NO. 06-35644

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAJOR MARGARET WITT,

Appellant,

v.

UNITED STATES DEPARTMENT OF THE AIR FORCE; DONALD RUMSFELD Secretary of Defense; MICHAEL W. WYNNE, Secretary of the Department of the Air Force; and COLONEL MARY L. WALKER, Commander,

Appellees.

BRIEF OF APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NO. C06-5195 RBL, HONORABLE RONALD B. LEIGHTON

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A. STATEMENT OF JURISDICTION

The District Court had jurisdiction under 28 U.S.C. § 1343(3). Final judgment was entered on July 27, 2006. ER 394. Timely notice of appeal was filed on July 31, 2006. ER 395-98. This Court has jurisdiction under 28 U.S.C. § 1291.

B. STATEMENT OF THE ISSUES

1. Does discharge of a reserve member of the armed forces, for engaging in homosexual conduct with a civilian partner in the privacy of her home hundreds of miles from the military base where she serves, violate the substantive due process right that Lawrence v. Texas held was entitled to "substantial protection"?

2. In the military context, should laws burdening the right recognized by Lawrence be examined on an "as applied" basis, as the Court of Appeals for the Armed Forces held in U.S. v. Marcum?

3. Is the right identified in Lawrence a fundamental constitutional right which triggers strict scrutiny? Or is the proper standard for assessing constitutionality intermediate scrutiny, "strong" rational basis scrutiny conducted on as "as applied" basis, or ordinary minimum scrutiny?

4. Assuming that the minimum scrutiny rational basis test applies, does Pruitt v. Cheney guarantee a service member an opportunity to prove that the challenged military rules violate substantive due process because they are the product of anti-homosexual prejudice and not supported by any evidence?

5. Assuming that the minimum scrutiny rational basis test applies, under Pruitt is a service member entitled to an opportunity to prove that the challenged military rules violate equal protection because there is no rational basis for requiring the discharge of all service members who engage in homosexual conduct with a consenting adult, while allowing the discretion to retain some service members who have engaged in criminal sexual acts with minors?

6. Does a delay of more than twenty months before holding a military discharge hearing violate a suspended service member's procedural due process right to a reasonably prompt post-deprivation hearing?

C. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

In April 2006, Major Witt, a veteran officer with over 19 years of service, filed suit to enjoin the Air Force from discharging her on grounds of homosexual conduct. ER 1-43. As the District Court noted, "Major Margaret H. Witt is a highly decorated, well respected flight nurse in the United States Air Force Reserves," who "has been used extensively as a role model in Air Force recruiting publications." Witt v. Department of the Air Force, 444 F.Supp.2d 1138 (W.D. Wash. 2006); ER 383. Major Witt argued that under Lawrence v. Texas, 539 U.S. 558 (2003), the statutes and Air Force regulations requiring her discharge were unconstitutional as applied to her. The Air Force and the named individual defendants (hereafter "the Air Force") filed a

motion to dismiss for failure to state a claim. ER 403 (Docket No. 24). The District Court granted the motion, ruling that notwithstanding Lawrence, the minimum scrutiny test still applied to cases involving laws burdening homosexual conduct, and relied on pre-Lawrence cases to find that test satisfied. ER 387-388.

The District Court also dismissed Witt's procedural due process claim involving excessive delay in providing her with a hearing at which she could object to her suspension from active duty. ER 392. Although Air Force regulations provide service members the right to an administrative discharge hearing, as of July 27, 2006 when the District Court rendered its decision the Air Force had not yet held any such hearing. A discharge hearing was finally held on September 28-29, 2006, at Warner Robins AFB, Georgia. The discharge board found that Witt had engaged in homosexual acts and that she had made statements that she was a homosexual. *See Appellant's Unopposed Motion to Expand the Record, 10/9/06*. The Board recommended that Witt be discharged from the Air Force with an Honorable Discharge. *Id.* That recommendation will be forwarded to the Secretary of the Air Force for further review. Absent some unanticipated rejection of the discharge board's recommendation, it is expected that Major Witt will be discharged sometime in 2007.

2. FACTS

On appeal from a dismissal under Fed. R. Civ. P. 12(b)(6), all facts alleged by the plaintiff are taken as true. Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295

(9th Cir. 1998). The following summary is drawn from the complaint and from evidence consistent with the complaint that was submitted in support of a motion for a preliminary injunction (denial of which is not appealed).

a. **Exemplary Military Career.**

Major Margaret Witt entered the Air Force on March 27, 1987. ER 9, 44. She was commissioned as a Second Lieutenant on April 11, 1987; promoted to First Lieutenant on April 11, 1989; to Captain on April 11, 1991; and to Major on October 1, 1999. ER 9, 45. On October 1, 2003 she became eligible for promotion to Lieutenant Colonel. ER 9, 45.

Major Witt first served as an Operating Room Staff Nurse at Castle AFB, California and Wiesbaden, Germany. ER 9, 45. In August 1992 she was transferred to Scott AFB, Illinois where she served as Flight Nurse, Nurse Scheduler, Medical Aircrew Training Officer, Flight Nurse Evaluator, and eventually as Chief of Medical Aircrew Standards and Evaluations, with the 375th Aeromedical Evacuation Squadron ("AES"). ER 9-10, 45. AES personnel are responsible for inflight management and care of ill and injured patients transported by military aircraft. ER 10, 45.

On December 16, 1995 she transferred from active duty to reserve, and was reassigned to McChord AFB, Washington, to the 446th AES where she served as Flight Nurse, Flight Nurse Examiner, Director of Weight Management and Physical Fitness, Officer in Charge of Ground Training and as of April 4, 2004, as Standards

and Evaluations Flight Commander. ER 10, 45. She had management responsibility for over 200 flight nurses and medical technicians. ER 10, 46.

In over 19 years with the Air Force, Major Witt received numerous medals, including: Meritorious Service Medal, Air Medal, Aerial Achievement Medal, Air Force Commendation Medal, Air Force Achievement Medal, Air Force Outstanding Unit Award, Combat Readiness Medal, National Defense Service Medal, Armed Forces Expeditionary Medal, Air Force Overseas Ribbon Long, Air Force Longevity Service, Armed Forces Reserve Medal, Small Arms Marksmanship Ribbon, and Air Force Training Medal. ER 10, 46.

In January 2003 she deployed to Seeb AFB, Oman in support of Operations Southern Watch and Enduring Freedom. ER 11, 46. As noted in the Air Medal citation awarded to her by President George W. Bush on May 14, 2003:

> Major Margaret H. Witt distinguished herself by meritorious achievement while … provid[ing] aeromedical evacuation services for multi-national coalition forces engaged in the global war on terrorism. ***Her airmanship and courage directly contributed to the successful accomplishment of important missions under extremely hazardous conditions and demonstrated her outstanding proficiency and steadfast devotion to duty***. Major Witt's professional skill and dedication ***contributed immensely*** to the wing's operational aeromedical evacuation and airlift capability . . . ***Her commitment to mission readiness and unrivaled clinical skills*** ensured the delivery of outstanding medical care to 150 patients during 18 sorties … while operating in an austere, hostile environment. ***The professional ability and outstanding aerial accomplishments of Major Witt reflect great credit upon herself and the United States Air Force.***

ER 11, 19, 46-47 (bold italics added).

. Seven months later, in December of 2003 she was awarded the Air Force Commendation Medal for saving the life of a passenger who collapsed aboard a commercial flight en route home from Seeb AFB. The commendation stated: "Her quick response to the emergency, her nursing professionalism, and dedication to the care to the patient without regard for her own personal injury and safety represent the best traditions of Aeromedical Evacuation." ER 11-12, 21, 47.

Major Witt consistently received exemplary evaluations in her annual Officer Performance Reports throughout her career. ER 12, 47. For example, her evaluation for the period immediately before her suspension from duty said that she "demonstrated excellent organizational and management skills;" and that she is an "excellent mentor" who is "often sought out by peers for advice." ER 23. The report continued:

> ***Outstanding squadron and Air Force representative*** – hand picked to coordinate humanitarian mission and patient transport with multiple civilian, military, government and DOD agencies assuring continuity of care; ***Recognized leader*** – submitted by peers and ***selected by superiors as Officer of the Quarter Spring of 2003***; Voluntarily assumed overall responsibility for multiple sections within the squadron during unit mobilization . . ..

ER 23 (bold italics added). The Officer of the Quarter award "is given only to those individuals who have demonstrated exceptional professionalism, leadership and service to our country." ER 26-27.

Because of her outstanding record of achievement and service, Major Witt was picked to be the "poster child" for the Air Force Nurse Corps recruitment flyer in 1993. ER 13, 29-32, 48. Photographs of Major Witt were included in the AF Nurse Corps recruitment flyer. ER 30-31, 58-59. Posters bearing her photograph continued to be used even after her suspension. ER 105.

When not fulfilling her duties at McChord AFB near Tacoma, Major Witt lives in Spokane, where she has served as a volunteer firefighter and, since 1999, has been employed as a physical therapist with the Spokane School District. ER 13, 48.

b. <u>Investigation Into Long Term Relationship With a Civilian Woman In the Privacy Of Her Off-Base Home</u>.

In July of 2004 Major Adam Torem informed Major Witt that he had been ordered to investigate an allegation that she had sexual relations with a civilian woman. ER 13, 49. Major Witt declined to make any statement to Major Torem about the allegation. ER 50. Approximately one month later, an Air Force chaplain approached Major Witt to say he had been sent by the 446th Wing Commander. ER 50. He told her "I know what has happened and it's very unfair." ER 50. She declined to speak with him as well. ER 50.

Major Torem interviewed the civilian woman identified to him as Major Witt's partner. The civilian acknowledged she was a lesbian, and said that she and Major Witt had engaged in a committed and loving relationship from July 1997 through October 2003. ER 13. Major Torem's final report stated that Witt had engaged in sexual

relations with the civilian woman. ER 51. His report was forwarded to Witt's squadron commander, Colonel Walker. ER 51.

On November 4, 2004 Major Witt was ordered to meet with Colonel Jan Moore-Harbert and Major Verna Madison. ER 51. Moore-Harbert told Witt that Colonel Walker had ordered her to tell Witt that Walker was initiating administrative separation proceedings. ER 51. Colonel Moore-Harbert later said that she was in tears after this meeting because it was the hardest thing she ever had to do in the Air Force. ER 75. Major Madison was so upset she "felt like taking off her uniform." ER 75.

On November 9, 2004, Major Witt received a memorandum dated November 5, stating that Colonel Walker had initiated administrative separation proceedings against her pursuant to AFI No. 36-3209. ER 14, 34. Colonel Walker's action precluded Witt from working and earning pay or points toward promotion and pension, pending final resolution of the separation action. ER 383. If Major Witt is discharged, she will not earn a retirement pension because she will be just short of the required 20 years of military service. ER 53.

After waiting for sixteen months without word on whether the suspension would be made permanent, on March 6, 2006 Major Witt received a letter advising her that she was accused of engaging in homosexual conduct, which was grounds for discharge. ER 14, 36-39. The letter advised her of her right to request an administrative discharge

hearing to be held at "the earliest possible date" at Warner Robins AFB. She promptly requested a hearing. ER 14-15, 41-42.

She also filed suit against the Air Force to enjoin her discharge. In her lawsuit, Major Witt did not deny her relationship with the civilian woman. ER 49. As the District Court noted:

> The woman with whom Witt was involved was never a member of the Air Force or any other branch of the military. The alleged acts occurred in the home the women shared in Spokane, Washington, across the state from Major Witt's duty station at McChord Air Force Base, outside of Tacoma, Washington. It is agreed that Witt did not ever engage in homosexual conduct on the base, or with a member of the military.

ER 383. Major Witt has never engaged in sexual relations with a woman while on duty, nor has she ever engaged in sexual relations with a woman on the grounds of any Air Force base. ER 49. Before filing suit, Major Witt never told anyone that she engaged in homosexual conduct with her former civilian partner. Until Major Torem asked her if she wanted to make a statement in the summer of 2004, never in the 19+ years of her military career did any service member ever ask Major Witt if she was a homosexual. ER 52. No service member has ever indicated any unwillingness to work with her, or expressed any discomfort at having to work with her, or under her supervision. ER 52. As the District Court noted: "Witt did not make any disclosures regarding her sexual orientation either before or after the investigation . . . Within the military context, she did not draw attention to her orientation, and her colleagues value her contribution to their unit and apparently want her back." ER 383, 386.

c. Witt's Positive Impact Upon Others in Her Unit.

The rationale behind the discharge rule is that the mere presence of service members who engage in homosexual conduct adversely affects unit cohesion and military effectiveness. That rationale has no application here, because Major Witt's presence in the Air Force never harmed military discipline, order, morale, or combat readiness. On the contrary, the members of her unit uniformly believe that her presence in the Air Force is a good thing, and that she contributes to positive unit morale—even after the Defendants advertised Major Witt's sexual orientation.

For example, Major Faith Mueller expressed "utmost confidence in her abilities as a member of the U.S. Air Force" and declared herself to be "honored to serve with her as a member of the same squadron." ER 62.

> I believe that Major Witt is a highly valuable, well-liked and well-respected member of our squadron. ***She plays an important role in ensuring the good order, morale and cohesion of our Unit.*** Major Witt is considered a premier authority on military regulations and routinely serves as a resource to me and other members of our squadron.
>
> Based on my personal observations of Major Witt ***I can say with confidence that her presence in the U.S. Air Force greatly enhances our squadron's combat efficiency and readiness.***

Id. (bold italics added). Sgt. James Schaffer explained that Major Witt could not hold the positions she did without enjoying utmost respect of her colleagues:

> It is important to recognize how significant it is that Major Witt was selected to be the chief of Standards and Evaluations for the 446th AES. The person selected to be the head of StanEval has to be "the best of the best." That is why they are selected for that position. The person who

> evaluates the performance of others has to be extremely highly regarded by the rest of the unit in order to perform the evaluation job successfully. ***That is why Major Witt was selected for the position – because she is so uniformly highly regarded by everyone in the unit.***

ER 77 (bold italics added). Similar praise was voiced by others. ER 65-70 (Sgt. Julian); ER 83-86 (Major Schindler); ER 87-92 (Major Carlson); ER 93-97 (Sgt. Brinks); ER 98-102 (Major Thomas); ER 103-107 (Major Oda). Major Julia Scott states that Major Witt:

> knows her job backwards and forwards, and is incredibly knowledgeable. She is highly regarded within the unit. People go to her with problems because she solves them. In the field of aeromedical evacuation you have to be able to think quickly and to deal with rapidly changing critical situations. She has these qualities. ***The bottom line is that people like Major Witt save lives.***

ER 79, ¶ 3 (bold italics added). The Air Force itself recognized that she was a model officer when it made Major Witt its "poster child" for recruitment. ER 69, 85, 95, 100, 105.

Only after the separation in November 2004 did her colleagues learn that Major Witt was a lesbian, although many had suspected as much. Once their suspicions have been confirmed as a result of Defendants' actions, they still report utmost respect for Major Witt and continued eagerness to serve with her. Major Mueller says:

> I was recently told by a friend of Major Witt's that she believes Major Witt is being discharged because she is accused of being a lesbian. Before I was told this, I suspected Major Witt was a lesbian. I can say without reservation that this fact makes absolutely no difference to me. ***In my opinion, if command were to announce to everyone on base that Major Witt was a lesbian and that she was remaining in the service, her continued presence in the Air Force would not have any negative impact upon our squadron's morale, discipline, or combat***

> ***readiness, and no negative effect whatsoever on me personally.*** It would still be my strong desire to have her remain in the service and to continue to work with her.

ER 64 (bold italics added). Similar statements were made by both male and female service members. ER 69 (Sgt. Julian); ER 75-76 (Sgt. Schaffer); ER 81 (Major Scott); ER 86 (Major Schindler), ER 90-91 (Major Carlson); ER 96 (Sgt Brinks); ER 100-101 (Major Thomas); ER 106 (Major Oda) ("Assuming that she is a lesbian . . . this fact makes absolutely no difference to me . . . it makes no difference to anyone else in the 446th either").

Notwithstanding Major Witt's sexual orientation, discharging her is harming unit morale. As stated by Technical Sergeant Julian:

> I have talked to many other people in the 446th AES about the decision to initiate separation proceedings against Major Witt, and in general they have reacted with shock, confusion and amazement. I have never heard any service member say that they approved of the decision, and in general everyone has responded by asking, "Why?" ***Our squadron has always had gays and lesbians in it, and their presence is widely known, but until this decision to seek a discharge against Major Witt it has never been an issue.*** We had two openly gay service members who retired (voluntarily) many years ago and no one ever sought to question their presence in the Air Force.
>
> In my opinion the Commander's decision to initiate an administrative discharge proceeding against Major Witt has seriously hurt unit morale, and that morale would be further harmed if the Air Force went ahead and actually discharged her. ***The incident has been seriously deflating to everybody in the 446th AES. Everyone who has discussed it in my presence has said they think the decision was a bad one.***

ER 68 (bold italics added). Others concur that the discharge proceedings have already hurt morale, and that a final discharge will harm it further. ER 64 (Major Mueller); ER 75-77 (Sgt. Schaffer); ER 82 (Major Scott); ER 86 (Major Schindler); ER 91-92 (Major Carlson); ER 96-97 (Sgt. Brinks); ER 101 (Major Thomas); ER 106-107 (Major Oda).

The discharge proceedings have so hurt unit morale that it has caused career Air Force officers to consider retiring rather than serve where exceptional officers are discharged for their private lives. Major Madison "felt like taking off her uniform" as a result. ER 75. Sgt. Julian actually did so:

> I have been in the Air Force over 20 years. I recently decided that I would apply for retirement. The Air Force's decision to initiate separation proceedings against Major Witt was a factor which contributed to my decision to apply for retirement from the service. ***I no longer want to serve in an organization which mistreats people in the way the Air Force is mistreating her.***

ER 67-68, 70 (bold italics added).

d. <u>Current Wartime Shortage of Qualified Flight Nurses</u>.

As of April 4, 2006, the Air Force Reserve listed 121 vacancies for flight nurses, the largest number of vacancies for any officer duty assignment. ER 54. See also ER 106 (Major Oda: "We currently have [a] huge shortage of qualified flight nurses in the Air Force. It makes no sense for the Air Force to discharge Major Witt, one of the very best flight nurses the Air Force has, at a time when the Air Force desperately needs qualified flight nurses."); ER 77 (Sgt. Schaffer: "It would be downright stupid to discharge such a skilled and knowledgeable officer, especially in a time of war when

people with her level of military skill and professionalism are so badly needed, and in such short supply.") If Major Witt had not been separated from her unit, she would now be deployed and serving as a flight nurse, most probably overseas in Qatar, Iraq or Germany. ER 54.

e. Absence of Evidence That Military Interests Are Harmed By Homosexuals Serving Openly and Without Restriction.

Political Science Professor Elizabeth Kier of the University of Washington is an expert on international security and civil-military relations. ER 109. Her article, "Homosexuals in the Military – Open Integration and Combat Effectiveness," published in the prestigious journal International Security (Vol. 23, Fall 1998), is part of the record in this case. ER 130-164. Professor Kier notes that the 23 countries that permit homosexuals to serve openly in their armed forces have experienced no adverse effect on military discipline or combat readiness. Studies of the armed forces of Canada, the United Kingdom, and Australia found no evidence of any negative impact upon unit morale. ER 111-113.

There is a scholarly consensus that the sociological assumptions upon which the present policy of excluding homosexuals from the armed forces are incorrect and unsupported by any evidence. ER 116. Scholars have noted that "even though military authorities had forecast serious risks to combat effectiveness" if African-Americans and women were integrated into the armed forces, their predictions were proved wrong. ER 118.

> Our historical experience also shows that the integration of new social groups into the U.S. military does not disrupt unit cohesion or degrade military performance, even though military authorities had forecast serious risks to combat effectiveness. Studies of racial and gender integration of the U.S. armed forces repeatedly find that these previously segregated groups were integrated *without* disrupting unit cohesion and military performance. Moreover, these studies support the conclusion that the open integration of gays and lesbians into our armed forces would *increase* military effectiveness.

ER 118-19. See also ER 110, 115-116, 119-121.

Even the internal studies of the Defense Department have concluded that there is no evidence to support the military's discriminatory policy against homosexuals. ER 123-124. As former Assistant Secretary of Defense Lawrence Korb has flatly stated, "the justification for the ban on homosexuals in the military is 'without factual foundation.'" ER 123, ¶ 34. As early as 1993 the Defense Department admitted "that it [could] not provide scientific evidence in support of its argument" that the presence of openly gay service members would hurt military morale or combat readiness." ER 123, ¶ 34. The military has consistently attempted to suppress these internal studies. ER 122, 124. (A similar pattern occurred after World War II, when the U.S. Army tried to prevent the public release of studies showing that the limited experiments with racial integration had worked. ER 124.)

The Air Force never contested this evidence demonstrating the irrationality of the discharge policy, and the 12(b)(6) dismissal prevented further development of the record on this subject.

D. SUMMARY OF ARGUMENT

The rule requiring mandatory discharge of gay service members for homosexual conduct, 10 U.S.C. § 654; AFI 36-3209 ¶ 1.15.15, is unconstitutional as applied in this case. Major Witt faces a stigmatizing discharge from the Air Force because she exercised her constitutionally protected right to form an intimate committed relationship with a civilian, in the privacy of her own home, hundreds of miles from her base, that she kept private, and that makes no difference to her colleagues, who suspected that Major Witt was a lesbian but nonetheless believe that unit morale and cohesion are greatly harmed by her discharge. On these facts, discharging Major Witt violates the constitution under any potential standard.

This conclusion is inescapable in light of Lawrence v. Texas, 539 U.S. 558 (2003), which held that the right to form intimate romantic relationships – even with a person of the same sex – is protected by substantive due process, and United States v. Marcum, 60 M.J. 198, 205 (C.A.A.F. 2004), which held that Lawrence should be applied in the military context on an as-applied basis considering case-specific facts. The trial court accepted the Air Force's erroneous argument that Lawrence should be viewed as a minimum-scrutiny rational basis case, and hence it did not affect the outcome of any pre-Lawrence cases. But this ignores the plain language of Lawrence. On its own terms, Lawrence announced a "fundamental human right" to form intimate relationships, and fundamental rights are protected by strict scrutiny. The

district court felt uncertain of this result because Lawrence did not use certain magic words. Conceivably, one could argue that Lawrence mandates some other form of heightened scrutiny, such as intermediate scrutiny or "rational basis with bite." But under any standard – including the most minimal rational basis review – a discharge on these facts violates substantive due process.

The discharge also violates equal protection, because it invidiously disadvantages sexually active gay service members with a blanket exclusion. Even heterosexual child molesters are allowed to prove, on a case-by-case basis, that they should not be discharged, but gay people who engage in homosexual conduct with consenting adults are per se excluded.

The Air Force's handling of Major Witt's discharge provides an independent basis for reversal, because it denied her the procedural due process right to a timely administrative discharge hearing.

Throughout, it is evident that this case should not have been dismissed on a 12(b)(6) motion. It is readily conceivable that Major Witt could, after discovery, introduce evidence to show that the discharge in her case would be irrational and in violation of constitutional rights. Indeed, some such evidence was already presented in connection with the motion for a preliminary injunction. At a very minimum, the judgment must be reversed and the case remanded for factual development.

E. STANDARD OF REVIEW

A dismissal for failure to state a claim is reviewed de novo. Steckman, 143 F.3d at 1295 (9th Cir. 1998); Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1992). "A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief." Yamaguchi v. Department of the Air Force, 109 F.3d 1475, 1480 (9th Cir. 1997).

F. ARGUMENT

1. *LAWRENCE* RECOGNIZED THAT THE RIGHT TO RESPECT FOR ONE'S PRIVATE LIFE IS A "FUNDAMENTAL HUMAN RIGHT" THAT IS ENTITLED TO "SUBSTANTIAL PROTECTION" BECAUSE IT IS "CENTRAL TO LIBERTY".

a. The Plain Language of *Lawrence* Demands Heightened Scrutiny Resembling Traditional Strict Scrutiny.

In June 2003, Lawrence v. Texas invalidated statutes barring adults from consensual sodomy. In so doing, the Supreme Court expressly overruled Bowers v. Hardwick, 478 U.S. 186 (1986) and held that the freedom to engage in adult consensual sexual acts – even with a partner of the same sex – is a substantive aspect of liberty protected by the Due Process Clause. Lawrence v. Texas, 539 U.S. at 567. "[L]iberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." Id. at 572.

> The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. ***Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.*** "It is a promise of the

> Constitution that there is a realm of personal liberty which the government may not enter."

Lawrence, at 578, (bold italics added), *citing* Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992).

The District Court recognized that Lawrence expressly overruled Bowers, but concluded that:

> [i]t did so without making it clear whether a new, higher standard of review is to be applied in cases involving regulation of homosexual conduct. The opinion employed language that in places suggests rational basis review should be applied, and in other places seems to imply that a higher level of scrutiny is required.

ER 384-85. Ultimately, the District Court concluded that "Lawrence is based on rational basis review; the same level of scrutiny applied by the Ninth Circuit Court of Appeals in upholding [the policy] prior to Lawrence." ER 387. Major Witt respectfully submits that the District Court erred. For a host of reasons the language of Lawrence mandates heightened scrutiny.

First, Lawrence consistently relies on prior "fundamental" rights cases such as Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973); and Carey v. Population Services International, 431 U.S. 678 (1977). All of these cases recognized that heightened scrutiny protects the right to autonomy in forming intimate sexual relationships against governmental interference. Lawrence expressly identifies Griswold as "the most pertinent beginning point" for its analysis, 529 U.S. at 564, and Griswold unequivocally recognized a "zone of privacy created by several

fundamental constitutional guarantees," 381 U.S. at 485 (italics added). Justice Goldberg's concurrence in Griswold used the term "fundamental" over thirty times. Similarly, Roe v. Wade spoke of "fundamental rights," 410 U.S. at 153, 155, as did Carey, 431 U.S. at 686-88. Lawrence's reliance on these strict scrutiny cases was not accidental.

Second, at virtually every turn the majority opinion in Lawrence explains that the right to form intimate sexual relationships with persons of the same sex is of the highest order. The opening paragraph of the opinion explains that the intimate sexual conduct is premised on "an autonomy of self that includes freedom of thought, belief, [and] expression." 539 U.S. at 562. These freedoms are unquestionably fundamental. The terms used by the majority to describe the right at stake are stirring: it is a "liberty" of "transcendent dimensions," id., and an "integral part of human freedom," id. at 577. Quoting from Planned Parenthood, 505 U.S. at 851, Lawrence described the right as "central to the liberty protected by the [due process clauses]," and "at the heart of liberty." 539 U.S. at 574. These words are inherently inconsistent with minimum scrutiny, which asks only whether there is some conceivable set of facts under which the challenged law might be found rational. Speaking of the substantive due process right of privacy, including the right of sexual intimacy under Lawrence, this Court recently said: "We cannot overstate the significance of these rights." Fields v. Palmdale School District, 427 F.3d 1197, 1208 (9th Cir. 2005). "[T]he strictness of

the Court's standard in Lawrence, however articulated, could hardly have been more obvious." See also L. Tribe, *Lawrence v. Texas: The Fundamental Right That Dare Not Speak Its Name,* 117 Harv. L. Rev. 1893, 1917 (2004).

Third, the Air Force ignores Lawrence's statement that the substantive due process right to autonomy in forming intimate sexual relationships is a "fundamental human right." 539 U.S. at 565, citing Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). A "fundamental human right" is always guarded by rigorous judicial review, not the minimal protection of the rational basis test. It makes no sense to suggest that the Supreme Court has created a new dichotomy between "fundamental constitutional rights" which enjoy heightened protection, and "fundamental human rights" which do not. Heightened scrutiny does not hinge on the presence or absence of magic words in an opinion, but in this case the magic word "fundamental" is unquestionably present.

Fourth, the Court held that the due process clause affords "substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." Id. at 572. "Substantial protection" is not a term that applies to the highly deferential rational basis test, under which courts are "very reluctant, as they should be," to scrutinize laws which do not impact fundamental rights, Cleburne v. Cleburne Living Center, 473 U.S. 432, 441 (1985). Instead, "substantial protection" describes the degree of judicial scrutiny for laws burdening important rights.

Fifth, Lawrence specifically links the concept of "substantial constitutional protection" with recognition of a "fundamental right." The Court stated: "the *protection* of liberty under the Due Process Clause has a substantive dimension of *fundamental significance* in defining the rights of the person." Id. at 565 (italics added).

Sixth, true rational basis review is a minimal inquiry that requires a court to consider only whether the challenged law furthers a legitimate state interest in one hypothetical instance, and not whether it outweighs the individual interest affected. This approach is impossible to square with the language of Lawrence, which devoted page after page to discussing the strength of the individual right. None of that would be necessary in a true rational basis analysis. But Lawrence took great pains to say—at some length—that adults may choose to enter into a relationship with a member of the same sex "in the confines of their homes and their own private lives," and that when "sexuality finds overt expression in intimate conduct" with that other person, "the liberty protected by the Constitution allows homosexual persons the right to make this choice." Id. at 567.

Seventh, a minimal rational basis approach is difficult to square with Lawrence's express reliance upon a decision of the European Court of Human Rights ("ECHR") which invalidated a European sodomy law because it violated Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Lawrence, 539 U.S. at 573, citing Dudgeon v. United Kingdom, 45 Eur.Ct.H.R. (1981) & ¶ 52.[1]

For all of these reasons, Lawrence recognized a fundamental liberty right. Laws burdening that right are subject to strict scrutiny. The District Court erred by concluding that this case is resolved only by reference to the rational basis test.

b. *Lawrence's* Adoption of Strict Scrutiny For the Substantive Due Process Right of Respect for One's Private Life Is Consistent With Supreme Court and Ninth Circuit Case Law Affording Strict Scrutiny to the Right of Intimate Association.

A separate line of cases, founded on both the First Amendment and due process,[2] protect the fundamental right to freedom of intimate association, a right that

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[1] Relying on Dudgeon, the ECHR later held that the United Kingdom's policy of discharging homosexuals from its armed forces also violated Article 8 of the Convention. Lustig-Prean & Beckett v. The United Kingdom, ECHR Nos. 31417/96 and 32377/96. Lawrence and Lustig-Prean are premised upon the same fundamental principle. Lawrence held: "The petitioners are entitled to respect for their private lives," 539 U.S. at 578; the ECHR based its decision on Article 8(1) of the Convention, which states: "Everyone has the right to respect for his private . . . life."

The petitioners in Lustig-Prean were military service members who were discharged from the Royal Navy because, like Major Witt, they had engaged in a private sexual relationship with a civilian partner. The ECHR considered and rejected the UK's contention that to maintain "national security" the discharge of these homosexual service members was "necessary in a democratic society." The ECHR rejected the argument that "the presence of open or suspected homosexuals in the armed forces would have a substantial and negative effect on morale and, consequently, on the fighting power and operational effectiveness of the armed forces," because it was founded upon private prejudice against homosexuals. This could not be considered to amount to sufficient justification "any more than similar negative attitudes towards those of a different race, origin or colour." Id. at p. 37, ¶ 90.

includes the right to choose one's intimate, romantic, or sexual partners. In Roberts v. United States Jaycees, 468 U.S. 609, 618-19 (1984), the Court acknowledged that it "has long recognized that . . . certain kinds of highly personal relationships" are entitled to "a substantial measure of sanctuary from unjustified interference by the State," and that such constitutional protection "safeguards the ability independently *to define one's own identity* that is central to any concept of liberty." (Italics added). Three years later the Court unambiguously stated that this "freedom to enter into and carry on intimate or private relationships [is] *a fundamental element of liberty* protected by the Bill of Rights." Board of Directors v. Rotary Club, 481 U.S. 537, 545 (1987) (italics added). Rotary explains that the right of freedom of intimate association is not restricted to relationships among family members. Id. Similarly, in Thorne v. City of El Segundo, 726 F.2d 459, 468 (9th Cir. 1983), this Court held that a relationship between a unmarried woman and a married man *was* protected by both the

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[2] Adopting the approach of the Tenth Circuit in Trujillo v. Board of County Commr's, 768 F.2d 1186, 1188-89 (10th Cir. 1985), this Court has held that intimate association is best analyzed as a substantive due process right, rather than under the First Amendment. IDK, Inc. v. County of Clark, 836 F.2d 1185, 1192 (9th Cir. 1988). See also Dallas v. Stanglin, 490 U.S. 19, 28 (1989) (Stevens, J., concurring in the judgment). Ultimately, what matters here is the protection given to the right of intimate association, not its precise source.

constitutional right to privacy and the First Amendment right to freedom of association.[3]

Intimate association arises in relationships distinguished "by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." Roberts, at 620; Rotary, at 545. Accord IDK, Inc. v. County of Clark, 836 F.2d 1185, 1193 (9th Cir. 1988) (protected relationships are those which are "highly personal" where the individuals "are deeply attached and committed to each other as a result of their having shared each other's thoughts, beliefs, and experiences.")[4] When a government rule causes "direct and substantial interference" with a person's intimate associations, the rule is subject to strict scrutiny. Akers v. McGinnis, 352 F.3d 1030, 1040 (6th Cir.

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[3] Thorne relied upon the substantive due process holding of Moore v. City of East Cleveland, 431 U.S. 494, 506 (1977) (striking down a law that forbade grandparents from living in the same house with their grandchildren). Relying on Moore, this Court held that "heightened scrutiny" applied to a government employment decision because a "substantial privacy interest" was implicated by governmental intrusion with the freedom to choose one's living arrangements. Thorne, 726 F.2d at 471. Like the defendants in this case, the municipal employer in Thorne argued that the job applicant's extra-marital affair would likely cause morale problems. Rather than simply accept this justification as rational on a blanket basis, this Court rejected it because there was no evidence that this rationale *applied to this particular job applicant*.

[4] See also See also Wilson v. Taylor, 733 F.2d 1539, 1544 (11th Cir. 1984) (dating relationship is a form of intimate association entitled to First Amendment protection); Anderson v. City of LaVergne, 371 F.3d 879 (6th Cir. 2004) (romantic and sexual

2003); Montgomery v. Carr, 101 F.3d 1117, 1124 (6th Cir. 1996). A government restriction on the right of intimate association is "direct and substantial" when "a large portion of those affected by the rule are absolutely or largely prevented from [forming intimate associations], or where those affected by the rule are absolutely or largely prevented from [forming intimate associations] with a large portion of the otherwise eligible population of [people with whom they could form intimate associations]." Id.

There can be no doubt that Major Witt's relationship was a constitutionally protected "intimate association." She was engaged in a "committed and loving long term relationship with a civilian woman from July 1997 through August of 2003," which ended because of a dispute over whether they should raise a child together. ER 13, 49. Clearly this relationship was precisely the type of small, highly selective, and secluded relationship that Roberts contemplated.

Moreover, Thorne unequivocally establishes that in this Circuit, the Government must prove that that an intimate relationship with another person will have an adverse impact upon job performance before it may impose a burden on the relationship. In words equally applicable to this case, this Court noted: "The affair was not a matter of public knowledge, and could not therefore diminish the department's reputation in the community. There was no reason to believe Thorne

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relationship between unmarried man and woman who lived together was a form of "intimate association" entitled to constitutional protection under due process clause).

would engage in such affairs while on duty or that the affair which had ended was likely to cause morale problems within the department." 726 F.2d at 471.

c. Discharging Major Witt Based on a Global Rule Without Consideration of Individual Circumstances Is Not a Narrowly Tailored Approach.

Laws subject to strict scrutiny will be sustained "only if they are suitably tailored to serve a compelling state interest." Cleburne, 473 U.S. at 440. Accord Plyer v. Doe, 457 U.S. 202, 216 (1982). Discharging *all* members of the Air Force who engage in homosexual acts is not a "narrowly drawn" policy. Rather than limit the scope of the discharge policy to acts committed with other service members and/or on military bases, the policy requires a homosexual service member to be completely celibate and to refrain from engaging in homosexual conduct with any person, at any place and at any time, no matter how far removed from the military environment. In *addition*, the service member must refrain from making any statement acknowledging his or her sexual orientation.

The Connecticut law in Griswold banned *all* sale of contraceptives merely because *some* uses of those contraceptives might be improper. This caused the Supreme Court to observe that the constitution would not allow the state "to achieve its goals by means having a maximum destructive impact" upon the constitutionally protected relationship between married people. Griswold, 381 U.S. at 485. Here, the challenged Air Force policy has the same "maximum destructive impact" on a

constitutionally protected relationship. Even if it could be shown that homosexual conduct in some settings causes an occasional weakening of military discipline, morale and unit cohesion – and there is no such showing in the record -- less restrictive means of addressing the situation obviously exist.

The rules restricting sexual activity for *hetero*sexual service members are far more narrowly tailored. To prevent superiors from favoring subordinate sexual partners, or from penalizing reluctant subordinates who do not wish to engage in sexual conduct with them, the Air Force simply forbids service members from having sexual relations with other members within their chain of command. See AFI 36-2909; Marcum, 60 M.J. at 207 ("the military has consistently regulated relationships between service members based on differences in grade to avoid partiality, preferential treatment, and the improper use of one's rank.")

No such carefully tailored approach is used for homosexual conduct between service members. A rule that merely required homosexual service members to abstain from homosexual acts while on duty, and requiring them to confine such sexual activity to their own private homes, would promote the same desired result by drastically decreasing the probability that other service members would ever come to learn about such activities (to the extent that is a legitimate goal). Similarly, a rule that

required service members to limit their sexual relations to conduct with civilian partners would have much the same effect.

d. The Court of Appeals for the Armed Forces Recognizes That *Lawrence* Requires a "Searching Constitutional Inquiry" To Determine Whether Military Sexual Conduct Laws Are Constitutional "As Applied."

The Court of Appeals for the Armed Forces has expressly concluded that Lawrence applies to service members and that this application demands a "searching constitutional inquiry." United States v. Marcum, 60 M.J. 198, 205 (C.A.A.F. 2004). Marcum recognized that (1) service members retain the right to form intimate sexual relationships under Lawrence; (2) any military incursion on that right must be justified in light of a strong governmental interest in military readiness, combat effectiveness, or national security; *and* (3) that any such restriction must be "narrowly tailored to accomplish these interests." Id. at 204-05. As a result, court martials for sodomy (whether homosexual or heterosexual) require careful examination of the facts and context to see how the interests of the military balance against the rights of the service member in the particular case.[5] Such cases call for "contextual, as applied

[5] Major Witt respectfully submits that it would be appropriate to rule that 10 U.S.C. § 654 and AFI 36-3209 are facially unconstitutional and void in all respects. At the same time, she acknowledges that the as-applied approach described in Marcum would afford her relief without requiring this Court to interfere to such an extent with the judgment of another branch of government.

analysis, rather than facial review," and "[t]his is particularly apparent in the military context." Id. at 205.

Sexual conduct between military superiors and subordinates, as in Marcum and United States v. Stirewalt, 60 M.J. 297, 304 (C.M.A. 2004), does not resemble the consensual sexual intimacy protected by Lawrence; for this reason, the military ban on the conduct may be constitutionally applied. Marcum's adoption of a contextual as-applied approach is consistent with the line of Ninth Circuit cases protecting the right of gay service members not to be discharged merely because of their status as homosexuals. As discussed further below, decisions of this Court have repeatedly found "as-applied" constitutional violations where military discharge rules were applied to force out gay service members based solely on their sexual orientation. Pruitt v. Cheney, 963 F.2d 1160, 1164 (9th Cir. 1991); Meinhold v. United States Department of Defense, 34 F.3d 1469 (9th Cir. 1994); Cammermeyer v. Perry, 97 F.3d 1235, 1237 (9th Cir. 1996). This sensitivity to unconstitutional applications of military policy can only be stronger after Lawrence and Marcum.

e. The Air Force Policy Is Unconstitutional As Applied to Major Witt. Sexual Relations In The Privacy of One's Home, Hundreds of Miles from One's Military Unit, In the Course of a Committed Relationship With a Civilian Partner, Cause No Harm to Any Military Interest. Enforcement of the Discharge Policy Actually Harms Her Unit and Deprives the Country of an Exemplary Officer in a Time of War When The Need for Her Particular Skills Is Paramount.

The Marcum approach necessarily contemplates that *in some cases* it will be unconstitutional for the military to apply a rule in derogation of a service member's constitutional right to sexual intimacy. Major Witt submits that the policy of discharging all service members who engage in homosexual conduct can never be constitutionally applied in cases involving relations with civilians, because they do not raise concerns about intra-military fraternization. But at the very least, the constitution does not permit *this* discharge of Major Witt for several additional reasons.

The stated purpose of the policy against homosexuals in the military is that their presence "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. § 654(15); AFI 36-3209 ¶ 1.15.15. Major Witt should be allowed to prove that her conduct poses no risk to these important ends, through evidence like the following.

1. Civilian Partner. Major Witt's sexual partner was not a member of the armed forces. Such sexual conduct posed no danger of coercion and no impediment to military discipline or morale as was the case in Marcum and Stirewalt.

2. Committed Relationship. Major Witt's sexual conduct occurred within the context of a years-long committed relationship. This poses less risk that she would make unwelcome advances on persons within the military. Lawrence protected sexual

expression not just for its own sake, but because of its role in expressing and deepening committed relationships, 539 U.S. at 567, so its application is especially strong here.

3. Not on Military Property. No sexual conduct occurred on any Air Force premises.

4. Geographically Remote. Major Witt and her partner lived in Spokane, hundreds of miles across the state from McChord AFB. Major Witt's colleagues were not in a position to learn about or observe – and therefore take offense at – her relationship with a civilian partner.

5. Private Home. Major Witt's sexual conduct occurred in her own home. Lawrence gave special weight to the right of adults to "choose to enter upon this [intimate] relationship ***in the confines of their homes and their own private lives*** and still retain their dignity as free persons." 539 U.S. at 567 (bold italics added). This observation is in keeping with other decisions giving special respect to the home as a protected place for sexual expression in our society. See Stanley v. Georgia, 394 U.S. 557, 565 (1969) (state cannot prohibit mere possession of obscene material in the home).

6. Reservist. During her relationship with her civilian partner, Major Witt was on reserve status. For most of her days, she was taking courses at Eastern Washington University, working as a physical therapist, volunteering as a firefighter, and pursuing other civilian activities. She was present at the base only a few days per

month. Whatever adverse impact a lesbian officer might have on her unit is lessened when most of the time she is away from her unit and the base. If she were activated to Iraq, her partner would again be far from the field.

7. No Voluntary Disclosure. As the District Court noted, Major Witt adhered to the "Don't Tell" provisions of the Air Force policy. She kept her private life private, and did not draw any attention to her sexual orientation. ER 386.

8. Widespread Assumptions. Despite her silence on the topic, it was widely suspected or assumed that Major Witt was a lesbian. See, e.g., ER 64, ¶ 13; 80, ¶ 10; 86, ¶ 12; 91, ¶ 15; 101, ¶ 13. The rule against homosexuals serving in the military is premised on the notion that disruption will occur if their sexual orientation becomes widely known. Here, Major Witt's sexual orientation was widely suspected (albeit through no words or conduct of her own), but no disruption of any sort resulted. Her colleagues have submitted declarations saying that they believed that she was a lesbian, but did not care. ER 64, ¶ 13; 86, ¶ 12; 96, ¶ 12. Further, they said that she would be welcomed back to duty even if she made an official announcement that she was lesbian (so that no speculation was required). ER 75-76, ¶¶ 14-15; 81, ¶ 14; 86, ¶ 12; 91, ¶ 15; 96, ¶ 12. In this way, her case closely resembles Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989) (en banc), which issued an injunction forbidding discharge of an openly gay service member because his orientation had been widely known for years with no adverse effects on his unit.

9. Affirmative Harm from Discharge. The Air Force's effort to discharge Major Witt is hurting morale. At least one officer testified that the threatened discharge of Major Witt contributed to his decision to resign after decades of service, saying that "I no longer want to serve in an organization which mistreats people in the way the Air Force is mistreating [Major Witt]." ER 68-69. Another officer said "she was so upset about Colonel Walker's decision that she felt like taking off her uniform." ER 75. See also, ER 64, 70, 77, 86, 92, 96, 101, 107.

f. Ninth Circuit Substantive Due Process Cases Decided Before *Lawrence* Must Be Revisited.

Major Witt maintains that Lawrence altered the legal landscape by recognizing a fundamental right that can be restricted only by a law that satisfies strict scrutiny. However, the District Court held that Lawrence did not change prior Ninth Circuit law on the subject. But Marcum held that after Lawrence, military regulations restricting homosexual conduct must be subjected to a "searching constitutional inquiry." Marcum, 60 M.J. at 205. That searching inquiry must be taken anew, because the earlier Ninth Circuit substantive due process cases did not have the benefit of Lawrence, and the legal and factual assumptions made in those decisions have been undercut both by Lawrence and by the social changes of recent decades, including the successful experiences that American and allied armies have had with gay and lesbian troops.

(i) The Leading Substantive Due Process Case: *Beller v. Middendorf.*

The leading Ninth Circuit substantive due process case on gays in the military is Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), authored by the future Justice Kennedy. In 1980, unlike today, there was no controlling Supreme Court precedent holding that "liberty gives substantial protection to adult persons deciding how to conduct their private lives in matters pertaining to sex." Lawrence, 539 U.S. at 572. To the contrary, Beller noted that the Supreme Court's only guidance at that time was a summary affirmance of a decision that held, like Bowers did a few years later, that it was constitutionally permissible for a state to criminalize sodomy. 632 F.2d at 809 (discussing Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), aff'g, 403 F.Supp. 1199 (E.D.Va.1975)). The specter of criminalization was clearly present in Beller, where the military's primary affidavit stated, among other things, that "Homosexuals may be less productive/effective than their heterosexual counterparts because of … fear of criminal prosecution." Id. at 811 n.22.[6]

Beller would not be decided the same way against a wholly different legal backdrop that includes the unequivocal statement that Bowers (and hence Doe v. Commonwealth's Attorney) "was not correct when it was decided, and it is not

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[6] The current statute makes the same assumption. 10 U.S.C. § 654(10) states as one of the justifications for the policy that the Uniform Code of Military Justice applies to members of the military at all times, an implicit reference to the UCMJ anti-sodomy law explored in Marcum.

correct today." Lawrence, 539 U.S. at 578. To take but one example: Beller said one reason the Navy should be allowed to discharge all homosexuals was that "toleration of homosexual conduct, as expressed in a less broad prohibition, might be understood as tacit approval." 632 F.2d at 811. The Navy has no interest in avoiding the appearance of tacit approval of conduct that has already received the Supreme Court's express approval.

Beller's main reasons for upholding the Navy's policy do not withstand inspection on the present facts. First, Beller said that "The Navy is concerned about tensions between known homosexuals and other members who 'despise/detest homosexuality'." 632 F.2d at 811. The Ninth Circuit has already disavowed this reasoning.

> To the degree that Beller may thus have rested on prejudice of others against homosexuals themselves, rather than on disapproval of specific acts of criminal conduct, its reasoning is undercut by Palmore v. Sidotti [which held that] "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." . . . This justification accepted in Beller, therefore, should not be given unexamined effect today as a matter of law.

Pruitt v. Cheney, 963 F.2d 1160, 1165 (9th Cir. 1991) (citations omitted).

Second, Beller said that "undue influence in various contexts [could be] caused by an emotional relationship between two members." 632 F.2d at 811. This concern has no bearing on Major Witt's relationship with a civilian.

Third, Beller said there could be "doubts concerning a homosexual officer's ability to command the respect and trust of the personnel he or she commands." 632 F.2d at 811. This mere "doubt" did not come to fruition in Major Witt's case. Both her superiors and subordinates gave her enormous respect. In any event, this factor merely restates in another form the deference to prejudice that Pruitt rejects.

Fourth, Beller said that the presence of gays in the military could have "possible adverse impact on recruiting." Id. Major Witt was literally the poster child for recruiting Air Force flight nurses. Even after her suspension, the Air Force uses her face and her career achievements to encourage others to join up. ER 69, 85, 96, 100. Far from harming recruitment if she stays in, discharging Major Witt has been proven to harm retention, with one officer leaving the service over it. And once again, this factor would simply replicate the presumed biases of recruits.

Then-Judge Kennedy filled Beller with provisos indicating that if legal or social conditions change, so would the result. Judge Kennedy noted that a substantive due process inquiry always "involves a case-by-case balancing." Id. at 807. The case-by-case balance struck in Beller was expressly limited to conditions existing "at the present time," id. at 812, and "at this time," id. at 810. The need to re-examine old assumptions is particularly strong in cases involving rights of unpopular minorities. The Founders "knew times can blind us to certain truths, and later generations can

see that laws once thought necessary and proper in fact serve only to oppress." Lawrence, 539 U.S. at 579. See also Pruitt, 963 F.2d at 1164.

(ii) Substantive Due Process Cases After *Beller*.

Later substantive due process cases applied Beller without much discussion, but they are either distinguishable or must be re-examined after Lawrence.

Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir. 1981), was a challenge to a court martial arising from a charge of homosexual sodomy with an enlisted man in the barracks within sight of other service members. Id. at 1381 n.5. The court rejected the argument that the sexual conduct truly occurred in a private place. Id. at 1384. Legally, the court viewed Hatheway's primary claim as arising under equal protection. Id. at 1382. To the extent it was a substantive due process case, it simply relied on Beller. Id. at 1384. Pruitt later noted that Hatheway had "similar weaknesses" to Beller, especially as it "relied on the same justifications accepted in Beller, including those arising from prejudice of other servicemembers or potential recruits against homosexuals." Pruitt, 963 F.2d at 1165 n.4.

Schowengerdt v. United States, 944 F.2d 483 (9th Cir. 1991), was the Circuit's first substantive due process case on this topic after Bowers v. Hardwick. It expressly relied on Bowers as a case that supported Beller's result. Id. at 490. Since Bowers was "not correct when it was decided, and it is not correct today," Lawrence, 539 U.S. at 578, Schowengerdt cannot be considered controlling.

After Bowers and Schowengerdt, litigants in this area understandably avoided substantive due process challenges in the Ninth Circuit, turning their attention instead to equal protection and free speech theories. Since that time, substantive due process was addressed only in a brief sentence from Holmes v. California Army National Guard, 124 F.3d 1126 (9th Cir. 1997) that cited Schowengerdt.

Holmes is plainly not the last word on the subject. After Lawrence was decided, the plaintiff in Hensala v. Department of the Air Force, 343 F.3d 951 (9th Cir. 2003), added a substantive due process claim on appeal in a case that was otherwise premised on equal protection. A majority of the panel indicated that it would not consider the issue for the first time on appeal, but expressly allowed the district court to consider on remand "whether Lawrence has effectively overruled Holmes." Id. at 956, 959. Hensala thus recognizes that Lawrence seriously calls into question the continued vitality of all pre-Lawrence Ninth Circuit substantive due process law regarding the discharge of homosexual military service members.

(iii). ***The Status Cases***.

A parallel development is the unbroken line of Ninth Circuit cases holding that the constitution forbids discharge of a service member for the status of having a homosexual or bisexual orientation. See Pruitt, 963 F.2d at 1164 (allegations that the Army was discharging plaintiff because of her status as a homosexual state a claim under the Equal Protection Clause); Meinhold v. United States Department of

Defense, 34 F.3d 1469 (9th Cir. 1994) (enjoining discharge based solely on status as a person with a homosexual orientation); Cammermeyer v. Perry, 97 F.3d 1235, 1237 (9th Cir. 1996) (affirming trial court judgment vacating the discharge of lesbian colonel). Even when it rejected an equal protection challenge premised on homosexual acts, Phillips v. Perry, 106 F.3d 1420 (9th Cir. 1997), took pains to distinguish the cases where discharges were predicated solely upon homosexual orientation or status from cases involving homosexual acts. Id. at 1429-30.

This unchallenged recognition that orientation alone cannot be a basis for discharge is premised on sound footing. Orientation alone, divorced from any conduct, is in the realm of freedom of thought and conscience and clearly protected by the Constitution, even among members of the military. "At the heart of liberty is the right to define one's own concept of existence." Casey, 505 U.S. at 851. Lawrence adds to this principle the insight that intimate sexual conduct is part and parcel of that same protected realm of personal dignity and autonomy.

The constitutionally protected conduct of which Major Witt stands accused is inextricably linked to her constitutionally protected orientation—her right to define her own concept of existence without demeaning interference from the government. Lawrence, as interpreted by Marcum, means that in the absence of demonstrable harm to government interests, both conduct and status will be protected. This Court should reverse to allow Major Witt to continue her proof (and to allow the

government the opportunity to put on the proof of harm that it has so far not even attempted at the 12(b)(6) stage).

2. DISCHARGE OF MAJOR WITT WOULD ALSO FAIL INTERMEDIATE SCRUTINY.

Substantive due process analysis is not purely binary. Under existing jurisprudence, there are more choices than (a) fundamental rights that trigger strict scrutiny, and (b) all other rights that trigger minimum rational basis scrutiny. As described above, Major Witt submits that the substantive due process right identified in Lawrence is a fundamental right and triggers strict scrutiny. But even if strict scrutiny does not apply, intermediate-level scrutiny does.

For example, the right of a pretrial detainee in avoiding unwanted anti-psychotic drugs is a "significant" liberty interest protected by the Due Process Clause, but not a "fundamental" liberty interest. Sell v. United States, 539 U.S. 166, 178 (2003). Accord Riggins v. Nevada, 504 U.S. 127, 136 (1992). To justify interference with this right, government must have an "important" interest, but not a "compelling" one. Sell, 539 U.S. at 180. Government must demonstrate that involuntary medication "will significantly further" the important interests of rendering the detainee competent to stand trial, and to ensure that the trial is fair. Id. at 181. It must also show that that forced medication is "necessary" to further those interests. Id. Finally, it must show that administration of the drugs is "medically appropriate, *i.e.*, in the patient's best medical interest in light of his medical condition." Id.

This standard is not as stringent as strict scrutiny, but it is far more strict than the rational basis test. Under the rational basis test, a law is upheld if a reasonable purpose is shown, even if that purpose is not furthered in the instant case. In other words, generally speaking there is no "as applied" consideration of the rationality of the law in question. But under intermediate scrutiny, the Court specifically requires a demonstration that the important government interests will be significantly furthered by application of the law to the particular individual before the Court. 539 U.S. at 180-181.

A mid-level tier of judicial scrutiny applies in civil cases involving governmental interference with the due process liberty interest of a competent person to refuse unwanted medical treatment. Cruzan v. Director, 497 U.S. 261, 278 (1990). Whether a person's constitutionally protected substantive due process right has been violated "must be determined by balancing [the patient's] liberty interests against the relevant state interests." Id. at 279, citing Youngberg v. Romeo, 457 U.S. 307, 321 (1982). Once again, this balancing process is conducted by examining the effect of the law "as applied" to the particular individual before the Court.

Aptheker v. Secretary of State, 378 U.S. 500, 505 (1964) (involving restrictions on foreign travel) provides another example of mid-level scrutiny to test governmental interference with a recognized substantive due process interest. Even though the challenged statute was passed "to protect our national security," the Court

held the right to travel could not be restricted by means which "sweep unnecessarily broadly and thereby invade the area of protected freedoms." Id. at 508-09. Unless narrowed or invalidated, the law would apply not only to those who traveled overseas to plot the overthrow of the United States government, but also to those who planned merely "to visit a sick relative, to receive medical treatment," or for other wholly innocent purposes. Id. at 511.

If this Court concludes that mid-level scrutiny applies to the Air Force policy in this case, then Major Witt's suit should not have been dismissed under Rule 12(b)(6). It is conceivable to imagine facts consistent with the complaint under which the Government would not be able to carry its burden of proving that the discharge of Major Witt would significantly further any important interest. In light of the partial evidence already developed on the preliminary injunction motion, it is extremely unlikely that the Government could prove that her discharge would harm unit cohesion, and far more likely that Witt would prove that her immediate reinstatement to active duty would improve unit morale and discipline.

3. ALTERNATIVELY, THE AIR FORCE DISCHARGE POLICY FAILS TO MEET THE "MORE SEARCHING FORM" OF RATIONAL BASIS SCRUTINY ("RATIONAL BASIS WITH BITE") APPLICABLE TO LAWS THAT INTERFERE WITH INTIMATE RELATIONSHIPS OR ARE MOTIVATED BY A DESIRE TO HARM UNPOPULAR GROUPS.

a. Laws Enacted To Harm Unpopular Groups Can Be Irrational As Applied.

Ordinarily under the rational basis standard of review, legislation is presumed constitutional and is sustained if the classification drawn by the statute is rationally related to a legitimate state interest. Williamson v. Lee Optical, 348 U.S. 483 (1955). But "a more searching form of rational basis review" applies when a law appears to be motivated by a desire to harm a politically unpopular group." Lawrence, 539 U.S. at 580 (O.Connor, J., concurring). This more stringent variant of rational basis review is most likely to apply in cases where the challenged law "inhibits personal relationships." Id., c*iting* Department of Agriculture v. Moreno, 413 U.S. 528 (1973), Eisenstadt v. Baird, 405 U.S. 438, 447-455 (1972), and City of Cleburne, 473 U.S. 432 (1985).

The laws challenged here clearly "inhibit personal relationships." Discharge proceedings have been initiated against Major Witt because she chose to have an intimate personal relationship with another woman, and, like the "hippies" in Moreno, the unmarried cohabitants in Eisenstadt, and the mentally retarded group home residents in Cleburne, she chose to live in the same house with that person. Accordingly the "more searching form" of rational basis scrutiny applies.

Under this stricter rational basis test, the challenged law must be rational ***as applied*** to the litigant before the Court. Thus in Cleburne the Court held that the challenged municipal law violated Equal Protection because it was not rational to apply it to the particular group home that had brought suit:

> Because in our view the record does not reveal any rational basis for believing that ***the Featherston home*** would pose any special threat to the

> city's legitimate interests, we affirm the judgment below insofar as ***it holds the ordinance invalid as applied in this case***.

473 U.S. at 448 (bold italics added).

b. <u>A Motion to Dismiss Cannot Be Granted If The Military Has Not Presented Evidence That The Policy is Rational As Applied to the Plaintiff</u>.

In <u>Pruitt v. Cheney</u>, 963 F.2d 1160 (9th Cir. 1992), defendants moved to dismiss a challenge brought by an Army reserve officer facing discharge for homosexuality. This Court held that the suit could not be dismissed on a 12(b)(6) motion because the Government had made no showing on the record that *her* discharge would satisfy the rational basis test. Relying upon <u>City of Cleburne</u> and <u>High Tech Gays v. Defense Industrial Security Clearance Office</u>, 895 F.2d 563 (9th Cir. 1990), <u>Pruitt</u> explained the necessity for the government to produce evidence, and not just argument.

> [I]n <u>High Tech Gays</u>, upon plaintiff's showing of discrimination, ***we required the government to establish on the record that its policy had a rational basis.*** The Supreme Court imposed the same requirement in <u>Cleburne</u>. Neither case supports the contention of the Army here that its far more rigid discrimination against homosexuals should be held to be rational as a matter of law, without any justification in the record at all. We have before us only a complaint that has been dismissed for failure to state a claim. After <u>Palmore</u>, <u>Cleburne</u> and <u>High Tech Gays</u>, ***we cannot say that the complaint is insufficient on its face***. Assuming that Pruitt supports her allegations with evidence, we will not spare the Army the task, which those cases imposed, of offering a rational basis for its regulation, nor will we deprive Pruitt of the opportunity to contest that basis.

<u>Pruitt</u>, 963 F.2d at 1160. <u>Accord</u> <u>Tovar v. United States Postal Service</u>, 3 F.3d 1271, 1278 (9th Cir. 1993).

Pruitt rejected the Defense Department's contention that courts could not require any evidence that the military's policies were rational:

> If we now deferred, on this appeal, to the military judgment by affirming the dismissal of the action in the absence of any supporting factual record, we would come close to denying reviewability at all. . . The Army . . . asks us to uphold its regulation without a record to support its rational basis. This we decline to do.

Pruitt, 963 F.2d at 1166-67. Notwithstanding the subsequent decisions in Phillips v. Perry, 106 F.3d 1420 (9th Cir. 1997) and Holmes v. California National Guard, 124 F.3d 1126 (9th Cir. 1997), Pruitt is still good law on this point.[7]

Here, the Air Force asserted that homosexuals pose a problem for the military by causing a deterioration in unit morale, but provided no evidence. By contrast, Major Witt proffered considerable evidence of irrationality (even though it was not required at this stage). See Section B.2.e, above; ER 111-121. Pruitt "require[s] the government to establish *on the record* that its policy had a rational basis." 963 F.2d at 1160 (italics added). In the absence of any evidence placed in the record by the government, a court "cannot say that the complaint is insufficient on its face." Id. Accord, Lustig-

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[7] Phillips was decided 2-1 by a three-judge panel in three separate opinions with no majority opinion. There was no majority in favor of overruling the narrow procedural holding of Pruitt. In another 2-1 decision, Holmes ruled that the military's policy did not violate Equal Protection as tested under the rational basis test. But the appeal in Holmes was from a grant of summary judgment, not from a dismissal for failure to state a claim, so Holmes does not conflict with Pruitt regarding 12(b)(6) standards. Moreover, under the rule of inter-panel accord, the three-judge panels in Holmes and Phillips panels may not overrule Pruitt, since only an *en banc* panel can do that. United States v. Mandel, 914 F.2d 1215, 1221 (9th Cir. 1990).

Prean, at p. 37, ¶ 92 (ECHR "note[s] the lack of concrete evidence to substantiate the alleged damage to morale and fighting power that any change in policy would entail.")

c. Deference to the Military Is Proper Only Where The Court Can Conclude that the Military's Decision Is a Reasonable Determination In Light of Record Evidence.

In the trial court, the Air Force pointed only to Congress's statement that its policy was necessary to military order. But "[t]he mere recitation of a benign . . . purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." Weinberger v. Wisenfeld, 420 U.S. 636, 648 (1975). Where the actual purpose is mere ratification of prejudice, the constitution is offended. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Palmore v. Sidotti, 466 U.S. 429, 433 (1984).

"Congress, of course, is subject to the requirements of the Due Process Clause [even] when legislating in the area of military affairs." Weiss v. United States, 510 U.S. 163, 176 (1994). Congress is not "free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause." Rostker v. Goldberg, 453 U.S. 57, 67 (1981). "Our citizens may not be stripped of basic rights simply because they have doffed their civilian clothes." Chappel v. Wallace, 462 U.S. 296, 304 (1983).

Military judgments are not to be lightly overruled by the judiciary, but that does not mean that courts are to accept all military assertions in the absence of any

supporting evidence. "[T]here is not now and must never be a 'military exception' to the Constitution." Cammermeyer v. Aspin, 850 F.Supp.910, 915 (W.D. Wash. 1994), *aff'd sub nom.* Cammermeyer v. Perry, 97 F.3d 1235 (9th Cir. 1996). To defer to military judgment "in the absence of any supporting factual record . . . would come close to denying reviewability at all," and the Ninth Circuit has expressly held that military judgments regarding the presence of homosexuals in the armed forces *are* subject to judicial review. Pruitt, 963 F.2d at 1166-67.

Under a Pruitt rational-basis-with-bite standard, this Court should reverse and remand to require the Air Force – if it can – to introduce concrete facts in the record to show that its discharge policy is rational and not merely the product of bias.

4. FINALLY, THE AIR FORCE'S DISCHARGE POLICY FAILS TO MEET EVEN THE MOST MINIMAL RATIONAL BASIS TEST.

Major Witt recognizes that the most recent substantive due process decision to apply a minimal rational basis standard is Holmes v. California Army National Guard, 124 F.3d 1126, 1136 (9th Cir. 1997). This pre-Lawrence decision relied upon the Beller line of cases to summarily reject the argument that the military's discharge policy lacked rational basis. Major Witt believes that a three-judge panel of this court has authority to rule that this aspect of Holmes cannot survive Lawrence (an issue expressly left open by Hensala, 343 F.3d at 959).[8] If the three-judge panel disagrees with that assessment,

[8] Major Witt also respectfully submits that Holmes conflicts with Thorne. That case said that "[i]n the absence of any showing that [her] private, off duty, personal"

Major Witt preserves her right to seek reversal of the Beller/Holmes cases en banc, if it becomes necessary to reach this issue.

5. THE AIR FORCE'S DISCHARGE POLICY ALSO VIOLATES EQUAL PROTECTION BY REQUIRING THE DISCHARGE OF ALL MEMBERS WHO ENGAGE IN OTHERWISE LAWFUL HOMOSEXUAL CONDUCT, WHILE ALLOWING RETENTION OF SERVICE MEMBERS WHO COMMIT CRIMINAL ACTS INCLUDING CHILD MOLESTATION, FORGERY, OR FRAUD.

Major Witt acknowledges that a majority of the panel in Phillips v. Perry, 106 F.3d 1420 (9th Cir. 1997), rejected a claim that the military's discharge policy violated equal protection by treating gay and straight service members differently without rational basis. Major Witt believes this case was wrongly decided, and preserves her right to seek its reversal en banc. That step may not be necessary, however, because in this case Major Witt makes a different equal protection argument not addressed in Phillips.

The Air Force contends that its policy is rational because unit morale and discipline are undermined if service members learn that one of their colleagues has engaged in consensual homosexual conduct. The blanket assumption, not permitting of

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affair and sexual relationship with a married man had "an impact on . . . [her] on-the-job performance," a woman could not be denied employment on the basis of that relationship. Thorne, 726 F.2d at 471. Moreover, the Court said: "[W]e hold that reliance on these private non-job related considerations by the [Government] in rejecting an applicant for employment violates the applicant's constitutional interests and *cannot be upheld under any level of scrutiny*." Id. (italics added).

any exceptions, is that (presumably) straight service members are made so uncomfortable by sexually active gay people that they won't be able to serve effectively with them (although they presumably are able to work side-by-side with celibate and closeted gay people). Therefore, the Air Force requires the discharge of all sexually active gay service members, regardless of their actual effect on actual unit morale.

At the same time, the Air Force does not have a mandatory rule discharging other people whose presence may also cause discomfort among other service members: namely, persons who commit a variety of crimes society condemns as loathsome. Child molesters, for example, are not subject to mandatory discharge, but are allowed to present facts relevant to their individual cases. AFI 36-3209 states that the Air Force "may" discharge those who engage in "sexual perversion" which includes "indecent acts with or assault on a child." ¶ 2.29.10. It is hard to conceive of a class of service members who are more likely to have a degrading effect upon unit cohesion than child molesters. Yet their exclusion from military service is not mandatory in all cases, while the exclusion of those engaging in homosexual conduct is required in every case. Similarly, AFI 36-3209 allows the retention of service members who have committed "acts of misconduct or moral or professional dereliction," such as lying, forgery, or check fraud. AFI 36-3209 ¶ 2.29.

The two groups of service members whose presence poses the same alleged threat to governmental interests are treated in a different manner: sexually active gay

people face an irrebuttable presumption of unfitness, but child molesters and forgers are allowed an opportunity to rebut the presumption. Irrebuttable presumptions that burden liberty interests protected by substantive due process are constitutionally disfavored at the best of times. See Cleveland Board of Education v. LaFleur, 414 U.S. 632, 644 (1974); Vlandis v. Kline, 412 U.S. 441, 446 (1973); Stanley v. Illinois, 405 U.S. 645, 654 (1969). The differential imposition of irrebuttable presumptions on sexually active gay service members, but not on child molesters and persons who commit crimes of dishonesty, is at a minimum without rational basis in violation of equal protection.[9] The 12(b)(6) dismissal on this theory should be reversed, and Major Witt should be allowed to develop the record and put defendants to their proof.

6. DEFENDANTS DENIED MAJOR WITT A REASONABLY PROMPT POST SUSPENSION HEARING IN VIOLATION OF PROCEDURAL DUE PROCESS.

Procedural due process requires the government to use fair and appropriate procedures when taking adverse action against an individual's significant rights. The due process clause without doubt applies in the military context. Weiss, 510 U.S. at 176; Rostker, 453 U.S. at 67. This includes the right to a prompt post-deprivation

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[9] The Supreme Court has never announced the equal protection standard for discrimination on the basis of sexual orientation. Tobias Barrington Wolff, *Principled Silence,* 106 Yale L.J. 247 (1996). Major Witt does not concede that the minimum rational basis standard for sexual orientation announced in High Tech Gays is correct in light of Lawrence, given its (now-discredited) reliance on Bowers. In the current setting, reversal on the equal protection theory is proper under any standard.

hearing if a hearing is not provided beforehand. Here, the Air Force ordered Major Witt off duty in November 2004, and left her to wonder, indefinitely, when or if a hearing would become available to contest the threatened loss. It had still had not scheduled a hearing when suit was filed in April 2006.

Nor had it notified Major Witt that a hearing date had been scheduled as of July 27, 2006, the date upon which the District court rendered judgment. It is not too much to ask the Air Force to follow long-established procedural due process principles calling for a prompt hearing. Because it did not, the proper remedy is to enjoin the deprivation.

a. Procedural Due Process Requires A Reasonably Prompt Post-Deprivation Hearing If No Pre-Deprivation Hearing Is Provided.

Barry v. Barchi, 443 U.S. 55 (1979) and FDIC v. Mallen, 486 U.S. 230 (1988) provide the controlling principles. The New York horse racing statutes in Barry created a rebuttable presumption that a trainer is responsible if a horse tests positive for a banned substance. John Barchi's training license was suspended for 15 days when a horse he trained tested positive, even though Barchi denied involvement. The relevant statutes left the suspension in place pending a post-suspension hearing, but did not establish a time in which the hearing must be held. The Supreme Court explained that "once suspension has been imposed, the trainer's interest in a speedy resolution of the controversy becomes paramount." Id. at 66. The Court could "discern little or no State interest… in an appreciable delay in going forward with a full hearing." Id. Accordingly, due process requires "a prompt postsuspension hearing." Id. As a matter of law, a hearing held excessively long after the suspension

simply cannot be fair, because it is not "at a reasonable time and in a reasonable manner." Id., quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

In Mallen, the Supreme Court reaffirmed the constitutional requirement of a prompt post-deprivation hearing, although it found that under the circumstances a hearing held 29 days after the suspension of a bank president was proper. 486 U.S. at 242. Mallen explained:

> In determining how long a delay is justified in affording a post-suspension hearing and decision, it is appropriate to examine the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken.

Id.

As in Barchi, the regulation in the present case does not contain any specific time limit within which the hearing must be held—a fatal omission—although it does reflect the aspirational goal that the hearing be prompt:

> Once the recommendation for separation or discharge is made, it is usually in the best interest of both the respondent and the Air Force to process the cases as expeditiously as possible. Commanders should monitor the effectiveness of separation or discharge programs under their control to insure that cases are processed without undue delay.

AFI 36-3209, ¶4.7. Here, the case was not pursued "expeditiously" and "without undue delay." No reasons for the extraordinary delay have ever been offered, either out of court or during the proceedings below. At a minimum, the 12(b)(6) dismissal should be reversed so that a record can be compiled on the Mallen factors as applied in this case.

The proper remedy is dismissal of the entire proceeding. Barchi is again instructive. The plaintiff had been suspended for 15 days, but had no prompt post-suspension hearing. The Supreme Court's remedy was not to remand for a hearing, but to affirm the judgment that the suspension was unconstitutional. 443 U.S. at 68. The entire punishment was disallowed, because the wrongful lack of a timely hearing cannot be cured by a later untimely hearing.

The District Court's order suggests that the due process right to a prompt post-deprivation hearing is not implicated unless the service member can demonstrate "that the stated reason for the discharge is untrue." ER 392. This puts the cart before the horse:

> The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense on the merits."

United States v. Two Hundred & Ninety Five Ivory Carvings, 689 F.2d 850 (9th Cir. 1982), *quoting* Fuentes v. Shevin, 407 U.S. 67, 87 (1972).

Moreover, the delay had practical adverse effects on Major Witt's defense to the discharge proceeding. Months after the district court entered judgment, the Air Force finally held a discharge hearing on September 28, 2006. One ground for discharge was the allegation that Major Witt made statements that she was homosexual. Had a timely hearing been held, there would have been no proof of any

such statements, since none were ever made as of November 2004. At the actual untimely hearing, the military introduced Major Witt's declaration that she filed with the District Court in this proceeding (ER 44-60), using it as evidence against her.[10] Also, one of Major Witt's defenses involved irregularities in the investigation process, a defense that required good recall on the part of witnesses. As in any proceeding, the longer the delay, the greater injury to the fact-finding process.

b. There Are Protectible Liberty Interests At Stake.

The District Court disregarded the indefinite delay on the theory that no protectible interest was involved. ER 392. Even though there may be no property interest in continued employment as a reservist, ER 391, Major Witt has a well-established liberty interest in not having her career terminated on grounds that she is unfit for service.

Under the "stigma-plus" line of cases stemming from Wisconsin v. Constantineau, 400 U.S. 433 (1971), and Paul v. Davis, 424 U.S. 693 (1976), a party who suffers from a stigmatizing statement by government and the concomitant denial of a tangible interest such as employment, has a liberty interest which the due process

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[10] By using her statement filed in a federal court, the Air Force penalized her for exercising her First Amendment right to petition for redress of grievances. A transcript of the recently concluded military discharge hearing is being prepared and should become available in the next few months. Major Witt reserves the right to move, at that time, to expand the record on appeal, and to submit supplemental briefing on the issues she raised during that hearing.

clause protects. Cox v. Roskelley, 359 F.3d 1105 (9th Cir. 2004); Ulrich v. City and County of San Francisco, 308 F.3d 968, 982 (9th Cir. 2002). Discharge of a reserve officer for homosexual conduct falls within the class of discharges for "substandard performance of duty." AFI 36-3209, § 2.26.1. Defendants stigmatize Major Witt when they proclaim that her service to her country has been substandard, and that her presence in the Air Force poses an unacceptable risk to military preparedness.

In the District Court, defendants argued that the stigma involved in her discharge is the fact of her sexual orientation. *Docket No. 24*, at p. 19. This assumption inadvertently revealed their hostility to gays and lesbians. Major Witt's sexual orientation is not shameful. Instead, the stigma arises from the government's message of unfitness and poor job performance.

That message is most severe if Major Witt receives a less-than-honorable discharge. Numerous cases hold that a less-than-honorable discharge (a term that includes a general discharge, Correa v. Clayton, 563 F.2d 396, 397 & n.1 (9th Cir. 1977) is stigmatizing and is subject to court review "with scrupulous care" for procedural regularity. Midgett v. United States, 221 Ct. Cl. 171, 603 F.2d 835, 848 (1979). "The military are not permitted to return persons to civil life with an unfair and derogatory characterization of their military service, attached without strict conformity to law, and full due process protection." Id. Accord, Golding v. United States, 48 Fed.Cl. 697, 726 (2001). But the stigma does not hinge solely on how the

discharge is labeled. If the certificate lists a stigmatizing reason for the discharge, it triggers due process even if the discharge is characterized as Honorable. Rogers v. United States, 24 Cl. Ct. 676, 684 (1991).

A discharge based on 10 U.S.C. § 654, categorized as a discharge for substandard performance of duty under AFI 36-3209, § 2.26.1, is stigmatizing. This principle is reflected in McVeigh v. Cohen, 983 F.Supp. 215, 221 (D.D.C. 1998), which granted a preliminary injunction against discharge of a military officer accused of homosexual conduct, in part because "[h]aving served honorably for the last seventeen years, Plaintiff will be separated from a position which is central to his life on the sole ground that he has been labeled a 'homosexual' and *thus by definition unfit for service*." (italics added).

The stigma in this case was connected to a "plus"--the prohibition from service since November 2004. A plus factor exists when an individual "legally [can] not do something that she could otherwise do." Miller v. Cal. Dep't of Soc. Servs., 355 F.3d 1172, 1179 (9th Cir. 2004). The stigmatizing accusation here was coupled with an immediate change in legal status in November 2004, when Major Witt was suspended from points and pay and prevented from reporting for any reserve duty and halting progress toward her eligibility for pension, which otherwise would have occurred in less than a year. Due process requires that the government provide a reasonably prompt hearing when it imposes such deprivations. Since the government failed to

provide such a hearing in this case, the appropriate remedy is to bar the government from discharging Major Witt.

G. CONCLUSION

For all of the reasons stated above, Major Witt asks this Court to reverse the dismissal of her suit, and to remand for further proceedings.

DATED this 12th day of October, 2006.

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