No. 10-56634, 10-56813

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOG CABIN REPUBLICANS,

Plaintiff-Appellee/Cross-Appellant,

v.

UNITED STATES OF AMERICA; and ROBERT M. GATES, Secretary of Defense,

Defendant-Appellants/Cross-Appellees

On Appeal from the United States District Court for the Central District of California
Case No. 2:04-cv-08425-VAP-E
The Honorable Virginia A. Phillips, District Judge

BRIEF OF *AMICI CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.; KNIGHTS OUT; OUTSERVE; HUMAN RIGHTS CAMPAIGN; AND ANTI-DEFAMATION LEAGUE IN SUPPORT OF PLAINTIFF APPELLEE/CROSS-APPELLANT FOR AFFIRMANCE IN PART AND REVERSAL IN PART

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FED. R. APP. P. 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure, *amici* declare the following:

Lambda Legal Defense and Education Fund, Inc. does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

Knights Out does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

OutServe does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

Human Rights Campaign does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

Anti-Defamation League does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

Executed this 4th day of April, 2011.

/s Peter Renn
Peter Renn
Attorney for *Amici Curiae*

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INTERESTS OF *AMICI CURIAE*

Amici are a coalition of nonprofit legal, advocacy, and military service member organizations committed to ensuring government respect for the rights of lesbian, gay, and bisexual people. All parties consent to the filing this brief.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest nonprofit legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender ("LGBT") people, and those with HIV. Lambda Legal has been involved for decades in challenges to the military's discriminatory treatment of lesbian, gay, and bisexual service members and violation of their rights of due process, equal protection, and freedom of speech, including *Witt v. U.S. Dep't of the Air Force*, 548 F.3d 1264 (9th Cir. 2008) (*amicus*); *Cammermeyer v. Perry*, 97 F.3d 1235 (9th Cir. 1996) (counsel); *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1992) (*amicus*); and *Berg v. Claytor*, 591 F.2d 849 (D.C. Cir. 1978) (counsel). Lambda Legal also was counsel in *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996), Supreme Court cases highly significant to this appeal. Based on this extensive work, Lambda Legal is uniquely qualified to assist this Court here.

Knights Out is an organization of LGBT graduates of West Point, and their allies. Heterosexual graduates, former cadets, and staff and faculty are included in the membership. Knights Out supports full equality of service for LGBT service

members, and supports West Point in training leaders for an Army that includes LGBT soldiers on an equal footing with "straight" soldiers. A number of Knights Out's members were discharged under the so-called "Don't Ask, Don't Tell" policy, not all with honorable discharges. Others discharged honorably are currently unable to re-join. These members continue to be adversely affected by the policy, regardless of the law's repeal. Knights Out has joined in this brief for these reasons and because it believes that equal and honorable service warrants equal and honorable treatment.

OutServe is a network of LGBT active-duty military service members. In addition to providing ways for LGBT service members to communicate and network, OutServe is committed to advocating for the fair and equal treatment of LGBT service members in the military. OutServe members continue to suffer from the harms inflicted by "Don't Ask, Don't Tell" ("DADT"). In the past year alone, there have been OutServe members who have committed suicide under the pressure of DADT. Other OutServe members have been subjected to discrimination and harassment on the basis of their perceived sexual orientation, which is aggravated by the discriminatory climate that DADT fosters.

Human Rights Campaign ("HRC"), the largest national lesbian, gay, bisexual and transgender political organization, envisions an America where gay, lesbian, bisexual and transgender people are ensured of their basic equal rights, and

can be open, honest and safe at home, at work and in the community. HRC has over 750,000 members and supporters nationwide committed to making this vision of equality a reality. HRC worked to ensure legislative repeal of "Don't Ask, Don't Tell" and opposes the discriminatory and unconstitutional law.

Anti-Defamation League was founded in 1913 to advance goodwill and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all. Today, it is one of the world's leading civil and human rights organizations combating anti-Semitism, all types of prejudice, discriminatory treatment and hate. The League is committed to protecting civil rights of all persons, and to assuring that each person receives equal treatment under law.

STATEMENT OF COMPLIANCE WITH RULE 29(C)(5)

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund this brief; and no person—other than *amici*—contributed money to fund this brief.

SUMMARY OF ARGUMENT

Amici submit this brief to raise three points that have not been the focus of extensive prior briefing:

1. Unless and until the government abates the harm that "Don't Ask, Don't Tell" ("DADT") continues to inflict upon countless lesbian, gay, and

bisexual service members and the country at large, this case will not be moot. The government has taken a significant step toward ending the era of statutorily-mandated discrimination against current and future service members by enacting the Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010) (the "Repeal Act"), but many more steps must still be taken in order to address the ongoing harms inflicted by DADT upon thousands of previously discharged service members. Some of these individuals wrongly received "other than honorable" discharges that the government has yet to remedy; many must carry discharge documentation that subjects them to the risk of discrimination and may reveal their sexual orientation; and others face recoupment efforts for alleged debts incurred as a result of incomplete service due to their discharge under DADT. This case will not be moot until the government implements a solution that remedies all of these ongoing problems.

2. The district court correctly applied heightened scrutiny to the substantive due process claim raised by the plaintiff. This standard of review is mandated by this Court's prior ruling in *Witt v. Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008), which held that DADT's intrusion upon the fundamental liberty interest in forming intimate family relationships can only be justified if the law substantially furthers an important government interest. The standard of review derives from the nature of the right at issue and is not affected by whether a case

presents a facial challenge contesting the constitutionality of a statute itself, as here, rather than its particular application, as in *Witt.*

3. The district court erred, however, in dismissing the equal protection claim raised below. There is no binding circuit precedent regarding the proper standard of review for classifications based on sexual orientation, let alone precedent requiring dismissal of the equal protection claim pled in this case as a matter of law. Applying the factors relevant to ascertaining whether a classification is suspect, this Court should hold that classifications based on sexual orientation such as DADT demand strict scrutiny or, at a minimum, heightened scrutiny, as recently concluded by the President and the U.S. Department of Justice.

ARGUMENT

I. The Continuing Harms Faced By Service Members Discharged Under DADT Present A Live Controversy Appropriate For Judicial Review.

If the requirements for a repeal of DADT are satisfied,[1] the barrier that currently prevents lesbian, gay, and bisexual service members from openly serving

[1] The Repeal Act provides that repeal of the DADT statute, 10 U.S.C. § 654, will become effective 60 days after (1) the Secretary of Defense has reviewed the report of the Comprehensive Review Working Group established by the Secretary of Defense, and (2) the President, Secretary of Defense, and the Chairman of the Joint Chiefs of Staff certify that they have considered the recommendations of the working group and have prepared the necessary policies and regulations to implement repeal consistent with military readiness. Repeal Act § 2(b). President Obama has stated that repeal will occur by the end of this year. *See* Ed O'Keefe,

in the military will be lifted—but that repeal will not in itself remedy the multiple harms that DADT has caused to members of the armed forces discharged pursuant to DADT. Repeal of DADT only means that new individuals will no longer be subjected to the statute's harms. It does nothing to absolve the government for the harms that that law has inflicted upon those already discharged under its provisions. The government likewise cannot plausibly contend that the day when this case will be moot is "swiftly approaching," United States Br. at 26, when it has not yet disclosed whether or how it will remedy these ongoing harms.

Dismissal of a case for mootness is permissible only when it is "absolutely clear" that a litigant no longer has any need of the judicial protection sought. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000). In deciding a mootness issue, "the question is not whether the precise relief sought at the time the application for an injunction was filed is still available" but rather "whether there can be *any* effective relief." *West v. Sec'y of the Dep't of Transp.*, 206 F.3d 920, 925 (9th Cir. 2000). A case is also not moot where secondary or collateral injuries survive after a plaintiff's primary injury has been resolved. Thus, for example, the Supreme Court has long-recognized an exception to the mootness doctrine for challenges to criminal convictions—even after a sentence is

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State of the Union 2011: Obama Says "Don't Ask, Don't Tell" To Formally End This Year, Washington Post, Jan. 25, 2011, *available at* http://voices.washingtonpost.com/federal-eye/2011/01/obama_dont_ask_dont_tell_will.html.

complete—where there is even the "mere possibility" that an individual will still face collateral consequences stemming from the conviction. *See Sibron v. New York*, 392 U.S. 40, 55 & 57 (1968) (holding that "a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed"). *See also Garcia v. Lawn*, 805 F.2d 1400, 1402 (9th Cir. 1986) ("a case is not moot if the court has the ability to undo the effects of conduct that was not prevented by the time of the decision") (internal quotation marks omitted).

The same is true here: although the repeal of DADT will presumably mean that lesbian, gay, and bisexual people will be able to join the military without having to hide their sexual orientation, those who have already been discharged continue to face collateral and even direct consequences, as explained below. To be clear, the government can ameliorate these harms, but unless and until it has done so, this appeal must proceed.

A. "Other Than Honorable" Discharges

Service members who have received "other than honorable" discharges under DADT present a stark example of individuals who are currently saddled with disabilities that simple repeal of DADT will not remove. These types of discharges can be given to those who engage in a "homosexual act" with a so-called aggravating factor or circumstance. Some of the categories of conduct that constitute an aggravating factor, such as coercion or prostitution, may

appropriately warrant an "other than honorable" discharge despite DADT; but some may not, including acts committed openly in public view (e.g., holding hands at a movie theater) or on military property (e.g., a farewell hug while being dropped off). *See, e.g.*, DOD Ins. 1332.14 Encl. 3 ¶ 8(c)(3) (commission of homosexual act "openly in public view" or aboard a military vessel can lead to an other than honorable discharge); Navy Military Personnel Manual Art. 1910-148 (April 23, 2010), *available at* http://www.npc.navy.mil/NR/rdonlyres/055684E2-B9F9-431F-B8BB-B77CFFDFEF9A/0/1910148.pdf (same); Marine Corps. Bulletin 1900 (April 23, 2010), *available at* http://www.usmc.mil/news/publications/Documents/MCBUL%201900%2023%20APR%2010.pdf (same). Indeed, as a result of DADT, service members who have simply attempted to marry a person of the same sex "openly in public view"—or who have effectively done something now permitted under the laws of five states and the District of Columbia and, for a period of time, in California—could be given "other than honorable" discharges. *Id.*

Courts have recognized that these "other than honorable" discharges present collateral consequences similar to those caused by criminal convictions. "[I]t is common knowledge that a discharge which is 'other than honorable,' . . . can seriously jeopardize an individual's prospects for future employment as well as his general reputation." *McAiley v. Birdsong*, 451 F.2d 1244, 1246 (6th Cir. 1971).

See also Kauffman v. Sec'y of Air Force, 415 F.2d 991, 995 (D.C. Cir. 1969) (noting that a dishonorable discharge imposes a lifelong disability of stigma and injury to reputation); *Giles v. Sec'y of Army*, 475 F. Supp. 595, 598 (D.D.C. 1979) (noting that certain discharges make it more difficult to obtain public benefits available to veterans and restrict employment opportunities in the public and private sector). As such, these ongoing harms also prevent a case from becoming moot. *See McAiley*, 451 F.2d at 1245 (holding that plaintiff could continue to challenge whether he was unlawfully inducted into army, even though he had been discharged during pendency of appeal); *Grubb v. Birdsong*, 452 F.2d 516, 517-18 (6th Cir. 1971) ("an undesirable discharge carries with it 'collateral consequences' which . . . require us to hold that [this case] is not moot"); *Boyd v. Hagee*, No. 06CV1025 JLS (RBB), 2008 U.S. Dist. LEXIS 12237, at *7 (C.D. Cal. Feb. 19, 2008) ("an undesirable discharge carries with it 'collateral consequences' which . . . require us to hold that [this case] is not moot").

Although most service members discharged under DADT have received "honorable" discharges, a significant number have not. From 1994 to 2003, at least 287 service members separated under DADT received "other than honorable" discharges. U.S. General Accounting Office, *Military Personnel: Financial Costs and Loss of Critical Skills Due to DOD's Homosexual Conduct Policy Cannot Be Completely Estimated*, GAO-05-299 (Feb. 23, 2005) at p. 6-7. From 2004 to 2009,

at least 95 service members similarly received "other than honorable" discharges. U.S. General Accounting Office, *Military Personnel: Personnel and Cost Data Associated with Implementing DOD's Homosexual Conduct*, GAO-11-170 (Jan. 20, 2011), at p.7. This does not include the discharges under DADT that took place in fiscal year 2010, of which there were at least 261. Chris Geidner, *DADT Discharges for Fiscal Year 2010: 261*, Metro Weekly, Mar. 24, 2011, *available at* http://metroweekly.com/poliglot/2011/03/dadt-discharges-for-fiscal-yea.html.

At present, there is nothing in the Repeal Act, the Comprehensive Review Working Group Report, or the Support Plan for Implementation[2] to redress undeserved "other than honorable" discharges. The government is aware of the discharge characterization problem. *See* Letter from Servicemembers Legal Defense Network Letter to Secretary Gates and Under Secretary Stanley (Feb. 7, 2011), *available at* http://www.sldn.org/page/-/Website/Special%20Boards%20Letter.pdf ("SLDN Letter"). Indeed, several members of Congress petitioned Secretary Gates about this issue, writing that "these discharge characterizations have implications on the ability of these men

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[2] In contending that this case would soon be moot, the government relied upon both Comprehensive Review Working Group Report, an assessment of the impact of DADT repeal and related policy recommendations, and the Support Plan for Implementation, a framework for carrying out preparation associated with repeal (both available at http://www.defense.gov/home/features/2010/0610_gatesdadt/). United States Br. at 9-11. To the extent this Court considers those materials on appeal, they fail to support the government's contention.

and women to access benefits they have earned and will continue to do so without action."[3] It is thus far from "absolutely clear" that the harms facing veterans laboring under these discharges will be abated absent affirmance of the district court's declaratory judgment finding DADT unconstitutional. *Adarand Constructors*, *supra*, 528 U.S. at 224.

B. Discharge Documentation

Even service members who received honorable discharges under DADT may face ongoing harm post-repeal. At present, their discharge documentation continues to indicate that they are unable to re-enlist in the military, even though employers routinely examine this documentation and may refuse to hire individuals based on its contents. *See* Comprehensive Review Working Group Report at 149 ("Generally, the fact that a Service member was separated on the basis of homosexual conduct is indicated by separation and re-entry codes provided on the Service member's record of discharge"); Ed O'Keefe, *Ending 'Don't Ask, Don't Tell' Doesn't End Problems Facing Gay Service Members*, Washington Post, Feb. 14, 2011, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2011/02/13/AR2011021302780.html. This is particularly true with respect to employers in law enforcement and security. *See* SLDN Letter.

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[3] http://gwenmoore.house.gov/images/stories/Gates_Letter.pdf (dated Feb. 3, 2011)

When a service member's discharge documentation indicates that the discharge was for "homosexual conduct," it places the person discharged at heightened risk for sexual orientation discrimination. This Court previously held in *Witt* that "an honorable discharge could be stigmatizing if prospective employers had some reason to know of the reasons for the honorable discharge." 527 F.3d at 812. *See also Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (noting that the Texas criminal conviction for sodomy "carrie[d] with it the other collateral consequences always following a conviction, such as notations on job application forms"). Although the government cannot control private bias, neither can the government give such bias effect by facilitating its expression. *See Palmore v. Sidoti*, 466 U.S. 429, 431-34 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."). And yet that is precisely what the government does: it deprives veterans of any control over whether, when, and under what circumstances to disclose their sexual orientation. This is a particularly perverse result, given that DADT initially demanded the active concealment of one's sexual orientation and yet has the subsequent effect of forcing its disclosure.

The government is also aware of this problem, but has not resolved it. The Comprehensive Review Working Group Report recommends that the military permit those whose paperwork indicates a discharge under DADT to re-enlist in

the military, if they are otherwise eligible to do so, but it does not resolve the problem for those who do not seek to re-enlist. Comprehensive Review Working Group Report at 149. Indeed, the Support Plan for Implementation recommends that the Defense Department should leave to the discretion of each branch of the military how each one will handle the problem of negative re-entry codes. Support Plan at 23. There accordingly is no assurance that every branch will act at all to resolve the problem.

C. Financial Recoupment

Yet another example of the ongoing harms caused by DADT is the government's attempt to recoup money from service members who were prematurely separated because of DADT. The government continues to pursue discharged service members for repayment of enlistment or re-enlistment bonuses and tuition money and will, in some cases, simply take the money from discharged service members' tax returns.[4] These individuals must not only bear the humiliation of discharge and the indignity of a ruined military career but, adding insult to injury, must also fend off government collectors. Yet there is also no

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[4]*See, e.g.*, Amanda Terkel, *Dan Choi Told to Repay Military $2,500 After Being Discharged Under DADT*, Jan. 27, 2011, *available at* http://www.huffingtonpost.com/2011/01/27/dan-choi-repay-army-bonus-dadt-discharge_n_815102.html; Chris Johnson, *Kicked Out And $79,000 in Debt*, Feb. 10, 2011, *available at* http://www.washingtonblade.com/2011/02/10/kicked-out-and-79000-in-debt/.

indication in either the Comprehensive Review Working Group Report or the Support Plan for Implementation that the government intends to cease this practice.

The district court's injunction, however, would end it. The injunction enjoins Appellants from "enforcing or applying" DADT against any person. This should include actions by the government to seek further recoupment of money from individuals who failed to complete a particular term of service because the government prevented them from doing so under an unconstitutional law. *Cf. Hensala v. Air Force*, 343 F.3d 951, 955 (9th Cir. 2003) (leaving undecided whether recoupment of money from service member discharged under DADT is contrary to a constitutional right in light of *Lawrence v. Texas*). A contrary result would mean that the federal government could violate individuals' constitutional rights—and then demand that the victims pay them for the consequences of the government doing so.

II. The District Court Properly Applied Heightened Scrutiny To The Due Process Claim.

A. *Witt* Mandates That Laws Burdening the Fundamental Liberty Interest In One's Private, Intimate Life Receive Heightened Scrutiny.

After *Witt*, the law of this circuit is settled: DADT can only survive, if it all, if the government is able to satisfy its burden under heightened scrutiny. Because DADT constitutes an attempt "to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*, the

government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest." *Witt*, 527 F.3d at 819.

The rights identified in *Lawrence* include the most cherished aspects of liberty, including the right to form an intimate, loving relationship, the right to form a family, and the right to privacy, particularly within the confines of the bedroom. This Court recognized that the weightiness of these fundamental liberty interests required the Supreme Court to apply "something more" than ordinary rational basis review in *Lawrence*, and that, likewise, those same interests require a more searching form of review here in adjudicating the constitutionality of DADT. The district court therefore properly applied heightened scrutiny—the appropriate standard of review for all substantive due process challenges to DADT.

B. Heightened Scrutiny Applies To Both Facial And As-Applied Due Process Challenges To DADT.

Standards of review do not vacillate upwards and downwards depending upon whether particular cases are framed as facial or as-applied challenges. The government advanced this novel distinction below, but wisely appears to have abandoned it on appeal. There is no precedent for such a distinction, for good reason: the question of what standard of review is appropriate for a substantive due process claim hinges on the nature of the liberty interest at stake—and whether that interest is sufficiently weighty to warrant more searching review—not on whether

a plaintiff is challenging the constitutionality of a statute itself or simply its application to his or her circumstances.

Case law makes clear that a single standard of review governs both as-applied and facial challenges. *See, e.g.*, *Bahrampour v. Lampert*, 356 F.3d 969, 975 (9th Cir. 2004) (noting that standard of review for constitutionality of prison regulations "applies equally to facial and 'as applied' challenges"); *Hills v. Scottsdale Unified School Dist.*, 329 F.3d 1044, 1050 & n.4 (9th Cir. 2003) (applying standard of review applicable to facial First Amendment challenges to policies that restrict speech in a limited public fora, *see Rosenberger v. Rector*, 515 U.S. 819, 829-30 (1995) (cited at 329 F.3d at 1050), to an "as applied" challenge). So does logic. For example, regardless of whether a particular application of a statute prevented an individual from exercising the right to vote or the statute on its face prevented many people (including that individual) from exercising that fundamental right, the restriction would need to be equally measured by whether it was necessary to further a compelling state interest. That standard flows from the judiciary's duty to closely scrutinize situations where fundamental rights are infringed because of the importance of such rights, not from whether the infringement was due to a facial problem with a statute or its application in particular circumstances.

Indeed, because facial challenges are often mounted in response to laws with substantial constitutional infirmities—such that they cannot even be saved with a narrowing construction or severance of the unconstitutional provision—it would be especially inappropriate to test their constitutionality under a less rigorous standard than that employed for government conduct applied to a single individual.

The fact that *Witt* arose in the context of an as-applied challenge to DADT does not compel a different result. *Witt* adopted an "as-applied balancing test" in order to require the government to prove actual rather than conjectural harm to the asserted interests of unit cohesion, morale, and discipline. 527 F.3d at 819 (holding that examination of "whether a justification exists for the application of the policy as applied to Major Witt . . . 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'"). Especially in an as-applied challenge like that brought by the plaintiff in *Witt*, that approach makes sense: the government should not be able to defend DADT by arguing that it could be properly applied to third parties or relying upon "some hypothetical, post hoc rationalization in general." *Id.* Accordingly, Major Witt invited the court to find DADT unconstitutional as-applied to her.

Witt did not hold that facial due process challenges to DADT are subject only to rational basis review—as the government initially argued below—let alone

that all facial due process challenges to DADT are prohibited entirely—as one *amicus* in support of the government has now suggested. *See* Nat'l Legal Foundation Br. at 2. To the contrary, *Witt*'s concern about preventing the government from relying upon hypothetical rationales in defense of the law can be addressed in both facial and as-applied challenges. Indeed, because the court's task in a facial challenge is to assess the law's application across a range of situations, it is well-positioned to discern which rationales are real and credible and which are imaginary. By contrast, application of rational basis review to a facial challenge increases the risk that the government will proffer imaginary justifications in the law's defense, untethered to the factual record.

Furthermore, where there is an extensive factual record from which to evaluate the constitutionality of a law's facial application—as there was here—there is substantially less risk that a court will make an "unnecessarily broad constitutional judgment[]." *Witt*, 527 F.3d at 819 (internal quotation marks omitted). This was not a pre-enforcement challenge to a recently-enacted law. *Cf. Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008). There was no need to speculate as to the multitude of ways in which DADT inflicted (and continues to inflict) harm upon lesbian, gay, and bisexual soldiers, because evidence of that harm was readily available based upon the nearly

two decades in which the government enforced the law across a variety of situations.

Finally, it is important to recognize that the district court below found DADT facially unconstitutional after applying the test for facial challenges recently articulated in *Washington State Grange*: that "a facial challenge must fail where the statute has a plainly legitimate sweep." *Id.* at 449 (internal quotation marks omitted). This is not a light standard, and the district court did not approach it as such. Nevertheless, the court found that the evidence introduced at trial "amply" illustrated that DADT does not have a "plainly legitimate sweep." *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 894 (C.D. Cal. 2010). Application of heightened scrutiny was therefore perfectly appropriate.

III. The District Court Erred In Dismissing The Equal Protection Claim As A Matter Of Law.

A. The Proper Standard Of Review For Classifications Based On Sexual Orientation Such Remains An Open Question.

Log Cabin Republicans also alleged that DADT violated the Equal Protection Clause of the Fifth Amendment, but the district court erroneously dismissed this claim. Order Denying in Part and Granting in Part Mot. to Dismiss, Dkt. 83 (June 9, 2009) at 19. The district court concluded that Ninth Circuit precedent required it to apply only rational basis review to classifications based on sexual orientation, and the court found that DADT satisfied that test. It arrived at

this conclusion based on three cases—*Holmes v. California Army Nat'l Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997), *Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997), and *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990)—all of which predated *Lawrence*.

The equal protection ruling in all of these cases, directly or indirectly, relied upon *Bowers* or its progeny. *Bowers v. Hardwick*, 478 U.S. 186 (1986). For example, over twenty years ago, this Court held in *High Tech Gays* that discrimination against lesbians and gay men is not subject to heightened scrutiny "because homosexual conduct . . . can be criminalized." The basis for that ruling, however, was subsequently soundly repudiated by *Lawrence*. 539 U.S. at 578 ("*Bowers* was not correct when it was decided, and it is not correct today."). Similarly, *Holmes* asserted that "homosexuals do not constitute a suspect or quasi-suspect class," 124 F.3d at 1132, by citing *Philips*, which in turn relied upon *High Tech Gays*. Indeed, these pre-*Lawrence* cases found equal protection challenges unavailing, even though *Bowers* was formally a due process decision, because it recognized that the two doctrines are linked. *See, e.g., Philips*, 106 F.3d at 1427 ("as we observed in *High Tech Gays*, substantive due process and equal protection doctrine are intertwined"); *High Tech Gays*, 895 F.2d at 571 (relying on *Bowers* but recognizing that it "analyzed the constitutionality of the sodomy statute on a due process rather than equal protection basis"). "Equality of treatment and the

due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects." *Lawrence*, 539 U.S. at 575. None of these earlier Ninth Circuit cases compelled the district court to dismiss the equal protection claim in light of *Lawrence* nor do they bind this Court to affirm that dismissal.

The district court also misapprehended this Court's prior equal protection ruling in *Witt* in two respects. First, *Witt* did not address a straightforward equal protection claim based on the fact that DADT creates a sexual orientation-based classification.[5] Instead, Major Witt argued that DADT violates equal protection because it discriminates against certain service members (e.g., lesbians and gay men) by requiring discharge on the ground that their known presence purportedly caused discomfort while permitting others to serve (e.g., child molesters) for whom that was at least equally as true. 527 F.3d at 821. In other words, if the purpose of the law was to reduce discomfort, then it was drawn in an under-inclusive manner. *Witt* held that this particular variety of equal protection claim receives rational basis review and affirmed its dismissal; but it did not foreclose other equal

[5] There can be no question that DADT creates a classification based on sexual orientation, even though it targets "homosexual conduct," in light of the Supreme Court's recent refusal "to distinguish between status and conduct in this context." *Christian Legal Soc'y v. Martinez*, 561 U.S. --, 130 S. Ct. 2971, 2990 (2010) (finding no difference between policy of discriminating against lesbian and gay individuals and policy of discriminating against individuals engaged in "unrepentant homosexual conduct").

protection claims, such as where the similarly situated group, rather than being child molesters, is heterosexual service members who, unlike those who are gay, are allowed to be open about their sexual orientation. Second, *Witt* did not address what standard of review is appropriate for sexual orientation-based classifications. Instead, having concluded that rational basis review was appropriate for the particular variety of equal protection claim before it, this Court stated that "DADT does not violate equal protection under rational basis review." *Id.* That left open the question of whether a sexual orientation-based classification should receive heightened scrutiny and whether DADT could survive such review.

B. Sexual Orientation-Based Classifications Must Be Strictly Scrutinized.

Although most laws are presumed constitutional, where there are reasons to be suspicious that a law's differential treatment of two classes of individuals may be due to bias or stereotypes, that situation is reversed and the law instead is presumed to be unconstitutional. Where it is highly unlikely that the differential treatment could be legitimate, the law is considered "suspect." If there sometimes may be situations where different treatment of the affected groups is valid, the classification drawn by the law is considered "quasi-suspect." *See Watkins v. United States Army*, 875 F.2d 699, 712 n.4 (9th Cir. 1989) (Norris, J., concurring) (describing difference between suspect and quasi-suspect classifications).

Suspect classifications exist when two essential components are present: (1) the group disfavored by the classification has been the target of a long history of invidious discrimination, and (2) the characteristic that distinguishes the group bears no relation to the group members' ability to contribute to society. *See Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (focusing on those two factors); *Varnum v. Brien*, 763 N.W.2d 862, 889 (Iowa 2009) (recognizing those two factors as most important); *In re Marriage Cases*, 183 P.3d 384, 443 (Cal. 2008) (same). As additional factors, courts have also considered the extent to which a given trait is immutable or integral to a person's identity, and the extent to which a group is politically vulnerable and lacks sufficient power to protect itself in the political process. *See Mass. Bd. of Ret.*, 427 U.S. at 313. No factor is dispositive, but the presence of each additional factor increases the risk that a particular classification "provides no sensible ground for differential treatment." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

As the U.S. Attorney General recently concluded, "[e]ach of these factors counsels in favor of being suspicious of classifications based on sexual orientation." Report from Attorney General to Speaker of House of Representatives, February 23, 2011 ("Attorney General Report") (report issued pursuant to 28 U.S.C. § 530D), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html. Upon consultation

with the President, the Attorney General arrived at the reasoned conclusion that the Department of Justice could no longer defend the so-called Defense of Marriage Act, but the basis for the conclusion applies equally to any law that discriminates against lesbian, gay, or bisexual people, including DADT.

1. Lesbians And Gay Men Have Suffered A Long And Painful History of Discrimination.

"First and most importantly, there is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today." Attorney General Report at 2. As the Ninth Circuit recognized over two decades ago, and recently reiterated, "homosexuals have suffered a history of discrimination." *High Tech Gays*, 895 F.2d at 573. *See also Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 954 (9th Cir. 2009) (observing that defendants would be "hard pressed to deny that gays and lesbians have experienced discrimination in the past in light of the Ninth Circuit's ruling in *High Tech Gays*"). Indeed, "for centuries there have been powerful voices to condemn homosexual conduct as immoral." *Lawrence*, 539 U.S. at 571.

Until 1973, discrimination against lesbians and gay men was justified by the erroneous classification of homosexuality as a mental illness. *See* Laura A. Gans, *Inverts, Perverts, and Converts: Sexual Orientation Conversion Therapy and Liability*, 8 B.U. Pub. Int. L.J. 219, 221-22 (1999) (noting that the American

Psychiatric Association did not remove homosexuality from the Diagnostic and Statistical Manual of Mental Disorders II until 1973); James A. Garland, *The Low Road to Violence: Governmental Discrimination as a Catalyst for Pandemic Hate Crime*, 10 L. & Sex. 1, 75-76 (2001) (describing the involuntary commitment of homosexuals to mental institutions in the 1960s under inhumane conditions due to the false belief that they were "sex deviate[s]"). Efforts to "cure" homosexuality were often sadistic and torturous. *See* David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. Cal. L. Rev. 1297, 1304-08 (1999) (describing "medical attempts . . . to extinguish homosexuality" via extreme measures, including lobotomies and castration).

Lesbians and gay men have also, for many years, experienced pervasive discrimination in public and private spheres, including with respect to their rights of association, *see, e.g.*, *Lynch's Builders Rest. v. O'Connell*, 303 N.Y. 408 (1952) (upholding revocation of liquor licenses for bars where gay people gathered); employment, *see, e.g.*, Exec. Order No. 10,450, § 8(a)(1)(iii), 3 C.F.R. 936, 938 (1953) (President Eisenhower's executive order requiring termination of all gay and lesbian federal employees); parenting, *see, e.g.*, *Weigand v. Houghton*, 730 So.2d 581, 586 (Miss. 1999) (denying father custody because his "homosexual activity may . . . have an adverse effect upon" the child); and private, consensual intimacy, *see, e.g.*, *Bowers*, 478 U.S. at 192-93 (noting that, as of 1986, "24 states

and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults").

Discrimination based on sexual orientation is not confined to the past. Federal and state laws continue to discriminate against gay people today by refusing to recognize their relationships and restricting their ability to adopt children, *see, e.g.*, Miss. Code Ann. § 93-17-3(5) ("adoption by couples of the same gender is prohibited"). Lesbian and gay youth must also contend with staggering amounts of antigay violence and harassment: nine out of every ten lesbian and gay youth are verbally or physically harassed because of their sexual orientation. *See* Joseph Kosciw et al., *The 2009 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools* 26 (2010) (reporting that 84.6% of lesbian and gay students had been verbally harassed because of their sexual orientation and 40.1% had been physically harassed).

2. Sexual Orientation Is Unrelated To One's Ability To Contribute To Society.

Strict or at least heightened scrutiny applies to government classifications based on a trait that bears "no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality). *See also Cleburne*, 473 U.S. at 440-41. There is no question that sexual orientation is such a trait. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 967 (N.D. Cal. 2010);

Watkins, 875 F.2d at 725 ("[S]exual orientation plainly has no relevance to a person's ability to perform or contribute to society.") (internal quotation marks omitted) (Norris, J., concurring). It is thus "not a characteristic that generally bears on legitimate policy objectives." Attorney General Report at 3.

3. Sexual Orientation Is An Immutable Trait That Is Deeply Rooted, Central to Personhood, and Resistant to Voluntary Change.

As a threshold matter, it must be understood that, for equal protection purposes, "immutability" does not mean that a person is unable to change the characteristic. *See Watkins*, 875 F.2d at 726 (Norris, J., concurring). Rather, "immutability" includes a central, defining trait of personhood that a person should not be required to change to avoid discrimination. Indeed, classifications based on characteristics such as alienage, illegitimacy, gender, and race are subjected to strict or heightened scrutiny even though aliens can become citizens, illegitimate children can be legitimated, a person's physical sex can be changed with medical intervention, and traits related to one's race can be changed via pigment injections, surgery, or hair treatments. *Id.*

Courts have thus considered a trait "immutable" when altering it would "involve great difficulty, such as requiring a major physical change or a traumatic change of identity," or when the trait is "so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change

[it]." *Id.* at 726. This Court has already held that sexual orientation is precisely such a trait: "Sexual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them." *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds*, *Thomas v Gonzales*, 409 F.3d 1177, 1187 (9th Cir. 2005); *accord Perdomo v. Holder*, 611 F.3d 662, 666 (9th Cir. 2010). *See also Varnum*, 763 N.W.2d at 893 (holding that sexual orientation "is central to personal identity and may be altered [if at all] only at the expense of significant damage to the individual's sense of self.") (internal quotation marks omitted).

Even if gay men and lesbians were put to the extra burden of demonstrating that they cannot choose to become heterosexual—even though a similar requirement has not been imposed upon all other groups afforded strict or heightened scrutiny—there is a scientific consensus that a person's sexual orientation defies voluntary change. *See Perry*, 704 F. Supp. 2d at 934-35, 940, 966-67 (N.D. Cal. 2010) ("No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation.").[6] But, "[s]cientific proof aside, it

[6] The question of whether sexual orientation can be voluntarily changed is distinct from the question of what causes sexual orientation, such as whether there are biological substrates to sexual orientation. *See* Qazi Rahman & Glen Wilson, *Born Gay? The Psychobiology of Sexual Orientation*, 34 Pers. & Individual Differences

seems appropriate to ask whether heterosexuals feel capable of changing *their* sexual orientation." *Watkins*, 875 F.2d at 726 (Norris, J., concurring). It bears emphasis that changing homosexuality requires not only eliminating sexual attraction to members of the same sex, but creating such attraction to members of the other sex.[7] Even if it could ever be scientifically demonstrated that this could be voluntarily accomplished for some vanishingly small number of individuals, that would still be a legally insufficient basis for withholding strict or heightened scrutiny, because there would remain individuals who could not alter their sexual orientation in order to avoid discrimination. The rights of an entire group of individuals, and those individuals' constitutional rights, are not judged on the basis of whether a single person may "opt-out" of the group.

It is reckless and irresponsible to continue to repeat the demonstrably false notion that everyone can choose to be heterosexual. Indeed, a disproportionate number of gay youth commit suicide each year—as evidenced by the surge of

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1337 (2003) (reviewing literature of biological origins of sexual orientation, including studies showing differences based on sexual orientation in neuroanatomy, morphological features indicative of prenatal hormone exposure, and birth order); Lynn Hall & Craig Love, *Finger Length Ratios in Female Monozygotic Twins Discordant for Sexual Orientation*, 32 Archives Sex. Behav. 23 (2003) (finding biological causes for differences in sexual orientation between identical twins).

[7] *See* Henry Adams et al., *Voluntary Control of Penile Tumescence Among Homosexual and Heterosexual Subjects*, 21 Archives of Sexual Behav. 17 (1992) (finding that neither heterosexual men nor gay men were able to increase sexual arousal to sexual stimuli contrary to their sexual orientation, even when motivated to do so).

suicides that have been recently reported[8]—because they are simultaneously unable to cope with harassment they face and unable to change their sexual orientation to escape it. These incidents also highlight that the *perception* of one's sexual orientation by others is not something that individuals can necessarily control, and thus the notion that sexual orientation is "invisible" is false for many people, particularly gay men and lesbians who exhibit gender-nonconforming traits and are bullied as youth because of those traits. *See* Nalini Ambady *et al.*, *Accuracy of Judgments of Sexual Orientation From Thin Slices of Behavior,* 77 J. of Personality and Social Psychology 538 (1999).

4. Lesbians And Gay Men Remain A Politically Vulnerable Minority.

Finally, it is clear beyond cavil that lesbians and gay men "have limited political power and 'ability to attract the [favorable] attention of the lawmakers.'" Attorney General Report at 3 (citing *Cleburne*, 473 U.S. at 445). This is painfully illustrated by the anti-gay initiative at issue in *Romer v. Evans*, 517 U.S. 620 (1996), which barred gay men and lesbians from the protection in non-discrimination rules, the anti-gay sodomy laws at issue in *Lawrence*, and of course,

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[8] These recent tragedies include the suicides of Seth Walsh, 13, Asher Brown, 13, Billy Lucas, 15, Tyler Clementi, 18, and Raymond Chase, 19. In light of the disproportionate number of lesbian and gay youth who take their own lives, courts have recognized that reducing antigay bias "may involve the protection of life itself." *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1151 (C.D. Cal. 2000).

the very law challenged here. Gay men and lesbians are underrepresented in decision-making bodies across this nation relative to their representation in the population as a whole. There are only four openly gay members of Congress. *See* Kerry Eleveld, *Cicilline Becomes Fourth Gay Rep*, Advocate.com (Nov. 2, 2010), *available at* http://www.advocate.com/News/Daily_News/2010/11/02/Gay_Mayor_Cicilline_Elected_to_Congress/. No openly gay person has ever served in the U.S. Senate, on the United States Supreme Court, on any federal Court of Appeal, or as President. *See* Courtney A. Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court's Application of Heightened Scrutiny*, 17 Duke J. Gender L. & Pol'y 385, 395 (2010); Lisa Keen, *Gay Federal Appeals Nominee: 11 Months and Still Waiting for Hearing*, Keen News Service (Mar. 7, 2011), *available at* http://www.keennewsservice.com/2011/03/07/gay-federal-appeals-nominee-11-months-and-still-waiting-for-hearing/. Across the nation, less than 500 of the more than 500,000 elected officials are openly gay. Powers, 17 Duke J. Gender L. & Pol'y at 395.

Although the passage of the Repeal Act was a historic accomplishment, it took until the year 2010 for Congress to address the mandatory policy of firing gay people in the military. Furthermore, the relevant inquiry is not whether the group has been able to achieve *any* gains through the political process, but whether it is

unable to do so systematically. *Frontiero* illustrates the point, as it determined that classifications based on gender are inherently suspect and warrant heightened scrutiny even though "the position of women in America ha[d] improved markedly in recent decades," key protective legislation had been enacted, and "women do not constitute a small and powerless minority." 411 U.S. at 685-86 & n.17. Similarly, by the early 1970s, African-Americans were already "protected by three federal constitutional amendments, major federal Civil Rights Acts . . . as well as by antidiscrimination laws in 48 of the states." *High Tech Gays*, 909 F.2d at 378 (Canby, J., dissenting).

Gender and racial classifications continue to receive heightened scrutiny even though there may be some measure of political success on those fronts. *See In re Marriage Cases*, 183 P.3d at 443 ("Indeed, if a group's current political powerlessness were a prerequisite to a characteristic's being considered a constitutionally suspect basis for differential treatment, it would be impossible to justify the numerous decisions that continue to treat sex, race, and religion as suspect classifications."). Existing legal protections on the basis of sexual orientation also do not begin to approach those on the basis of race or gender. The first version of a federal bill to provide employment protection on the basis of sexual orientation was introduced in 1974; nearly four decades later, its passage still remains only a dream rather than a reality.

This backdrop of unequal treatment illustrates that lesbians and gay men face systemic, unjust barriers to protecting their interests through the political process as others are able to do. Strict or at least heightened scrutiny is not only warranted but necessary to safeguard this minority against anti-gay laws that flout the promise of equal protection to all.

CONCLUSION

For the reasons set forth above and in the Plaintiff's brief on appeal, *amici* respectfully request that this Court affirm the district court's substantive due process ruling, reverse its dismissal of the equal protection claim, and hold that sexual orientation classifications are subject to heightened scrutiny.

DATED: April 4, 2011

Respectfully submitted,

By: /s Peter Renn
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,250 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman type style.

Dated: April 4, 2010

s/ Peter C. Renn
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CERTIFICATE OF SERVICE

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 April 4, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s Sklar K. Toy