legitimate Constitution." J. Madison, Letter to Henry Lee (June 25, 1824), *in Selections from the Private Correspondence of James Madison from 1813-1836*, at 52 (J.C. McGuire ed., 1853).

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824). The words of the Constitution are neither suggestive nor superfluous: "In expounding the Constitution . . . every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840).

The U.S. Supreme Court reaffirmed this approach in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 2788 (2008):

> [W]e are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague,* 282 U.S. 716, 731 (1931); see also *Gibbons v. Ogden,* 9 Wheat. 1, 188 (1824).

The meaning of the Constitution is not the province of only the most recent or most clever judges and lawyers: "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Heller*, 128 S. Ct. at 2821.

The Court should therefore protect those rights that are clearly enshrined in the Constitution, rather than those interests that emanate from the imaginations of later courts.

III. BECAUSE THE CONSTITUTION DOES NOT RECOGNIZE A RIGHT TO ENGAGE IN HOMOSEXUAL CONDUCT, MILITARY POLICY CONCERNING HOMOSEXUALS SHOULD BE ANALYZED ACCORDING TO, AT MOST, A RATIONAL BASIS STANDARD.

The court can reach the correct result without overturning *Lawrence v. Texas,* 539 U.S. 558 (2003). *Amicus* argues that because homosexual conduct has been disfavored and/or prohibited in much of the world throughout history, the court should accord such conduct, at most, lower-tier status and analyze the military policy banning homosexuals under a rational basis standard.

A. Homosexual conduct was, until recently, strongly disapproved in most cultures and in Anglo-American law.

Prohibitions against homosexual conduct go back to ancient times. The Bible, which has influenced moral values for Judaism, Christianity, Islam, and other religions, contains clear disapproval of homosexual conduct in the Old

Testament (*Leviticus* 18:22) and in the New Testament (*Romans* 1:26-27).[2] Among the Romans, homosexual conduct did exist, but homosexual acts were capital offenses under the Theodosian Code (IX.7.6) and under the Justinian Code (IX.9.31). In the Middle Ages, St. Thomas Aquinas, a preeminent disciple of natural-law theory, called homosexuality "contrary to right reason" and "contrary to the natural order." St. Thomas Aquinas, 4 *Summa Theologica, Secunda Secundae,* Quest. 154, Art. 11 (Benziger Bros. Press 1947).

The English common law maintained similar provisions. Sodomy was codified by statute as a serious crime early in England. "The earliest English secular legislation on the subject dates from 1533, when Parliament under Henry VIII classified buggery (by now a euphemism for same-sex activity, bestiality, and anal intercourse) as a felony. Penalties included death, losses of goods, and loss of lands." Vern L. Bullough, *Homosexuality: A History* 34 (New American Library 1979). Sir Edward Coke, the "Dean of English Law," called homosexuality "a detestable, and abominable sin, amongst Christians not to be named, committed by carnal knowledge against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast." "At common law 'sodomy' and the phrase 'infamous crime against nature' were

[2] Although recently certain writers have tried to reinterpret these and other passages, throughout most of history Jews, Christians, and Muslims have interpreted them as prohibiting and/or disapproving homosexual conduct.

often used interchangeably." Raymond B. Marcin, *Natural Law, Homosexual Conduct, and the Public Policy Exception,* 32 Creighton L. Rev. 67 (1998).

Sir William Blackstone—of whose *Commentaries on the Laws of England* (1763) Justice James Iredell said in 1799 that "[F]or near 30 years [it] has been the manual of almost every student of law in the United States"[3]—wrote in his *Commentaries* concerning homosexual conduct:

> IV. WHAT has been here observed, especially with regard to the manner of proof [for the crime of rape], which ought to be the more clear in proportion as the crime is the more detestable, may be applied to another offense, of a still deeper malignity; the infamous crime against nature, committed either with man or beast. A crime, which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offense of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out: for, if false, it deserves a punishment inferior only to that of the crime itself.
>
> I WILL not act so disagreeable part, to my readers as well as myself, as to dwell any longer upon a subject, the very mention of which is a disgrace to human nature. It will be more eligible to imitate in this respect the delicacy of our English law, which treats it, in its very indictments, as a crime not fit to be named; "*peccatum illud horribile, inter christianos non nominandum*" ["that horrible crime not to be named among Christians"].

[3] U.S. Supreme Court Justice James Iredell, *Claypool's American Daily Advisor,* April 11, 1799 (Philadelphia) 3; *Documentary History of the Supreme Court of the United States, 1789-1800, at 347* (Maeva Marcus, ed., Columbus University Press 1990).

4 Blackstone, *Commentaries on the Laws of England* Ch. 4. Blackstone next explained the punishment under the common law for this "crime not fit to be named":

> THIS the voice of nature and of reason, and the express law of God, determine to be capital. Of which we have a signal instance, long before the Jewish dispensation, by the destruction of two cities by fire from heaven: so that this is an universal, not merely a provincial, precept. And our ancient law in some degree imitated this punishment....

Such consistent and universal condemnation of sodomy was carried over into American law, as attested by Perkins and Boyce in their hornbook *Criminal Law*, "Homosexual conduct was made a felony by an English statute so early that it was a common-law offense in this Country, and statutes expressly making it a felony were widely adopted." Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 465 (3d ed. 1982).

The "crime against nature" was prohibited in many of the colonial law codes. When the Constitution was adopted, homosexual conduct was prohibited either by statute or by common law in all thirteen states. *Bowers v. Hardwick,* 478 U.S. 186, 192 (1986). When the Fourteenth Amendment was adopted, homosexual conduct was prohibited in 32 of 37 states, and during the twentieth century it was prohibited in all states until 1961. *Id.* at 192-3. Also, numerous states, either by statute or by case law, prohibited homosexual parents from adopting or having

custody of a child. Although the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558, 570 (2003), claimed that many statutes specifically aimed at homosexual conduct are of relatively recent origin, the more general statutes and the common law prohibitions have been in effect since time immemorial.

B. *Lawrence v. Texas* represents a radical departure from common law and historic precedent.

In *Lawrence v. Texas*, Justice Kennedy wrote, quoting from *Parenthood of Southeastern Pa.* v. *Casey,* 505 U.S. 833, 851 (1992):

> These 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 by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

539 U.S. at 574. *Amicus* does not agree that the Constitution includes a "right to define one's own concept of existence,"[4] but the court need not overrule *Lawrence*

[4] The term "liberty" as it is used in the Preamble to the U.S. Constitution and in the Fifth and Fourteenth Amendments was understood by the Framers as Blackstone understood liberty. Blackstone understood liberty in terms of moral right and wrong:

> The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, with out any restraint or control, unless by the law of nature: being a right inherent in us by birth, and one of the

in order to uphold the military policy concerning homosexuals. The Court in *Lawrence* emphasized the narrowness of its decision:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

Id. at 578. Furthermore, *Lawrence* did not specify whether issues of alleged homosexual rights are to be analyzed according to an lower-tier, middle-tier, or upper-tier standard. Because it is not a right expressly recognized in the Constitution and because it is not a right that was even remotely contemplated by the Framers of the Constitution, the Bill of Rights, and the Fourteenth Amendment, Amicus believes it should be analyzed according to a lower-tier standard.

Nor did the *Lawrence* Court rule on whether the same alleged right or the same analysis should apply in a military setting. It is one thing to say an individual has a right to engage in private homosexual conduct, which cannot be criminalized under *Lawrence*; it is quite another to say one has a right to engage in homosexual conduct while serving in the armed forces. Indeed, there is no "right" to be a

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> gifts of God to man at his creation, when he endued him with the faculty of free will.

Blackstone, *op. cit.* I:121. Note that Blackstone said man's liberty is restrained by "the law of nature," and that he called homosexual conduct "the infamous crime against nature." Fn. 4.

member of the armed forces, and just as the military can limit participation in the armed forces by prohibiting adultery and drunkenness—even in private—it has a necessary obligation to enforce the discipline of its servicemembers.

Although *Lawrence* did not specify the level of scrutiny that should be given in cases involving homosexual activity, the Court did state, "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual," 539 U.S. at 578. This reference to "legitimate state interest," coupled with the lack of any language suggesting any departure from the normal rational basis standard, strongly indicates that the Court intended lower-tier rational basis analysis. In *Lofton v. Secretary of the Department of Children & Family Services,* 358 F.3d 804 (11th Cir. 2004), the Eleventh Circuit held that upper-tier strict scrutiny is not appropriate for such cases but did not decide whether middle-tier or lower-tier was appropriate. In *Witt v. Department of the Air Force,* 527 F.3d 806 (9th Cir.2008), this Court held that a case involving the discharge of a homosexual required middle-tier analysis. *Amicus* believes the opinion should have given more consideration to the needs of the military that make adjudications concerning the military's policy concerning homosexuals policy different from cases concerning homosexual conduct in civilian situations. But the *Witt* Court did qualify its holding by stating that

> In addition, we hold that this heightened [intermediate] scrutiny analysis is as-applied rather than facial. "This is the preferred course

> of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments." *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 447, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). In *Cleburne,* the Court employed a "type of 'active' rational basis review," *Pruitt,* 963 F.2d at 1165-66, in requiring the city to justify its zoning ordinance as applied to the specific plaintiffs in that case. And *Sell* required courts to "consider the facts of the individual case in evaluating the Government's interest." 539 U.S. at 180, 123 S.Ct. 2174. Under this review, we must determine not whether DADT has some hypothetical, posthoc rationalization in general, but whether a justification exists for the application of the policy as applied to Major Witt. This approach is necessary to give meaning to the Supreme Court's conclusion that "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Lawrence,* 539 U.S. at 572, 123 S.Ct. 2472.

This Court did not go so far as to say that intermediate scrutiny analysis is appropriate in all military cases, and it is not appropriate in this case. At some future time, if the military policy banning homosexuals or something similar to it is reinstated, it will then be appropriate to consider the constitutional implications in full.

In *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 441, 445 (1985), the Supreme Court identified four factors to consider in determining whether members of a certain class are entitled to heightened scrutiny: first, whether, "[a]s a historical matter, they have ... been subjected to discrimination[;]" second, whether their common characteristic "bears [any] relation to [their] ability to perform or contribute to society[;]" third, whether they "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group[;]"

and, fourth, whether they are "politically powerless in the sense that they have no ability to attract the attention of the lawmakers."

Of these factors, only the first even arguably applies to homosexuals—and the extent to which they have been "subjected to discrimination" is evidence that there has never been a legal or constitutional right to engage in homosexual conduct. Homosexual rights advocates would be the first to argue that their homosexuality bears no relation to their ability to perform or contribute to society. They do not "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group," and they are by no means "politically powerless," for they exert political influence far out of proportion to their numbers.

Application of the *Cleburne* factors clearly demonstrates that issues of homosexual conduct, and especially the issue of homosexuals in the military, should be analyzed according to the normal rational basis standard.

C. The Courts should give substantial deference to Congress and to military authorities in passing judgment upon military policies and military needs.

Even if heightened scrutiny is appropriate in other situations involving homosexual conduct, it is not appropriate in a military setting, for at least two reasons: (1) the armed forces require military discipline, morale, unit cohesion, and other factors that are not considerations in civilian settings; and (2) civilian judges lack the experience and expertise that is needed in order to know what is necessary

to preserve and promote military discipline, morale, and the combat unit cohesion that can be disrupted by sexual attractions and overtures.

This does not mean the judiciary has no authority to review military policies that clearly violated expressly-granted constitutional rights. But civilian judges should therefore be highly deferential to military authorities on matters of this nature and should be very hesitant to second-guess a determination by senior military officials that the policy banning homosexuals is necessary for these reasons. This deference is especially appropriate when the courts review long-standing military policies based on time-honored beliefs, based upon allegations that these policies conflict with recently-discovered extra-constitutional rights.

In *Goldman v. Weinberger,* 475 U.S. 503 (1986), the Supreme Court upheld an Air Force policy requiring all military personnel to wear standard Air Force headgear, rejecting the claim of an Orthodox Jewish doctor that the Air Force should allow him to wear the Jewish yarmulke as required by his religion. Without a doubt, in a civilian setting Captain Goldman's right to wear the yarmulke would have been upheld. But the Court reasoned that "'within the military community, there is simply not the same [individual] autonomy as there is in the larger civilian community.' *Parker v. Levy, supra,* at 417 U. S. [733,] 751 [1974]." The demands of the military may constitute a legitimate or even compelling governmental

interest in a military setting that would not be as substantial an interest in a different setting. Furthermore, the Court said,

> when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest. *See Chappell v. Wallace, supra,* at 462 U. S. 305; *Orloff v. Willoughby, supra,* 345 U. S. 93-94. Not only are courts "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have,'" *Chappell v. Wallace*, 475 U. S. 508 *supra,* at 462 U. S. 305*,* quoting Warren, *The Bill of Rights and the Military,* 37 N.Y.U.L.Rev. 181, 187 (1962), but the military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy. "[J]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."*Rostker v. Goldberg,* 453 U. S. 57, 453 U. S. 70 (1981).
>
> The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank. The Air Force considers them as vital during peacetime as during war, because its personnel must be ready to provide an effective defense on a moment's notice; the necessary habits of discipline and unity must be developed in advance of trouble.

Id. at 507-08.[5]

[5] Note that *Goldberg* was decided in 1986, while the compelling state interest / less restrictive means test of *Wisconsin v. Yoder,* 406 U.S. 205 (1972), was in force, and before the *Yoder* test was limited by *Employment Division v. Smith,* 494 U.S. 872 (1990).

In an interesting parallel to the present case, as part of the National Defense Authorization Act for Fiscal Years 1988 and 1989, Congress amended this policy and allowed military personnel to wear some kinds of religious apparel with the uniform. Similarly, in the present case Congress has repealed the statute and policy banning homosexuals in the military. In both instances it is entirely appropriate that Congress and the President, those branches of government to whom the Constitution delegates the authority to set military policy, and not the judicial branch, make this determination in consultation with senior military officials.

D. The military policy banning homosexuals substantially furthers legitimate, important, and even compelling governmental interests.

One can scarcely imagine a governmental interest more important, more compelling, than the health, fitness, and combat-readiness of the nation's military personnel. [6] At the time the 10 U.S.C. § 654 and its implementing regulations were adopted in 1993, compelling evidence existed that admitting homosexuals into the

[6] In *Jacobson v. Massachusetts,* 197 U.S. 11 (1905), the Supreme Court held that the state has the authority to enforce compulsory smallpox vaccination laws because the state has the power and duty to protect the health of the people and compulsory vaccination is a means of fulfilling that duty, even though experts may disagree as to their effectiveness and safety. Certainly the U.S. Government has at least the same authority concerning its military personnel.

military would have serious health consequences for military personnel. That evidence is just as compelling today.

The evidence establishes that homosexuals are far more likely than the general population to contract and spread a wide variety of diseases. The exact degree of disproportionality depends upon the percentage of the population that is homosexual. Alfred Kinsey posited that ten percent of adult American males claimed to have been more or less exclusively homosexual for at least three years between the ages of 16 and 55,[7] and that the same is true for about five percent of adult American females.[8] However, Kinsey's figures and methodology have been widely criticized and refuted,[9] and other studies have indicated a much lower figure:

- A 1989 study of 36,741 Minnesota teenagers concluded that only 1.5 percent of the males and 1.1 percent of the females were homosexual or bisexual. [10]

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[7] Alfred C. Kinsey et.al., *Sexual Behavior in the Human Male* 650-51 (Philadelphia: W.B. Saunders & Co., 1948).

[8] Kinsey et al., *Sexual Behavior in the Human Female* 474-75 (Philadelphia: W. B. Saunders & Co., 1953).

[9] Dr. Judith A. Reisman and Edward W. Eichel, *Kinsey, Sex and Fraud: The Indoctrination of a People* 17, 20, 62, 181 (Lafayette, LA: Lochinvar/Huntington House, 1990).

[10] Gary Ramafedi, "Demography of Sexual Orientation in Adolescents," 89 *Pediatrics* 714-21 (1992).

- A study funded by the National Science Foundation and released by the National Opinion Research Center in 1991 concluded that only five to six percent of sexually active adults had been bisexual or exclusively homosexual since age eighteen.[11]
- A study of randomly-selected British males reported by the *British Medical Journal* in 1989 concluded that just under three percent were engaged in homosexual activity.[12]

Amicus concludes that homosexuals therefore constitute a much smaller percentage of the population than Kinsey estimated. Nevertheless, according to a 1992 report of the Centers for Disease Control, nearly two-thirds of all AIDS cases in the United States are directly attributable to homosexual activity. If, for the sake of argument, homosexuals constitute ten percent of the population as Kinsey erroneously concluded, they are eighteen times more likely to contract AIDS than the general population.[13] To the extent that their proportion of the population is less than ten percent, their disproportionate likelihood of contracting AIDS increases exponentially.

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[11] Tom W. Smith, "Adult Sexual Behavior in 1989: Number of Partners, Frequency of Intercourse and Risk of AIDS," *Family Planning Perspectives* 102 (May/June 1991).

[12] D. Forman and C. Chilvers, "Sexual Behavior of Young and Middle-Aged Men in England and Wales," 298 *British Medical Journal* 1137-1142 (29 April 1989).

[13] National Center for Infectious Diseases, Division of HIV/AIDS, Centers for Disease Control, "The HIV/AIDS Surveillance Report" 9 (January 1992).

Nor is the health danger limited to AIDS. According to Robert Knight,

> ...a compilation of recent health studies shows that homosexuals account for a disproportionate number of America's most serious sexually transmitted diseases. Homosexual youths are 23 times more likely to contract a sexually-transmitted disease than heterosexual youths. Lesbians are 19 times more likely than heterosexual women to have had syphilis, twice as likely to suffer from genital warts, and four times as likely to have scabies. Male homosexuals are 14 times more likely to have had syphilis than male heterosexuals.[14]

In a study of ninety-three homosexuals, Dr. Jonathan W.M. Gold, M.D., found that 65.5 percent had had gonorrhea, 52.5 percent had had hepatitis, 49.5 percent had had ameobiasis, 40.8 percent had had venereal warts, 39.7 percent had had phthiris pubis, 36.7 percent had had syphilis, 26.8 percent had had nonspecific urethritis, 22.9 percent had had genital herpes simplex, 16.1 percent had had shingellosis, 10.7 percent had had giardiasis, 10.7 percent had had nonspecific proctitis, and 6.4 percent had had scabies.[15]

Dr. Robert S. Ernst, M.D., and Dr. Peter S. Houts, Ph.D., reached similar conclusions:

> In addition to high rates of gonorrhea, syphilis, and hepatitis B, gay men have been shown to be at high risk for venereal transmission of anorectal venereal warts, hepatitis A, enteric pathogens, and cytomegalovirus infection. The recently described acquired immune

[14] Robert Knight, "Sexual Disorientation: Family Research in the Homosexual Debate" 6 (Family Research Council, Washington, D.C., June 1992).

[15] Dr. Jonathan W. M. Gold, M.D., "Unexplained Persistent Lymphadenopathy in Homosexual Men and the Acquired Immune Deficiency Syndrome," 64 *Medicine* 204 (1985).

> deficiency syndrome (AIDS) involving opportunistic infections such as Pneumocystis carinii pneumonia and Karposi's sarcoma accentuate the public and personal health risk associated with sexually promiscuous gay males.[16]

Dr. Anne C. Collier, M.D., observed that "A past history of sexually-transmitted diseases was given by 160 (89 percent) of 180 homosexual men compared with 12 (46 percent) of the 26 heterosexual clinic patients."[17] Dr. Miriam J. Alter concluded that "Hepatitis B infection occurred at rates of 40% to 60% among homosexual men, compared with 4% to 18% among heterosexual men."[18]

The practices of homosexuals are the likely reason for their heightened risk of disease. Homosexuals tend to have sexual relations with a much larger number of partners than do heterosexuals,[19] and their frequent practice of oral and anal

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[16] Dr. Robert S. Ernst, M.D., and Dr. Peter S. Houts, Ph.D., "Characteristics of Gay Persons with Sexually Transmitted Diseases, 12 *Sexually Transmitted Diseases* 59-63 (1985).

[17] Dr. Anne C. Collier, "Cytomegalovirus Infection in Homosexual Men: Relation to Sexual Practices, Antibody to Human Immunodeficiency Virus and Cell-Mediated Immunity," 82 *American Journal of Medicine* 594 (1987).

[18] Dr. Miriam J. Alter, "Hepatitis B Virus Transmission Between Heterosexuals," 256 *Journal of the American Medical Association* 1307-1310 (1986).

[19] Alan P. Bell and Martin S. Weinberg, *Homosexualities: A Study of Diversity about Men and Women* 308 (New York: Simon & Shuster, 1978). Bell and Weinberg found that the average practicing homosexual had more than 250 partners during his lifetime; 43 percent claimed to have had sex with 500 or more partners, and almost 30 percent reported having 1,000 or more partners.

sex[20] that put them in contact with urine, feces, and blood. And because homosexuals frequently have sexual relations with bisexuals, and bisexuals with heterosexuals, and heterosexuals with other heterosexuals, homosexual practices endanger the community as a whole.

Clearly, then, homosexuals in the armed forces constitute a health risk to the entire military community. The government has a strong interest in the health of its citizens, and even more, the government has a compelling interest in making sure that its soldiers are healthy and combat-ready. The presence in the military of a category of people who have a proclivity to engage in practices that pose a health hazard to themselves and to their fellow-soldiers, is clearly a matter of military concern.[21] The government's interest in protecting its soldiers from such categories of people is clearly an important, even compelling interest.

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[20] Dr. Paul Cameron, Dr. Kirk Cameron, and Dr. Kay Proctor, "Effect of Homosexuality upon Public Health and Social Order," *Psychological Reports* 64 (1989): 213-218; Dr. Mary Guinan, M.D., Ph.D., et al., "Heterosexual and Homosexual Patients with the Acquired Immunodeficiency Syndrome," *Annals of Internal Medicine* 100 (1984) 213-218; Dr. Walter E. Stamm, et al., "The Association Between Genital Ulcer Disease and Acquisition of HIV Infection in Homosexual Men," *Journal of the American Medical Association* 260 (9 September 1988) 1429-33. Drs. Cameron and Proctor found that well over 90 percent of homosexuals engage in anal intercourse and over 60 percent engage in anilingual sex.

[21] The medical evidence concerning the health hazards of the homosexual lifestyle as it would impact the armed forces was thoroughly set forth at the time the policy was adopted by Melissa Wells-Petry, Army Major and Judge Advocate, in *Exclusion: Homosexuals and the Right to Serve* (Regnery 1993), and by *amicus*

Furthermore, a substantial portion of the military budget goes to medical care to keep soldiers and their dependents in good physical condition. If homosexuals enter the armed forces, the military will be responsible for their medical care, and for those who are medically discharged that medical care will continue for their entire lives. In 1986 Dr. Ann Hardy, et al., calculated that the cost of hospital care alone for each AIDS patient was $147,000,[22] and in 1992 the Jewish War Veterans concluded that each AIDS case costs the military approximately $200,000.[23] Using a Consumer Price Index rise of 6.5 percent per year, Major R.D. Adair and Captain Joseph C. Myers estimated that the cost of caring for an AIDS patient would grow to about $386,000 per patient by the year 2000 and to nearly $639,000 by the year 2008.[24] These were important considerations when Don't Ask, Don't Tell policy was adopted in 1993. Today,

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counsel John Eidsmoe, Air Force Lt. Colonel and Judge Advocate, in *Gays & Guns: The Case Against Homosexuals in the Military* (Huntington House 1993).

[22] Dr. Ann M. Hardy, et al., "The Economic Impact of the First 10,000 Cases of Acquired Immune-deficiency Syndrome in the United States," *Journal of the American Medical Association* 255 (10 January 1986) 210.

[23] "Adopted Resolutions, Jewish War Veterans of the United States" (16-23 August 1992, Baltimore, MD); cited by Robert H. Knight and Daniel S. Garcia, "How Lifting the Military Homosexual Ban May Affect Families" (Family Research Council, Washington, D.C., November 1992) 2.

[24] Major R.D. Adair and Captain Joseph C. Meyers, "Admission of Gays to the Military: A Singularly Intolerant Act," *Parameters: U.S. Army War College Quarterly,* 23 (Spring 1993) 16.

with the current crisis in the budget, those conditions are just as important as in 1993 if not more so.

The Foundation has presented data that was current in 1993, when the policy at issue was adopted. According to the National Center for HIV/AIDS, Hepatitis, SDD, and TB Prevention, of the Centers for Disease Control, the health threat posed by homosexual conduct has only increased in the intervening years. Using the term "MSM" (men who have sex with men, whether homosexual, bisexual, or other; this would include some men who are not homosexual but would exclude homosexual men who are not sexually active), the Center reported in September 2010:

> Gay, bisexual, and other men who have sex with men (SM) represent approximately 2% of the US population, yet are the population most severely affected by HIV and are the only risk group in which new HIV infections have been increasing steadily since the early 1900s. In 2006, MSM accounted for more than half (53%) of all new HIV infections in the United States, and MSM with a history of injuctin drug use (MSM-IDU) accounted for an additional 4% of new infections. At the end of 2006, more than half (53%) of all people living with HIV in the United States were MSM or MSM-IDU. Since the beginning of the US epidemic, MSM have consistently represented the largest percentage of persons diagnosed with AIDS and persons with an AIDS diagnosis who have died.[25]

The Center further reported that a recent CDC study found that in 2008 one in five (19%) of MSM in 21 major U.S. cities were infected with HIV, and nearly half

[25]"HIV Among Gay, Bisexual and Other Men Who Have Sex with Men (MSM)," National Center for HIV/AIDS, Hepatitis, STD, and TB Prevention, Centers for Disease Control, September 2010.

(44%) were unaware of their infection; that in 2007 MSM were 44 to 86 times more likely to be diagnosed with HIV compared with other men, and 40 to 77 times as likely as women; and that between 2005 and 2008, estimated diagnoses of HIV infection increased approximately seventeen percent among MSM.[26] Likewise, a 2007 study from the United Kingdom revealed similar results: gay men in sexual relationships with other men were far more likely to have contracted HIV, and those who had been diagnosed with HIV were also more likely to have contracted other sexually transmitted infections (STI) including gonorrhea, Chlamydia, syphilis, hepatitis, and LGV (lymphogranuloma venereum).[27]

The evidence is clear: the important, even compelling interest that existed in 1993 when 10 U.S.C. § 654 and its implementing policy was adopted, remains an important, even compelling interest in 2011.

CONCLUSION

This court-created right to engage in homosexual conduct is not found in the Constitution and therefore should be analyzed, if at all, only according to a lower-tier rational basis standard. The need to preserve the health and fitness of

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[26] *Id.*

[27] Ford Hickson, Peter Weatherburn, David Reid, Kathie Jessup, and Gary Hammond, *Testing Targets: Findings from the United Kingdom Gay Men's Sex Survey 2007,* Sigma Research, September 2009, www.sigmaresearch.org.uk/go.php/reports/report2009f (accessed 28 February 2011).

America's fighting forces, while at the same time conserving medical expenses, is not only a legitimate state interest; it is an important, even compelling governmental interest, and the military policy concerning homosexuals is not only rationally related to that interest but substantially and directly furthers it. Even though a lame-duck Congress has repealed the policy, Congress should be free to consider reinstating that policy or a similar policy if future needs should so require.

For the foregoing reasons, *Amicus* respectfully urges that the district court's decision below be reversed.

Dated this 4th day of March, 2011.

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s/ Benjamin D. DuPré
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March 4, 2011

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on this day, March 4, 2011.

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