No. 97-2303

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

THE UNITED STATES DEPARTMENT OF DEFENSE,

Petitioner,

-against-

HERMAN EWING and GABRIELA SLOANE,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

Erich Grosz
Rua Kelly
Counsel for Respondents
Stanford Law School
Stanford, California
(650) 497-1322

QUESTIONS PRESENTED FOR REVIEW

I.

Does 10 U.S.C. Section 654, a law that is motivated by fear and hatred of homosexuals, results in the discharge of "open" homosexuals from military service, and bears no rational relationship to the stated goal of "military readiness" violate the equal protection component of the Fifth Amendment to the United States Constitution?

II.

Does 10 U.S.C. Section 654(b)(2), the speech-related component of Petitioner's "Don't Ask, Don't Tell" policy, under which the Navy expelled Lieutenant Gabriela Sloane for her private statement of her identity as a lesbian, violate the First Amendment's protection of the freedom of speech?

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The orders of the United States District Courts for the Western and Eastern Districts of Kirkwood are unreported. The opinion of the United States Court of Appeals for the Thirteenth Circuit is unreported and contained in the Transcript of Record. (R. l-26).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals (Civ. Nos. 97-1799 and 97-1842) was entered on April 30, 1997. A petition for certiorari was filed on August 8, 1997, and this Court granted certiorari on January 9, 1998.

The United States Supreme Court has certiorari jurisdiction over this case pursuant to 28 U.S.C. Section 1254(1) (1993).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The text of the relevant portions of the following constitutional provisions and statutes are set forth in the appendices: U.S. Const. amends. I, v, XIV; 10 U.S.C. Section 654(a) (1994); 10 U.S.C. Section 654(b) (1994).

STATEMENT OF THE CASE

Eradication of identity has become a mandatory condition of service in the United States military - but only for gays or lesbians. The "Don't Ask, Don't Tell" law, 10 U.S.C. Section 654 (1994), singles out homosexual service members and requires them, under threat of expulsion, to ser e in silence, never expressing their true identity through either words or actions. According to the law, a service member's mere statement or single act suggesting homosexual identity generates a near-conclusive presumption that he or she is unfit for military service. See 10 U.S.C. Section 654(b) (1994). Under this policy, the United States Department of Defense, Petitioner in this case, expelled from the armed services two of its most talented and successful officers, each for a single incident of speech or mild conduct indicating their homosexuality. (R. 5, 6). The Respondents, Major Herman Ewing and Lieutenant Gabriela Sloane, ask this Court to hold that Petitioner's termination of their careers violated their constitutional rights. (R. 1). More generally, this case asks the Court to determine

whether the "Don't Ask, Don't Tell" policy violates the equal protection component of the Fifth Amendment and the free speech guarantee of the First Amendment. (R. **1).**

Major Herman Ewing, a Respondent in this case, was singled out for punishment solely on the basis of his sexual orientation, despite his exemplary record as an Army officer. After he garnered an Army ROTC scholarship to Berkford University, he dedicated his career to military service beginning with two years in the Army. (R. 2). Recognizing his potential, the Army paid for his studies at the University of Kirkwood School of Law, from which he graduated with the highest honors, the Order of the Coif. (R. 2). Ewing immediately returned to the nation's service, joining the Army's Judge Advocate General ("JAG") Corps, the branch of the Army responsible for trying cases under military law. (R. 2). In merely seven years, Ewing rose to become a major and one of the most senior members of the JAG Corps. (R. 2-3). Throughout his career, he received the highest possible performance ratings. (R. 2).

Petitioner cut short Major Ewing's remarkable career in order to punish Ewing's mild, private expression of affection for another man. (R. 3-5). On December **31, 1994,** while off-base and off-duty, Major Ewing and a male friend attended a private dinner at another friend's home. (R. 3). Major Ewing and his companion behaved no differently than many other couples at New Year's Eve celebrations; they briefly held hands and allowed themselves a single kiss at

midnight. (R. 3-4). Had Ewing's companion been female, Petitioner would never have objected to Ewing's actions. However, because Ewing's friend was male, Petitioner declared that these fleeting indications of affection were "homosexual conduct," grounds for expulsion under the "Don't Ask, Don't Tell" policy. (R. 5).

Two weeks later, Petitioner began the process of expelling Major Ewing from the Army. (R. 3). During the discharge proceedings, Ewing's colleagues rallied to his defense, offering testimony on his behalf. (R. 4). Colonel Patton, Ewing's commanding officer, testified that he considered Ewing the "most exceptional JAG Corps attorney I have seen in my entire career," and would have predicted a "stunning career" for Major Ewing. (R. 4). Lieutenant Rabb, an attorney under Ewing's supervision, had suspected Ewing's homosexuality but found Ewing's orientation entirely compatible with military service. (R. 4). He commended Major Ewing's "superior abilities and commitment to the service," and testified that he "felt honored to serve under the command of Major Ewing." (R. 4). Despite this emphatic support from his fellow officers, Major Ewing was discharged from the armed forces on May 20, 1995. (R. 5).

Petitioner found mere words sufficient reason to destroy the career of Lieutenant Gabriela Sloane, one of the Navy's most outstanding combat pilots. (R. 5). Lieutenant Sloane completed the ROTC program at Kirkwood State University, then joined the Navy as an ensign. (R. 5). She

received swift promotions, rising to lieutenant junior grade after only two years and lieutenant after another two years. (R. 5). After graduating first in her class from flight school, Lieutenant Sloane became one of the Navy's first female combat aviators. (R. 5). In 1994, she earned an Outstanding Achievement Award for her distinguished record of aviation performance and dedicated service to the nation. (R. 5).

The brief conversation that Petitioner used as grounds to expel Lieutenant Sloane took place on January 5, 1995, in the privacy of Sloane's own home. (R. 5). While visiting Lieutenant Sloane, a colleague from the Navy asked Sloane about a pink triangle magnet on her refrigerator. (R. 5). Lieutenant Sloane explained that it was a symbol used by Nazis during the Holocaust to designate homosexuals for persecution, and in response to direct questioning, Sloane admitted, "Well, I'm a lesbian." (R. 5). The colleague reported this exchange to Navy officials. (R. 5).

Ironically, the pink triangle once again facilitated persecution: Petitioner immediately began proceedings to expel Lieutenant Sloane from the military for simply admitting her identity as a lesbian. (R. 5-6). As in the case of Major Ewing, numerous officers rallied to the defense. (R. 6). For example, Lieutenant Sloane's commanding officer testified, "Lieutenant Gabby Sloane is one of the most promising young flyers I have ever had the pleasure of working with. Together, her intelligence,

skill, honesty, and integrity make it highly likely that she will achieve great distinction in her military career." (R. 6). Lieutenant Sloane herself, in an effort to rebut the presumption against her, testified that she had never engaged in homosexual conduct and would never do so in the future. (R. 6). Indeed, the record is devoid of any evidence that Sloane had ever or would ever engage in such conduct. Nevertheless, Petitioner punished her based on her speech alone, discharging her from the Navy on June 1, 1995 for stating her identity as a homosexual. (R. 6).

Both Respondents brought suit against Petitioner and challenged the "Don't Ask, Don't Tell" policy, and now ask only that this Court affirm the holding of the United States Court of Appeals for the Thirteenth Circuit. (R. 1 ?). Major Ewing initially challenged the law in a suit filed in United States District Court for the Western District of Kirkwood on April 15, 1996. (R. 1). His complaint argues that, on its face and as applied, the "Don't Ask, Don't Tell" policy violates the Equal Protection component of the Fifth Amendment. (R. 1). Lieutenant Sloane raised the same argument in her suit, filed June 12, 1996 in the United States District Court for the Eastern District of Kirkwood. (R. 1). Additionally, Sloane's complaint alleges that the policy, on its face and as applied, violates the First Amendment. (R. 1). Both parties in both cases filed cross-motions for summary judgment. (R. 1). Though the courts granted Petitioner summary judgment, the Court of Appeals

consolidated the cases and reversed that judgment. (R. 1-2) Instead, in its opinion of April 30, 1997, the Court of Appeals found the "Don't Ask, Don't Tell" law blatantly unconstitutional. (R. 2). Petitioner sought a grant of certiorari from this Court, which was given on January 9, 1998. Respondents ask that this Court affirm the Appeals Court's decision, and recognize that Petitioner's policy both irrationally discriminates against homosexuals like Major Ewing and Lieutenant Sloane, and punishes the mere statement of one's identity.

SUMMARY OF THE ARGUMENT

This case calls upon the Supreme Court to affirm the lower court's decision that 10 U.S.C. Section 654 (1994), the "Don't Ask, Don't Tell" law, violates the equal protection component of the Fifth Amendment and the First Amendment's guarantee of free speech. As a preliminary matter, this Court need not offer any special deference to Petitioner's regulation. Though courts have deferred to certain military regulations on matters of national defense, this law encompasses even unofficial, off-duty speech and activity, and violates fundamental constitutional rights.

While the stated purpose for the policy is "military readiness," the actual purpose is animus. The law merely cloaks the animosity of public officials and private citizens, and promotes the military's tradition of banishing homosexuals from its ranks because of prejudice. Like the amendment struck down in Romer v. Evans, this policy can be

explained only by animus towards gays and lesbians. It bears no rational relationship to any legitimate state interest. The policy therefore violates the equal protection component of the Fifth Amendment.

Moreover, Petitioner's policy, both on its face and as applied to Respondents, regulates speech based on its content and thereby violates the First Amendment. The law heavily burdens mere statements of homosexual identity, presuming the speakers unfit for military service. Such content-based restrictions on speech receive the strictest judicial scrutiny, which requires that the law be narrowly tailored to a compelling government purpose. This speech regulation, which is overinclusive, underinclusive, and rooted in anti-gay animus, utterly fails strict scrutiny. Furthermore, this law does not use speech merely as evidence of conduct: there is no present or past conduct to prove. At most, this policy interprets speech as evidence of a propensity or orientation, which without resultant conduct is an illegitimate basis for punishment. Lieutenant Sloane has not engaged in any proscribed conduct; Petitioner banished her from the military solely because of her words. The First Amendment does not permit Petitioner's draconian regulation of the most basic and meaningful speech possible, the statement of one's identity.

ARGUMENT

Petitioner's "Don't Ask, Don't Tell" policy targets a particular class of citizens solely on the basis of their sexual orientation and denies them equal protection of the law. See 10 U.S.C. Section 654 (1994). Distinguished and dedicated soldiers like Lieutenant Gabriela Sloane and Major Herman Ewing suffer banishment from the armed forces for private conduct or even mere statements of identity. The threshold issue of deference to the military is easily resolved; Petitioner's egregious violations of equal protection and freedom of speech do not involve matters of national defense and deserve no special treatment. Petitioner's persecution of gays and lesbians cannot be reconciled with the Constitution.

I.
THE DEFERENCE TO THE MILITARY'S DECISIONS IN THE REALM OF NATIONAL DEFENSE IS INAPPROPRIATE IN THIS CASE, WHICH INVOLVES VIOLATIONS OF EQUAL PROTECTION AND FREEDOM OF SPEECH.

This Court has consistently recognized that deference to the military on matters of national defense does not eliminate constitutional protections. See, e.g., Goldman v. Weinberser, 475 U.S. 503, 507 (1986) (holding that deference to military's interest in a consistent dress code does "not . . . render nugatory in the military context the guarantees of the First Amendment"). While courts frequently defer to the military's decisions about military readiness, such deference does not require compromising the constitutional guarantees of equal protection and free speech in this case.

In areas of constitutional law such as this, the judiciary possesses greater expertise than the military, and hence should not wholly surrender its power of review. Furthermore, deference is generally limited to areas where the military has particular expertise: decisions about "internal operations, including the proper scope of uniformity, discipline, and morale." Hartmann v. Stone, 68 F.3d 973, 984 (6th Cir. 1995).[1]

However, Petitioner's "Don't Ask, Don't Tell" policy, particularly as applied to Respondents, does not regulate "internal operations" related to national defense. On its face, the law sweeps broadly, regulating not just the official activities of gay and lesbian service members, but also the private sphere of service members' "off-duty" lives, targeting harmless personal conduct and factual statements of identity. See 10 U.S.C. Section 654(b) (1994). As applied to Respondents, the intrusive nature of the policy becomes apparent. Lieutenant Sloane was discharged for an off-duty statement of identity, made in the privacy of her own home and posing no threat to military

[1] This limited view of deference finds additional support in a variety of contexts. See Chappell v. Wallace, 462 U.S. 296 (1983) (deferring to military's need for discipline in official, on-duty military activities, and hence permitting protection of officers from personal liability to subordinates for racially discriminatory actions taken within their official capacity); cf. Steffan v. Perry, 41 F.3d 677, 709 (D.C. Cir. 1994) (Wald, J., dissenting) (arguing that "[t]he military has no special competence to decide [the] question" of whether future homosexual conduct may be inferred from a mere admission of homosexual status).

discipline. (R. 5-6). Major Ewing was punished for off-duty, off-base actions: brief hand-holding and a single kiss with a male companion while at a private New Year's Eve celebration. (R. 3-5). Regulation of such private speech and conduct, in contrast to regulation of actions directly affecting military preparedness and national defense, should not receive special deference from this Court.

Indeed, courts carefully limit the areas in which the military enjoys such deference. For example, in Hartmann v. Stone, the Court of Appeals for the Sixth Circuit found that in regulating on-base day care, "the Army has wandered far afield" and cannot expect special deference to its interests. See Hartmann, 68 F.3d at 985. The Army had barred any religious activities during on-base day care even when parents specifically requested such accommodation. The court relied on four factors, each with parallels in this case, to find that the military could not establish even an "ephemeral" link to its combat mission. Seed . First, the regulation impacted the lives of individuals outside the service, the family members of' soldiers. Seed . The "Don't Ask, Don't Tell" policy also affects such "outsiders," effectively barring the companions of service members like Major Ewing from engaging in any physical affection with the service member. Second, and more significantly, the regulation in Hartmann was not neutral and generally applicable: it targeted specific First Amendment activities. See id. Likewise, as explained

below, the "Don't Ask, Don't Tell" policy restricts the freedoms of a specific group and aims at particular content of speech. Third, the day-care regulation reached into a "functionally private" locale. Seed . This factor is even more apparent in this case: the policy was applied within the private, off-base residence visited by Major Ewing and within Lieutenant Sloane's own home. Lastly, the Army in Hartmann regulated individuals in a sphere traditionally reserved for private, parental authority. Seed . Petitioner's policy also intrudes on a realm generally regarded as private: the personal expression of sexuality, perhaps the most intimate area of one's life. The Hartmann court afforded the military no special deference, and held the regulation uncc stitutional. Seed . at 985-86. Respondents' case merits a similar approach: judicial review without special deference.

Even the prior cases involving deference to the military on certain specific First Amendment issues carve out narrow areas for reduced protection, rather than give the military free rein to trample freedom of speech and expression. In Goldman, for example, this Court deferred to the specific military interest in uniformity of dress, permitting the Air Force to bar an Orthodox Jewish officer wearing a yarmulke indoors. See Goldman v. Weinberser, 475 U.S. 503 (1986). In a similarly limited decision, General Media Communications deferred to the military's regulation of a narrow and less-protected category of speech: sexually

explicit material. See General Media Communications v. Cohen, 131 F.3d 273 (2d Cir. 1997) (allowing military to exclude sexually explicit material from sale at on-base, official military exchanges). In both cases, the courts deferred only to regulation of expression occurring in an on-duty, on-base, official situation. To defer to Petitioner's "Don't Ask, Don't Tell" policy would require a substantial and unprecedented broadening of such deference.

This case also presents a striking contrast to those decisions in which courts deferred to the military's need for uniformity as an element of military readiness. In cases like Goldman, the aggrieved parties sought special treatment, exceptions to the general rules of the military. See Goldman v. Weinberser, 475 U.S. 503 (1986) (rejecting an exception to the military dress code). Respondents, though, do not ask for any such exceptions; on the contrary, they seek only to be treated equally. In other words, they ask for the very uniformity that the military itself considers crucial: that their words and conduct be treated exactly the same as those of heterosexual service members.

II.
THE "DON'T ASK, DON'T TELL" LAW, WHICH VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT IS MOTIVATED BY FEAR, IS NOT RATIONALLY RELATED TO MILITARY READINESS, AND TARGETS A WLNERABLE CLASS OF PEOPLE FOR DISCRIMINATION.

This case is not about "special rights," nor is it about gay sex. This case is about two soldiers who devoted their lives to military service only to be dismissed because of Petitioner's unfounded hypothesis that homosexuals pose an "unacceptable risk" to military readiness. Petitioner has attempted to posit legitimate rationales for this policy. There are none. Justifications proffered for the law simply cloak the animus behind it, for not one shred of evidence indicates that the law fosters military readiness. No rational nexus exists between the ban and military readiness. Thus, the "Don't Ask, Don't Tell law is unconstitutional under the equal protection component of the United States Constitution.

A. THE "DON'T ASK, DON'T TELL" LAW SHOULD BE SUBJECTED TO STRICT SCRUTINY ANALYSIS.

The Equal Protection Clause of the Fourteenth Amendment, enacted in 1868, mandates the equal treatment of all citizens under the laws of this country. Furthermore, the Due Process Clause of the Fifth Amendment makes the same requirement binding on the federal government. See Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that racial segregation by the federal government violated equal protection). Most laws are reviewed under equal protection simply to ensure that there is a "rational" connection between the classification employed by the legislature and

the ends of the legislation. See Williamson v. Lee Optical co., 348 U.S. 483 (1955) (holding that laws affecting opticians are reviewed for rationality). However, laws affecting suspect classes are strictly scrutinized to ensure that the classification is narrowly drawn and serves a compelling goal. See Korematsu v. United States, 323 U.S. 214 (1944) (establishing strict scrutiny for racial groups).

The Court has defined race, national origin, and alienage as inherently suspect classifications that receive strict scrutiny. See, e.g., Korematsu, 323 U.S. at 214 (race); Hernandez v. Texas, 347 U.S. 475 (1954) (national origin) ; Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (alienage). Other groups have received heightened scrutiny as "quasi-suspect" classes. See Crais v. Boren, 429 U.S. 190 (1976) (holding that gender classifications require heightened scrutiny in equal protection review).

"Suspect classes" share several characteristics.[2] First, they have a history of discrimination. See, e.g., United States v. Virsinia, 518 U.S. 515, 525 (1996) (noting that "scrutiny of official action . . . based on sex responds to volumes of history."). Second, they have been

[2] Justice Stone's famous "footnote 4" in United States v. Carolene Products, *304 U.S. 144, 153 n.4 (1938), argued that laws impacting "discrete and insular minorities" deserve strict scrutiny. While relevant to equal protection analysis, courts have not made it a threshold pre-requisite for minorities seeking judicial protection to prove that they are "discrete and insular." Such a requirement would preclude heightened scrutiny for many groups, most notably women.

subjected to false stereotypes. See, e.g., Korematsu, 323 U.S. at 240 (Murphy, J., dissenting) (arguing that "half-truths and insinuations (have) for years been directed against Japanese Americans by people with racial and economic prejudices."). Third, they lack political power. See, e.g., Plyler v. Doe, 457 U.S. 202 (1982) (finding that children of aliens lack access to the political process). Fourth, they are defined "by an immutable characteristic determined solely by the accident of birth." Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

All of the above characteristics of suspect classes apply to homosexuals. Therefore, while courts have evaluated the military's treatment of homosexuals under both rationality review[3] and strict scrutiny,[4] the latter is far more appropriate for this legislation.

1. Homosexuals share every sinsle trait that defines a suspect class; thus, all policies that discriminate on the basis of sexual orientation deserve strict scrutiny.

There is no group in America as hated and feared as homosexuals that also enjoys as little judicial protection.

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[3] See, e.g., Watkins v. United States Armv 847 F.2d 1329 (9th Cir. 1988) withdrawn, 875 F.2d 699 ('9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957; see also Able v. United States, 880 F.Supp. 968 (S.D.N.Y. 1995) (applying heightened scrutiny to the "Don't Ask, Don't Tell" law), vacated and remanded, 88 F.3d 1280 (2d Cir. 1996).

[4] See, e.g., Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993), vacated sub nom. Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (en banc); Cammermever v. Aspin, 850 F.Supp. 910 (W.D. Wash.), appeal dismissed as moot, 97 F.Supp. 910 (W.D. Wash. 1994); Dahl v. Secretary of the United States Naw, 830 F.Supp. 1319 (E.D. Cal. 1993); Ben-Shalom v. Marsh, 703

Like all suspect groups, homosexuals have been subjected to centuries of legal discrimination. While many Americans believe that racial harmony, ethnic diversity, and sexual equality are becoming reality in America, homosexuals are still fired from public employment, stripped of child custody, and even killed by angry mobs.[5] Clearly, a more tolerant attitude toward minorities in this country has not translated into the kinder, gentler treatment of our homosexual citizens.

Furthermore, homosexuals are defined by gross and overbroad stereotypes. The most common is the child molester stereotype that drove, for example, Anita Bryant's anti-gay rights campaign in Florida. She claimed that "[homosexuals] wanted gay rights protection so they could work at playgrounds and public schools and recruit young people to their way of life." Randy Shilts, Conduct Unbecoming 298 (1994). Her supporters, meanwhile, distributed "Kill a Queer for Christ" bumper stickers. Id. at 299. While the molester stereotype implicitly refers to gay men, lesbians are not free from this stereotype. For example, Navy Vice Admiral Joseph S. Donnell admitted that lesbians were among the service's "top performers," but tend

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F.Supp. **1372** (E.D. Wis.), rev'd, **881** F.2d 454 (7th Cir. 1989), cert denied, 494 U.S. 1004 (1990).

[5] See, e.g., Rowland v. Mad River Local School District, Montsomery County, Ohio, **730** F.2d 444 (6th Cir. 1985) (upholding the dismissal of a public school teacher based on her sexual preference); Bottoms v. Bottoms, 457 S.E. 2d 102 (Va. 1995) (denying custody to the mother, in

to foment a "predator-type environment" for younger women. Jane Gross, Navy is Ursed to Root Out Lesbians Despite Abilities, N.Y. Times, Sept. 2, 1990, at A24. Donnell's comments also rest on a second stereotype: homosexuals as "sexual cluster bombs, waiting to explode." Martin Kasindorf, At Base Fear Is Order Of Day, Newsday, January 30, 1993, at 7. Gays and lesbians are thought to be brimming over with lust and ready to attack. As Marine Lance Corporal Tony Argier noted, he and his colleagues "are scared now and just want to get out, 'cause with gays you've got to watch yourself." Id.

Furthermore, although homosexuals are thought by some to be members of the "cultural elite," able to flex their political muscle with ease, recent history does not bear this out. While a handful of states have passed gay rights bills, Congress has enacted the "Don't Ask, Don't Tell" policy, passed the "Defense of Marriage Act" that prohibits same-sex marriage, and more recently, refused to accept the nomination of James Hormel, a gay man, for the position of ambassador to Luxembourg, simply because he is gay. See Elsa C. Arnett, Gay Americans Make Gains, But Still See Barriers, New Orleans Times-Picayune, April 5, 1998, at A24. In addition, homosexuals have difficulty forming political alliances because of the cultural bias against them.[6]

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large part because her lesbianism might bring the child into "social condemnation").

[6] For example, one gay rights organization held a benefit that was sponsored by prominent businesses and law firms;

Therefore, just as the existence of the NAACP does not preclude the need to strictly scrutinize laws affecting African-Americans, the presence of a gay rights lobby in Congress does not defeat the argument for strict scrutiny.

Finally, homosexuality is a natural and immutable characteristic, according to the preponderance of scientific evidence. People do not "choose" to be gay. "[N]either individuals nor their parents can control whether the person turns out to be [homosexual] . . . The most conservative estimate is that sexual orientation is firmly established by adolescence[.]" See Note, An Arsument for the Application of Equal Protection Heishtened Scrutiny to Classifications Based on Homosexuality, 57 S. Cal. L. Rev. 797, 818 (1984). "his point is illustrated by an exchange between Senator Strom Thurmond and Jeffrey W. Levi, a gay rights advocate.

> MR THURMOND: Does your organization advocate any kind of treatment for gays and lesbians to see if they can change them and make them normal like other people?
> MR. LEVI: Well, Senator, we consider ourselves to be quite normal, thank you. We just happen to be different from other people . . . To . . . answer the question more seriously, the predominant scientific evidence is that homosexuality is probably innate, if not innate then formed very early in life.

Thurmond on Homosexualitv, N.Y. Times, Aug. 2, 1986, at A6.

2. Strict scrutiny of laws that classify on the basis of sexual identity would reflect the history and tradition of equal protection.

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however, "photographers were restricted in the pictures they could take because . . . some participants feared that if their presence at it became known, others would assume that they were homosexual." Concern Over AIDS Helps Rishts Unit, N.Y. Times, May 3, 1987, Section 1 at 43, col. 1.

Strict scrutiny of laws that discriminate on the basis of sexual orientation would promote the vision behind equal protection: laws based on neutral principles. Under such a regime, homosexuals would not face discrimination based on fear and prejudice, but nor would they enjoy any status-based preferences. Contrary to popular belief, the argument for strict scrutiny is not a request for special rights, merely equal rights. In the context of military service, for example, homosexuals simply seek to be judged as soldiers, not as potential sodomists.

The equal protection principle protects disadvantaged groups, and this protection has been extended to groups who were not part of the original vision of the Constitution's framers, like members of the Jewish faith and women. The Court has been understandably hesitant to extend well-established constitutional rights in the absence of historical evidence that the Framers so intended, particularly in the context of the Due Process Clause. However, equal protection does not "safeguard traditions; it protects against traditions, however long-standing and deeply rooted." **Cass** R. Sunstein, Essay: Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U. Chi. L. Rev. **1161, 1174 (1988).**

As Justice Warren noted in Brown v. Board of Education, "[i]n approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or

even to 1896 when [Plessy v. Ferguson] was written." 347 U.S. 483, 492 (1954). Just as the decision in Brown to end segregation cannot be justified by reference to the Framers' vision, neither can the decision to extend equal protection to homosexuals. But as in Brown, the powerful vision of equal protection should trump the tradition of unjust treatment of a vulnerable group of citizens.'

3. The "Don't Ask, Don't Tell" law fails strict scrutiny because it is not narrowly tailored to serve a compelling governmental interest.

Under strict scrutiny, laws affecting a protected class must be narrowly tailored to serve a compelling governmental interest. See Palmore v. Sidoti, 466 U.S. 429 (1984) (noting that suspect classifications "must be justified by a compelling governmental interest and must be necessary [to achieve those ends]"). Even assuming, *arguendo*, that military readiness is a compelling government interest, the "Don't Ask, Don't Tell" law fails strict scrutiny because it is not narrowly tailored to achieve this goal.

According to Petitioner, homosexual conduct, not homosexuality per se, poses the threat to military readiness. The law, however, permits the dismissal of celibate homosexuals, while allowing heterosexual soldiers

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[7] Congress has taken special care in this case to point out that "[t]here is no constitutional right to serve in the armed forces." 10 U.S.C. Section 654(a)(2) (1994). While this is technically correct, it is worth noting that this Court's holding in Brown placed both education and military service on a citizenship continuum. "[E]ducation is required in the performance of our most basic public

caught *in flagrante delicto* to go unpunished, since those soldiers lack the "propensity" for homosexuality and can rebut the presumption of future homosexual conduct under the "Don't Ask, Don't Tell" law. Hence, the law is both too broad and too narrow, permitting heterosexual sodomists to serve while banishing non-sexually active homosexuals.

The "Don't Ask, Don't Tell" law is an imprecise and highly restrictive law. The military could employ less restrictive and more precise measures to eliminate potentially disruptive homosexual conduct. Same-sex conduct that the military considers harmful could be attacked through strict discipline as well as the rigorous enforcement of laws currently in force. The Uniform Code of Military Justice already prohibits ti conduct that the military considers harmful, including sodomy, rape, and sexual harassment. See 10 U.S.C. Sections 893, 920, 925, 934 (1994). Furthermore, laws of general application could be brought to bear on this "problem." Title VII, for example, has been held by this Court to permit same-sex harassment claims, including those of soldiers harassed by members of their own gender. See Oncale v. Sundowner Offshore Services, No. 96-568, 1998 U.S. Lexis 1599 (March 4, 1998). Laws of general application and the military's own laws are thus far less restrictive and more effective means of preventing homosexual conduct. Therefore, the

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responsibilities, even service in the armed forces." Brown, 347 U.S. at 493.

"Don't Ask, Don't Tell" law is not narrowly tailored to achieve its goal and should be struck down.

B. THE "DON'T ASK, DON'T TELL" LAW CANNOT EVEN WITHSTAND RATIONALITY REVIEW, BECAUSE IT IS DRIVEN BY ANTI-GAY ANIMUS AND HAS NO RATIONAL RELATIONSHIP TO THE GOAL OF "MILITARY READINESS."

Even if the Court determines that homosexuals are not a suspect class, the policy must be evaluated to ensure that there is a rational relationship between the classification and the policy's ends. In this case, the Court must thus determine whether banishing homosexuals serves a legitimate government purpose and if so, whether this banishment of homosexuals bears any rational relationship to a legitimate governmental interest-namely, military readiness. See, e.g., F.S. Royster Guano Co. v. Virsinia, 253 U.S 412 (1920) (holding that under rationality review, a law must have a "fair and substantial relationship" to its goal.)

The Court overturns laws driven by animus, even if applying rationality review. Animus-based laws create "classes" of citizens by irrationally denying benefits to disfavored groups. Romer v. Evans, 517 U.S. 1620 (1996), is an important modern example of animus-based law. In Romer, the Court struck down a constitutional amendment prohibiting the enactment of legislation to benefit homosexuals as a "per se" violation of the Equal Protection Clause that was motivated by pure animus. See Romer, 517 U.S. at 1620. In overturning Colorado's now-infamous Amendment 2, the Court demonstrated that rationality review has "bite" when the law

"identifies persons by a single trait and denies them protection across the board." Id. at 1628. The Romer majority noted that "even in the ordinary equal protection case. . . we insist on knowing the relation between the classification adopted and the object to be attained." Id.

Furthermore, Romer v. Evans illustrates that Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that states can criminalize sodomy) should not be read to mean that gays and lesbians can be denied equal protection. Reading Bowers in this fashion simply conflates homosexual status and homosexual conduct, like the "Don't Ask, Don't Tell" law itself. It is one thing to outlaw specific conduct like sodomy; it is entirely another to outlaw an entire category of people who might commit such acts. More importantly, this reading of Bowers blatantly disregards the holding in Romer v. Evans. Romer implicitly found that while states can ban homosexual conduct, the equal protection principle forbids states from targeting homosexuals for discrimination if their motive is animus. Bowers is therefore inapposite to the case at bar.

By any measure, the Court has never abdicated its responsibility to ensure equal protection for all citizens; instead, it has consistently articulated the crucial role of rationality review in equal protection. The Court's role in rationality review "remains significant as a bulwark against unreasonable and illegitimate restrictions." Cleburne v. Cleburne Livins Center, 473 U.S. 432, 450 (1985) (finding

that the denial of a special use permit for a group home for the mentally retarded was driven by animus and thus illegitimate under rationality review). For as Alexander Pope famously noted, "the ruling passion conquers reason still."

1. While the stated purpose of military readiness is lesitimate, it is not the real purpose of the "Don't Ask, Don't Tell" law; the actual goal is to eradicate homosexuality in the military.

President Clinton's announcement in 1993 that he would end the long-standing ban against homosexuals in the military ignited a political firestorm. Unfortunately, the public outrage stemmed from fear about homosexuals, not national security.[8] Public hostility toward homosexuals clearly resonated with Congress and the President, who rapidly retreated from his earlier position. The result of the "backlash" against gays in the military is the complicated political compromise known as the "Don't Ask, Don't Tell" law.

Supporters of the "Don't Ask, Don't Tell" law state unequivocally that "military readiness" is its purpose, despite the fact that every study conducted or commissioned by Petitioner has concluded that "one concept which persists without visible supporting data . . . . is the idea that

[8] While national opinion polls in 1993 were narrowly split on this issue, members of Congress were flooded with calls from the ban's supporters. William E. Clayton, Jr., Calls to Consressmen Oppose Lifting Gav Ban; Area Reps Say That's How They Feel, Too, Houston Gazette, January 29, 1993, at A16.

homosexual individuals and those who have indulged in homosexual behavior cannot acceptably serve in the military." Report To The Board Appointed to Prepare and Submit Recommendations To the Secretary Of The Naw For The Revision of Policies, Procedures, and Directives Dealing With Homosexuals 6 (1988).

Discerning the actual (and illegitimate) purpose of the policy is not difficult. Comments by members of the 1993 Military Working Group,' such as Retired Admiral Thomas Moorer ("homosexuals engage in 'a filthy, disease-ridden practice"') or Assistant Secretary of Defense Edwin Dorn ("much of the resistance to gays is grounded in fear and prejudice") or even President Clinton ("those who oppose lifting the ban are clearly focused on . . . how nongay service members feel about gays in general[.]") highlight the animus behind the law. See Cammermever, 850 F. Supp. at 925. Identical stereotypes about homosexuals fueled the passage of Colorado's Amendment 2.[10] As noted in Cleburne, "mere negative attitudes . . . are not permissible bases" for discriminatory laws. 473 U.S. at 448.

The animus is so clear-cut in this case that many commentators have described "Don't Ask, Don't Tell" as a

[9] The Military Working Group was a group of active and retired soldiers assembled by Congress to study the ban.

[10] "[T]he supporters of Amendment 2 engaged in a concerted effort to identify homosexuals with otherwise deviant lifestyles and with sexual abuse of children." Daniel Farber and Suzanna Sherry, The Pariah Principle, 13 Const. Comment. 257, 284 n.90 (1996).

policy "in desperate search of a rationale."[11] Congress has gone to heroic lengths on this fruitless search. This statute is accompanied by congressional "findings" concluding that homosexuals: weaken discipline, order and morale; destroy unit cohesion; undermine rank and command; infringe on privacy; diminish public confidence in the military; irreparably harm recruitment; and overall, constitute an "unacceptable risk" to the military.

These findings have absolutely no factual bases: in fact, quite the contrary. In addition to the 1957 report submitted to the military, noted above, the RAND Corporation performed a similar study for Petitioner in 1993, and found "no scientific evidence regarding the effects of acknowledged homosexuals on a unit's cohesion and combat effectiveness." Rand, National Defense Research Institute, Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment 283 (1993). Nor did the General Accounting Office find any evidence of "serious problems resulting from the presence of open homosexuals" when they investigated similar agencies in 1992. G.A.O., Defense Force Manasement: DOD's Policy On Homosexuality 56 (1992).

Congress's findings, unsupported in fact, therefore only make sense in the context of prejudice against

[11] C. Dixon Osburn, A Policy in Desperate Search of a Rationale: The Military's Policy on Lesbians, Gavs and Bisexuals, 64 UMKS L. Rev. 199 (1995) [hereinafter Osburn, A Policy in Desperate Search].

homosexuals.[12] Without "reading in" traditional stereotypes of homosexuals, the findings are simply bizarre and illogical. "Reduced to its essentials, the military's justification is simply that some heterosexuals in the services hold prejudices against [homosexuals], and that these prejudices are so strong that the mere presence of [homosexuals] in the armed services may cause the heterosexuals to disrupt the military's smooth operation."[13] Osburn, A Policy in Desperate Search, at **213-14.**

Seen in this light, the military's rationale is indistinguishable from that proffered in Palmore v. Sidoti, **466** U.S. 429 (1984) (striking down a denial of custody to an interracial couple that was justified by reference to "social disapproval"). This Court has stated unequivocally that social stigma is an illegitimate justification for any law. "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside

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[12] Private animus was the driving force behind another military policy that this Court has rejected in other contexts as violative of equal protection: racial segregation. After World War II, changing attitudes forced the military to develop "new logic to justify [racial segregation]—logic that did not rely on racist stereotypes. [Petitioner] met this challenge by asserting that . . . [segregation] was needed because of white soldiers' attitudes toward African-Americans." Shilts, Conduct Unbecoming 184. Furthermore, the military justified their racist practice by reference to efficiency, good order, morale, privacy, and discipline. See id.

[13] As the Report of the Association of the United States Army noted, "Heterosexual animosity toward known homosexuals can cause latent or even overt hostility, resulting in degradation of team or unit esprit." Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearing

the reach of the law, but the law cannot, directly or indirectly, give them effect." Palmore, 466 U.S. at 433.

2. Even if this Court assumes that banning homosexual conduct promotes military readiness, such conduct only results in dismissal under the policy if the soldier is "gay"; thus, the policy does not ban conduct, but homosexuality.

Petitioner has argued that the ban targets homosexual conduct, not homosexuality, and therefore the ban targets both gays and straights. However, the actual language of the "Don't Ask, Don't Tell" law contains an "escape hatch" for heterosexuals-the "propensity" clause.[14] Essentially, straight soldiers suspected of committing homosexual acts can escape discharge by proving a lack of "propensity" toward homosexuality. No escape is possible, however, for soldiers like Lieutenant Sloane and Major Ewing, who honestly admit their homosexual orientation.

While Major Ewing did engage in mild homosexual conduct, this behavior would not have been grounds for dismissal if he were heterosexual. Since he was "unable to show that he did not have a propensity to engage in homosexual acts" (R.4) his solemn promise to abstain from "conduct proscribed by the UCMJ if engaged in with an opposite-sex partner" (R.5) was disregarded by Petitioner.

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before the House Comm. On Armed Services, 103rd Cong., 1st Sess. 337 (1993).

[14] 10 U.S.C. Section 654(b)(1)(1994) allows soldiers to evade dismissal by proving that they "do not have . . . propensity or intent to engage in homosexual acts."

Lieutenant Sloane's equal protection case is identical to Ewing's. Petitioner's policy forced her to leave the Navy because she was a lesbian, not because she engaged in lesbian acts. Though she did not engage in homosexual conduct, Sloane was precluded by the language of the statute from successfully litigating her case. She could not retract the statement "Well, I am a lesbian." Therefore, under U.S.C. Section 654(b) (1), it was effectively impossible for Sloane to rebut the presumption of "propensity to engage in [homosexual] acts." The dismissal, then, of both soldiers was an inevitable result of this policy, which "treats a statement of homosexual orientation as proof of the case." Able, 880 F.Supp. at 976.

The Department of Defen: e has argued strenuously that this policy targets conduct, not homosexuality per se, claiming that "homosexual status is acceptable and not a ground for discharge." Holmes v. California Army National Guard, 124 F.3d 1126, 1138 (9th Cir. 1997). However, Lieutenant Sloane was not dismissed because of what she did, since she "did" nothing. She was dismissed merely because of what she is-a lesbian. The language and application of the "Don't Ask, Don't Tell" law simply do not bear out the military's purported acceptance of homosexuality.

Thus, the "Don't Ask, Don't Tell" law places homosexual soldiers at risk of banishment on the grounds of self-identity-a fate that no other soldiers need fear. To avoid this fate, homosexuals must conceal their identity and

desperately hope that they are not "discovered" by their commanding officers or fellow soldiers. Like citizens of a totalitarian state, homosexuals in the military must heed George Orwell's warning in the novel 1984: "If you want to have a secret you must keep it from yourself."

Lastly, Lieutenant Sloane's personal history illustrates that there is nothing "conclusive" about homosexual status. She is a lesbian who has refrained from sexual contacts for all of her adult life. While it would be absurd to suggest that "no" connection exists between status and conduct, homosexuality is not sufficiently predictive of conduct to warrant banishment.

3. There is no rational nexus between military readiness and homosexuality,

There is no evidence that homosexuals like Major Ewing and Lieutenant Sloane pose an "unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. Section 654(1)(a)(14). They have served with honor, like so many homosexual soldiers throughout history.

The ban is not about military readiness. One officer explained his refusal to discharge gay soldiers during World War II as follows: "There was a war going on. Who in hell is going to worry about this?" Richard N. Goodwin, Under Fire, They're Good Soldiers and Bad, February 1, 1993, L.A. Times, at B7. Another admiral was even more adamant when he was ordered to screen out homosexuals: "Lay off my

district, because you're taking some of my best people away and we've got to win this [expletive deleted] war." Id. Petitioner's argument thus defies both logic and experience. Homosexual soldiers have fought proudly for this country since it was founded, and "military readiness" has been enhanced, not endangered, by their presence.

III.
SECTION 654(B) (2) OF THE "DON'T ASK, DON'T TELL" POLICY IS AN UNCONSTITUTIONAL CONTENT-BASED RESTRICTION ON SPEECH AND, HENCE, VIOLATES THE FIRST AMENDMENT.

Not only does Petitioner's "Don't Ask, Don't Tell" policy on gays and lesbians in the military run afoul of the Fifth Amendment, it also violates the First Amendment. In response to a question from a colleague, Lieutenant Gabriela Sloane admitted, "I'm a lesbian." For this mere statement, Petitioner terminated Sloane's career of service to her country and discharged her from the Navy. Petitioner relied on **10** U.S.C. Section 654(b) (2) (1994), which allows expulsion from the armed forces for a service member's statement "that he or she is a homosexual or bisexual, or words to that effect." On the most basic level, all that Lieutenant Sloane has done is to admit to a proper status; as discussed above, Petitioner's own directives declare that homosexuality is consistent with military service. See Dep't of Defense Directive No. 1332.30 at 2-2. Even more significantly, Petitioner's suppression and punishment of speech based on its content breaches freedom of speech. Courts consistently recognize that political speech forms the inviolable core of the First Amendment's protections. See, e.g. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (recognizing that speech on public issues should be "uninhibited" by government regulation). A key element of the American political system is the recognition of the individual as the basic political unit. Seen from this perspective, the right of the individual to state her

identity could not be more essential. More specifically, a statement of one's homosexuality, particularly in the charged political environment that has given birth to anti-gay laws such as "Don't Ask, Don't Tell," constitutes a profoundly political statement. Such a statement of identity is both the quintessential instance of political speech and the very emblem of human dignity.

A. THE "DON'T ASK, DON'T TELL" POLICY PUNISHES SPEECH BASED ON ITS CONTENT, AND CANNOT SURVIVE STRICT SCRUTINY ANALYSIS.

1. The "Don't Ask, Don't Tell" law is a content-based speech resulation, because it suppresses and Punishes factual statements of identity based solely on their content.

Had Lieutenant Sloane said, "I'm a heterosexual," rather than "I'm a lesbian," she would not have been punished. Thus, Petitioner's regulations punished her for *what* she said, for the content of her speech. Petitioner's own directives state that "[s]exual orientation is considered a personal and private matter, and homosexual orientation is not a bar to continued service . . . ." Dep't of Defense Directive No. 1332.30 at 2-2. Hence, if Petitioner's policy does not punish the admittedly proper status of being homosexual, the only remaining possible object of punishment is the speech itself.

Furthermore, the "Don't Ask, Don't Tell" speech restriction could not possibly be construed as a content-neutral "time, place, or manner" regulation. Such laws, which receive somewhat less rigorous scrutiny, must be

content-neutral, regulating the context of the speech without any regard for its content. See, e.g. Heffron v. International Society for Krishna Consciousness, 452 **U.S.** 640 **(1981)** (upholding as content-neutral a rule requiring every party soliciting business at a state fair to use a booth, regardless of the party's message or business). Petitioner's policy does not limit its scope by reference to the context of the speech; the law discriminates against particular speech solely because of the *content* of that speech. Lieutenant Sloane's words would constitute grounds for discharge regardless of when, where, or how she made her statement.

Comparison to this Court's prior doctrine also establishes that the "Don't Ask, Don't Tell" speech provision is a content-based regulation. In the Simon & Schuster, Inc. case, for example, the New York statute at issue targeted books or other works by criminals describing their crimes, requiring payment of any proceeds from such publications to the Crime Victims Board. See Simon & Schuster, Inc. v. Members of New York State Crime Victims Board, **502 U.S. 105, 109 (1991).** This Court found the statute to be an unconstitutional content-based regulation of speech. See id. at 123. Significantly, the holding of Simon & Schuster, Inc. illustrates this Court's long-held view that content-based regulations are unconstitutional regardless of whether they actually outlaw speech or impose burdens on the speech short of outright censorship. Such

unconstitutional burdens take many forms, including the financial consequences at issue in Simon & Schuster, Inc., and the banishment of homosexuals from the military at issue in this case. However, such content-based regulations all share the same illegitimate goal: targeting speech based on *what* it communicates. Petitioner has chosen to burden with grievous consequences the communication of a particular statement of identity, and the First Amendment does not permit such content-based regulation of speech.

2. Content-based restrictions like Petitioner's policy receive the strictest judicial scrutiny, resultins in a Presumption of unconstitutionality.

Laws like Petitioner's "Don't Ask, Don't Tell" policy, which suppress speech based on its content, represent an especially grievous threat to the freedom of speech. Such laws drastically curtail the unfettered exchange of diverse ideas, and almost never can be reconciled with the Constitution. In Moslev, this Court declared, "[Above] all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dept. v. Mosley, 408 U.S. 92, 95 (1972). As this Court has long recognized, " [clontent-based regulations are presumptively invalid." R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992). The Court applies the strictest level of scrutiny to such regulations: the government bears the burden of proving that "its regulation is necessary to serve a

compelling state interest and is narrowly drawn to achieve that end." Arkansas Writers Project, Inc. v. Rasland, 481 U.S. 221, 231 (1987). The "narrow tailoring" prong of this test is especially stringent: this Court consistently holds that a law is not narrowly tailored "if less restrictive alternatives would be at least as effective in achieving" the government's ends. Reno v. ACLU, 117 S. Ct. 2329, 2346 (1997). This test protects speech so vigorously that almost no content-based regulation can satisfy its criteria. The "Don't Ask, Don't Tell" law fails both prongs of the test.

3. Petitioner's speech regulation does not serve any compelling government interest.

Whether Petitioner's interests are understood to be fear of unrest in the ranks or simply antipathy to gays and lesbians, they do not offer a sufficiently compelling rationale for this speech regulation. The government's purported rationale for this law is that "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. Section 654(a) (15). While the government's interest in military order and readiness is concededly a compelling purpose, that alleged rationale veils more ominous goals. As discussed above, the "Don't Ask, Don't Tell" policy is rooted in animus against homosexuals. In Romer v. Evans, this Court found such a purpose entirely illegitimate, declaring that "a bare . . .

desire to harm a politically unpopular group cannot constitute a *legitimate* government interest." See Romer v. Evans, 116 S. Ct. 1620, 1628 (1996), quoting Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973).

Even if the law did not amount to an effort to forge law into a weapon against homosexuality, though, it still lacks the compelling purposes required by strict scrutiny. As best can be inferred from the law, Petitioner feels that admissions of homosexuality endanger unit cohesion because of the possibility that soldiers will react with anger to the disclosure by a fellow service member of his or her homosexuality. Yet this Court has held that averting an audience's anger or "unrest" cannot justify the suppression of speech. See Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("[Free speech] may indeed best serve its high purpose when it induces a condition of unrest. . . . It may strike at prejudices and preconceptions and have profound unsettling effects . . . ."). Moreover, Petitioner's interest in unit cohesion appears much less compelling as applied in situations like Lieutenant Sloane's case. Sloane made her admission to a single individual while in a private, off-duty context. (R. 5). Under the circumstances, Sloane's statement presented no immediate threat to unit cohesion or military readiness. Nor did it present any longer-term threat, as her commanding officer indicated at her separation proceeding. He testified, "[Sloane's] intelligence, skill, honesty, and integrity make it highly

likely that she will achieve great distinction in her military career." (R. 6). Indeed, an arguably greater threat to military preparedness is presented by the "Don't Ask, Don't Tell" policy itself, which asks officers like Lieutenant Sloane to compromise their integrity and lie regularly. The law also poisons the military atmosphere of team loyalty by implicitly encouraging soldiers to report their homosexual colleagues.

4. This speech resulation, which is both overinclusive and underinclusive, is not narrowly tailored to the government's asserted interest.

Petitioner's policy also fails the second prong of strict scrutiny analysis. The strict scrutiny test requires not only that the law in question be directed to a compelling government interest, but also that it be narrowly tailored to that end. See Arkansas Writers Project, Inc. v. Rasland, 481 U.S. 221, 231 (1987). As stated above, the government must use the least restrictive means possible to pursue its interests. See Reno v. ACLU, **117** S. Ct. at 2346. The "Don't Ask, Don't Tell" speech regulation purports to reach virtually all service members likely to engage in homosexual conduct without reaching any other service members. Yet in fact, the armed forces have turned their artillery on their own troops: true, the assault will hit some of the targeted few, but others will survive, and meanwhile the barrage will strike unintended victims, as well. In other words, this law is both overly broad and overly narrow. Service members who say, "I'm gay," but who

give their oath never to engage in the targeted conduct - soldiers like Lieutenant Sloane - nevertheless will fall prey to this law. Its overbreadth is also evident in its applicability to the private, off-duty statements of service members, speech far removed from official military activity. At the same time, the regulation is too narrow: gay and lesbian service members who regularly engage in the proscribed conduct without being caught, and who never declare their homosexuality, will not be reached by the policy. Laws exhibiting this sort of poor fit, both overinclusive and underinclusive, obviously lack the narrow tailoring required by strict scrutiny.

Additionally, Petitioner's use of a content-based speech regulation is far from the least restrictive means available to pursue the objective of preventing homosexual conduct among soldiers and maintaining military readiness. Obviously, the existing prohibition on actual sexual activity between soldiers of the same gender serves as a much more focused and appropriate means of pursuing the former interest. The latter goal may also be met by less restrictive means. If Petitioner fears that admissions of homosexuality by some service members will create unrest among other soldiers, the solution is to pursue greater tolerance, not to embrace intolerance. Businesses throughout the country offer or require sensitivity training to assuage concerns and combat prejudices. The armed forces could implement similar programs. It would be rash to

countenance the most constitutionally suspect of measures - a restriction on the content of speech - when such less restrictive measures have yet to be tried.

5. The mere fact that the law creates a rebuttable presumption to Punish the speech at issue, rather than a ban on the speech, cannot redeem its unconstitutionality.

The preceding analysis applies to this law even though the policy purports to offer accused service members an opportunity to rebut the presumption that they may engage in proscribed homosexual activity. As stated above, the First Amendment does not protect speech solely from those regulations that directly impose punishment for speech; its protections also guard against less absolute restrictions on speech. See, e.g., Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123 (1992) (striking down a fee requirement for demonstrations as an unreasonable burden on speech). Hence, strict scrutiny analysis applies to Petitioner's policy regardless of whether the termination of a military career is understood as punishment or merely as a lesser burden on speech akin to the fee requirement in Forsyth County. Likewise, the analysis does not change because the presumption against speakers like Lieutenant Sloane may be rebutted. The speech is still burdened: the statement "I am a lesbian," for example, will result in a separation proceeding and a very strong likelihood of expulsion from the military.

This Court has held that the possibility of rebutting a presumption or invoking affirmative defenses cannot salvage

an otherwise unconstitutional speech regulation. In Reno v. ACLU, this Court found unconstitutional the Communications Decency Act ("CDA"), which sought to punish the display or transmission of indecent material on the Internet. See Reno v. ACLU, 117 S.Ct. 2329 (1997). Like the "Don't Ask, Don't Tell" policy, the CDA regulated speech based on its content. Its blanket prohibitions were qualified by the availability of two affirmative defenses, in a manner analogous to the rebuttable presumption at issue here. A defendant in a CDA case could attempt to show "good faith, reasonable, effective, and appropriate actions" taken to protect minors from indecent material, or could show the use of a credit-card system restricting access to indecent material. See id. at 2339. This Court held both defenses "illusory." See id. at 2349. This Court found "effective" protection of minors unfeasible because of inadequate technology, and the credit-card system "not economically feasible" for most speakers. See id. Though some defendants might have been able to take advantage of these affirmative defenses, such nominal protections for the speaker were entirely insufficient to save the generally unconstitutional law.

The affirmative defenses under the "Don't Ask, Don't Tell" speech regulation are even more illusory and offer even less protection than those in Reno v. ACLU.[15] Human

[15] Hundreds of soldiers are dismissed each year for admissions of homosexuality. In 1997 alone, the military discharged 997 service members for homosexuality. See Tim Weiner, Military Discharges of Homosexuals Soar, N.Y. Times, April 7, 1998, at A21. Yet during the first three years of

biology, a considerably more inflexible barrier than technology or economics, stands in the way of effective exercise of the affirmative defenses in this law. Though a service member may, like Lieutenant Sloane, swear never to engage in homosexual conduct, he or she cannot disavow any propensity for such conduct without lying about his or her sexual orientation. The soldier must establish, among other things, that he or she does not "ha[ve] a propensity to engage in" homosexual conduct. See **10** U.S.C. Section 654 (b)(2) **(1994).** Given that homosexuals may be defined as individuals with a natural propensity to engage in homosexual conduct, a gay or lesbian service member cannot make the required rebuttal without flagrant dishonesty. Surely the armed forces, for whom integrity is both a paramount virtue and a military necessity, cannot demand such dishonesty of their soldiers. But in order to adhere to this high standard of integrity, a homosexual service member subject to a separation hearing would have to admit his or her propensity and abandon any hope of rebuttal.

B. NEITHER MITCHELL'S "SPEECH-AS-EVIDENCE" DOCTRINE NOR RENTON'S "SECONDARY EFFECTS" DOCTRINE APPLY TO THIS CONTENT-BASED SPEECH REGULATION.

1. The "secondary effects" justification for speech restrictions does not apply here; it is limited to less-Protected categories of speech, and cannot be invoked when the speech does not cause the alleged nesative effects.

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the "Don't Ask, Don't Tell" policy, only eight service members successfully rebutted the presumption against them. See Thorne v. United States Department of Defense, 945 F. supp. 924, 926 (E.D. Va. 1996).

The "secondary effects" rationale for restrictions on speech does not apply in this case. Established in the context of a content-based regulation which suppressed the commercial exhibition of obscene films, this doctrine allowed speech regulation where the law in question aims "not at the *content* of the [speech], but rather at the *secondary effects* of such [speech,]" effects that included increasing crime and declining property values. See Renton v. Playtime Theatres, Inc., **475** U.S. **41, 47** (1986). However, the doctrine was crafted specifically for regulation of an admittedly unprotected category of speech: obscenity. Applying the exception here would require that this Court carve into pristine First Amendment territory, extending the limited secondary effects doctrine to protected speech like Lieutenant Sloane's statement of identity. Instead, Respondents ask simply that this Court adhere to its established jurisprudence, keeping the secondary effects exception limited to unprotected categories of speech.

Simple logic also bars the application of the "secondary effects" doctrine to the "Don't Ask, Don't Tell" speech regulation. In Renton, the secondary effects were exactly that - *effects.* See id. at 48. The conditions that provoked the city's concern - increasing crime, eroding property values, threats to quality of life - were proximately *caused by* the speech. See id. at 47-48, 51.

Here, the statement, "I'm gay" does not cause the proscribed homosexual conduct at which the law is aimed. Gay sex is not an "effect" of this speech, in either an actual or a proximate manner. Furthermore, while anger on the part of heterosexual soldiers hearing a service member's admission of homosexuality might be defined as an "effect" of the speech, the "secondary effects" doctrine does not encompass such audience hostility. In Boos v. Barry, this Court specifically held that "[l]isteners' reactions to speech are not the type of "secondary effects" we referred to in Renton." Boos v. Barry, 485 U.S. 312, 321 (1988). In this case, the only detectable negative consequence to flow from Lieutenant Sloane's statement was the abrupt termination of her distinguished career.

2. The Mitchell doctrine, allowing use of speech as evidence of Proscribed conduct, does not apply to speech where no conduct has already been established to have occurred.

The circumstances of this case also bar Petitioner from invoking the "speech as evidence" doctrine of Wisconsin v. Mitchell. 508 U.S. 476 (1993). Mitchell upheld the enhancement of sentences for crimes accompanied by hate speech; the speech served an evidentiary purpose, of establishing these crimes as "hate crimes." Hence, the law did not target the content of the speech, but merely used it as evidence. The Mitchell exception requires, at a minimum, the existence of additional conduct, of which the speech is evidence. Here, there has been no accompanying conduct

analogous to that in Mitchell; the speech is, at most, evidence of future conduct. By seeking to punish the mere possibility of future wrongdoing, Petitioner turns the traditional American understanding of guilt on its head.[16] First principles of criminal law prove instructive even in this civil context: culpability requires both a guilty mind and a guilty act. The case of Lieutenant Sloane offers, at most, a *mens rea:* her sexual orientation. The *actus reus* is completely missing. This situation may be distinguished from the legitimate government use of a confession to a crime as evidence of the speaker's guilt. In the confession scenario, additional evidence exists: a crime has occurred. Here, no proscribed conduct has occurred. Just as a confession wit, at a crime would not constitute evidence, so Lieutenant Sloane's statement, without commission of the proscribed conduct, cannot constitute evidence.

Furthermore, as currently written and applied, Petitioner's policy makes statements of identity virtually conclusive evidence of the proscribed homosexual conduct - in effect, the statement establishes a *prima facie* case of conduct. This approach conflates the statement and the hypothetical conduct, treating the statement as the legal

[16] Some lower courts that have addressed the constitutionality of the "Don't Ask, Don't Tell" policy have erroneously applied the Mitchell evidentiary rule. See, e.g., Richenbers v. Perry, 97 F.3d 256 (8th Cir. 1996); Thomasson v. Perry, 895 F. Supp. 820 (E.D. Va. 1995), aff'd 80 F.3d 915 (4th Cir. 1996). For the reasons described in the text, such application of the evidentiary rule is inappropriate in this case.

equivalent of the proscribed conduct. The government then imposes punishment, allegedly to strike at homosexual conduct. However, at that point, no conduct has occurred. Hence, the punishment must be for the statement, not the conduct of which the statement is "evidence." In other words, while in Mitchell the punishment was for already-established conduct, of which the speech was additional evidence, here the punishment is for the speech alone.

3. Even if Mitchell did apply, this speech would be used as evidence to justify punishment of a status or propensity, somethins which this Court's decision in Robinson disallows.

Even if the "Don't Ask, Don't Tell" law did not target the content of speech, but merely used speech as evidence, it would still run afoul of the Constitution. As explained above, the speech cannot be understood to be evidence of conduct, given that no conduct has yet occurred. Hence, its evidentiary value must be as proof of propensity. The law itself supports this reading, allowing the service member to attempt to argue that he or she does not "ha[ve] a propensity to engage in . . . homosexual acts." 10 U.S.C. Section 654(b)(2) (1994). Upon a finding of such propensity, the armed forces will discharge the service member in question.

However, this Court's decision in Robinson bars such punishment of mere status or propensity. See Robinson v. California, 370 U.S. 660 (1962). Robinson involved a California statute that imposed punishment for merely being

a drug addict - someone with a *propensity* to use drugs - even absent proof of any specific illegal acts. See id. at 666. Similarly, the evidentiary-use interpretation of the "Don't Ask, Don't Tell" law imposes punishment, in the form of expulsion from the military, for merely being a homosexual. The law requires no additional proof of specific proscribed acts. Such punishment of status or propensity cannot pass constitutional muster under the Robinson rule. In fact, Lieutenant Sloane is an even better candidate for protection under the Robinson rule than was Robinson himself. While Robinson admitted to having committed illegal acts of drug use in the past, in effect creating his status, see id. at 661, Sloane testified that she had never engaged in any homosexual conduct, see R. 6, and obviously cannot be said to have "created" her homosexual status. Punishment of an immutable status like homosexuality also violates the Constitution for the equal protection reasons described above. Lastly, given that homosexual status, according to Petitioner's own directives, is not a bar to service, "admitting to that status . . . cannot itself be cause for discharge. There can be nothing wrong about admitting to a status that is proper." Holmes v. California National Guard, 124 F.3d 1126, 1138 (9th Cir. 1997) (Reinhardt, J., dissenting).

CONCLUSION

The "Don't Ask, Don't Tell" law violates both the Fifth Amendment's equal protection component and the First Amendment's protection of free speech. For those reasons and the reasons stated above, Respondents ask that this Court affirm the judgment of the Court of Appeals for the Thirteenth Circuit that 10 U.S.C. Section 654 is unconstitutional both on its face and as applied. Respondents also request both declaratory and injunctive relief.

Respectfully submitted,

Erich Grosz

Rua Kelly

Counsel for Respondents
Stanford Law School
Stanford, CA 94305

APPENDIX A: RELEVANT CONSTITUTIONAL PROVISIONS

From the United States Constitution:

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX B: RELEVANT FEDERAL STATUTORY PROVISIONS

10 U.S.C. Section 654:
Policy concerning homosexuality in the armed forces.

(a) Findings. Congress makes the following findings:

(1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.

(2) There is no constitutional right to serve in the armed forces.

(3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.

(4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.

(5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.

(6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

(7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.

(8) Military life is fundamentally different than civilian life in that:

(A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

(B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

(9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.

(10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member **has** a military

status, whether the member is on base or off base, and whether the member is on duty or off duty.

(11) The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.

(12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

(13) The prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service.

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(b) Policy. A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made an approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further finds, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that -

(A) such conduct is a departure from the member's usual and customary behavior;

(B) such conduct, under all the circumstances, is unlikely to recur;

(C) such conduct was not accomplished by use of force, coercion, or intimidation;

(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made an approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(3) That the member has married or attempted to marry a person known to be of the same biological sex.