NO. 06-35644

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAJOR MARGARET WITT,

Plaintiff-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,

Defendant-Appellees.

Brief Of *Amicus Curiae* Lambda Legal Defense and Education Fund, Inc. In Support Of Appellant And Supporting Reversal

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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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CORPORATE DISCLOSURE STATEMENT

Lambda Legal Defense and Education Fund, Inc. is a not-for-profit corporation organized and incorporated under the laws of New York with no parent company.

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INTEREST OF *AMICUS CURIAE* AND AUTHORITY TO FILE

Lambda Legal Defense and Education Fund, Inc. is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and people with HIV through impact litigation, education and public policy work. Lambda Legal has been involved for decades in supporting the liberty interests and equal treatment of servicemembers, including representing Col. Grethe Cammermeyer and Capt. Dusty Pruitt before this Court. Lambda Legal also represented in state court and the United States Supreme Court both the petitioners in *Lawrence v. Texas* and the respondents in *Romer v. Evans,* and appeared as *amicus curiae* in *United States v. Marcum* to address the constitutionality of the military sodomy law before the Court of Appeals for the Armed Forces. Lambda Legal is uniquely qualified to assist the Court in the case before it. Lambda Legal files this brief with the consent of the parties.

ARGUMENT[1]

Major Margaret Witt's case presents a stark constitutional question: If not her, then who? If the exemplary Air Force career of Major Witt may be ended on this record, then the protected liberty interest in having in one's most private life the sustenance and love of an intimate relationship with another person, *Lawrence v. Texas*, 539 U.S. 558 (2003), is effectively extinguished for lesbian and gay people throughout their military careers. The Fifth Amendment does not permit such a result, nor is it in the least humane to expect endurance of the risks and stressors of military life without such an intimate, private refuge. The so-called "Don't Ask, Don't Tell" statute, 10 U.S.C.A § 654 (West 2006) and related regulations and policies ("DADT"), may not be enforced to end the 19+ year career of a universally respected and highly decorated officer simply because someone chose to reveal that she previously had shared her home with her civilian same-sex partner, hundreds of miles from her military base, for six years.[2]

Lawrence clears away prior Circuit precedent, Witt Br. at 36-43, that denied similar claims in reliance on authorities that *Lawrence* decisively overrules. The

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[1] *Amicus* adopts the Statement of Facts presented in the Brief of Appellant ("Witt Br.").

[2] While *amicus* strongly believes and has litigated the position that DADT is facially unconstitutional, *e.g. Able v. United States*, 155 F.3d 628 (2d Cir. 1998), *amicus* focuses here on the claim that DADT is unconstitutional as applied to Major Witt's private, same-sex relationship.

district court's reading of *Lawrence*, with all due respect, misses the forest for the trees. *Witt v. United States*, 444 F. Supp. 2d 1138 (W.D. Wash. 2006). The court failed to absorb the jurisprudential grounding and rationale of the Supreme Court's decision; the bases for its overruling of *Bowers v. Hardwick*, 478 U.S. 186 (1986); the significance of its adoption of the reasoning of Justice Stevens' dissent to the *Bowers* decision; and the pervasive characterizations of the importance of the right at stake in the *Lawrence* opinion. This Court already has read *Lawrence* far differently. *See Fields v. Palmdale School Dist.*, 427 F.3d 1197, 1208 (9th Cir. 2005) ("We cannot overstate the importance of these rights," describing *Lawrence* and privacy case law cited therein).

Instead, the district court relied on a single sentence from the majority opinion, that it wrongly interpreted as a rational basis ruling, to hold that the Supreme Court had not found a fundamental right in *Lawrence,* or applied heightened or strict scrutiny. In doing so, the district court adopted dissenting Justice Scalia's distorted analysis, which is tethered to the *Bowers* Court's misframing of the asserted right, of the majority opinion. The court also found unwarranted significance in Justice Kennedy's supposed failure to answer Justice Scalia's dissent. *Witt*, 444 F. Supp. 2d at 1144. The lower court's faulty analysis of *Lawrence* caused it prematurely to end Witt's claim under Fed. R. Civ. P. 12(b)(6) – and to read a landmark decision as providing next to no protection for a

liberty interest it extolled as "transcendent" and an "integral part of human freedom." *Lawrence*, 539 U.S. at 562, 577.

In fact, *Lawrence,* 539 U.S. at 567, 572, 574, 578, held that the sexual intimacies and relationships of lesbian and gay consenting adults are protected under the shelter of an *existing* liberty interest long recognized as fundamental. *See, e.g., United States v. Henderson*, 34 M.J. 174 (C.M.A. 1992) (upholding consensual sodomy conviction under *Bowers* but noting long line of pre-*Bowers* Supreme Court cases recognizing a zone of intimate conduct immune from government interference). *Lawrence,* 539 U.S. at 567, 578, overruled *Bowers* and corrected its "failure to appreciate the extent of the liberty at stake" or to formulate the liberty interest properly. The Court noted the persistent criticism of *Bowers* "in all respects" and that "precedents before and after [*Bowers*'] issuance contradict its central holding." *Id.* at 576, 577. The Court declared facially unconstitutional any statute so penalizing sodomy in private because such laws grossly intrude into the intimate life of all individuals, and demean, stigmatize and invite further discrimination against lesbian and gay people.[3] *Id.* at 576.

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[3] Justice O'Connor found the Texas statute infirm because, like DADT, it disparately treated the sexual intimacies of same-sex and different-sex couples. *Lawrence*, 539 U.S. at 579-85 (O'Connor, J., concurring). She found this targeting of gay people contravened the Equal Protection Clause under a rational basis analysis akin to that employed in *Romer v. Evans*, 517 U.S. 620 (1996) (a decision joined by all those in the *Lawrence* majority) and several past cases.

DADT is little different. It works here a wholesale denial of the liberty interest of Major Witt in having a private, intimate and sexual relationship with another adult of her choice. Such extreme intrusions on protected liberties are rarely if ever upheld. The federal government inflicts life-altering injuries, including irretrievably lost opportunities to form and benefit from intimate associations, that are at least as grave as those inflicted by the State of Texas in *Lawrence*.[4] Even though she was highly discreet and "closeted", the government is terminating the sterling career of an officer on the brink of retirement eligibility after an intrusive investigation into deeply personal matters. These actions strip Major Witt of her ability to serve her country or to rise in the ranks, and of the unmitigated respect, benefits and opportunities attendant to a career as distinguished as hers – all because of a private relationship having no bearing on her ability to serve.

Amicus acknowledges, of course, that some of the military and security interests *invoked* to support the intrusions on Major Witt's protected liberty here are inherently weightier than the interests invoked in *Lawrence*. The military setting, however, does not enter into assessing the nature and importance of the liberty at stake for the individual. The Court must grapple forthrightly with a clash

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[4] Texas officials arrested John Lawrence and Tyron Garner for having consensual sex in Lawrence's home, held them overnight, convicted them of a Class C misdemeanor, fined them each $200 and exposed them to various collateral harms. *Lawrence*, 539 U.S. at 562-63, 575-76.

between the exercise of a fundamental human right by Major Witt and the military interests asserted by the government, taking into account the facts presented. It cannot escape this task by devaluing Major Witt's liberty interest as the district court did.

In the end, *Lawrence* compels the conclusion that the government has no cause to demand a complete sacrifice of the protected liberty interest in intimacy with a same-sex partner as a condition of serving in the armed forces. The Constitution requires a less draconian approach than the wholesale deprivation of this fundamental right, even in the military, *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) ("[T]he powers of government 'must be so exercised as not, in attaining a permissible end, unduly to infringe' a constitutionally protected freedom"), and thus requires that Major Witt be given an opportunity to demonstrate why the government's application of DADT in her case cannot be constitutionally justified.

I. THE DISTRICT COURT MISREAD *LAWRENCE* AND UNDERVALUED THE FUNDAMENTAL LIBERTY INTEREST AT STAKE FOR MAJOR WITT.

This case involves the same fundamental liberty interest protected in *Lawrence,* an interest amplified in importance to Major Witt by its exercise over many years within the constitutionally guarded cocoon of an enduring, primary relationship in a shared home. Thus, as in *Lawrence*, the case involves the liberty

of the person both "in its spatial and more transcendent dimensions," *Lawrence*, 539 U.S. at 562, and it requires that this Court honor established limits on government's intrusive powers in a civilized society, even for people subjected to the deprivations of military life. There can be no serious question that *Lawrence* set down its anchor along the "'rational continuum'" of fundamental liberty interests that represent the full scope of liberty of a free people, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 848 (1992), quoting *Poe v Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting), and that Witt's autonomy and privacy in this arena is entitled to the highest constitutional respect.

A. The Exercise of Liberty by Major Witt Is Among the Most Cherished and Safeguarded of Individual Autonomy Rights.

Lawrence and the case law on which it builds reflect expectations of liberty and privacy that are foundational to the relationship between government and individuals. *See Bowers*, 478 U.S. at 217 (Stevens, J., dissenting). "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." *Lawrence*, 539 U.S. at 562. To Americans, nothing is more personal and private than sexual relations between consenting adults behind closed doors. *See, e.g., Powell v. State*, 510 S.E.2d 18, 24 (Ga. 1998) (striking down statute upheld in *Bowers* and stating: "We cannot think of any

other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity.").

Major Witt's relationship with her former partner in her home must be especially closely guarded against government interference or penalty. This exercise of liberty "involves the most private of human conduct, sexual behavior, and in the most private of places, the home." *Lawrence*, 539 U.S. at 567. "In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo v. United States*, 533 U.S. 27, 37 (2001).[5]

The application of DADT here invades a uniquely intimate realm of personal autonomy in sexuality, family, and relationships. *Casey*, 505 U.S. 833; *Griswold v. Connecticut*, 381 U.S. 469, 484 (1965) (government may not intrude into the "sacred precincts of marital bedrooms"); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (married and unmarried persons share same rights of autonomy in intimate matters). The Constitution "protects those relationships, including family

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[5] Constitutional protection extends to "other private places" as well. *Lawrence*, 539 U.S. at 562. Notably, prosecutions under the Uniform Code of Military Justice for consensual sexual acts have been thrown out for being "in private" when the acts took place in locations such as a bedroom behind a closed but unlocked door with a party going on outside, *United States v. Sims*, 57 M.J. 419, 422 (C.A.A.F. 2002), or in a shared barracks room with no third party present. *United States v. Izquierdo*, 51 M.J. 421, 423 (C.A.A.F. 1999).

relationships, that presuppose deep attachments and commitments to the necessarily few individuals with whom one shares not only a special community of thoughts, experiences and beliefs, but also distinctively personal aspects of one's life." *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537, 545-46 (1987) (internal quotation marks omitted). The government may not harshly penalize Major Witt for consensual, adult intimacies that are an integral part of forming and sustaining long-term relationships.

B. *Lawrence* Recognized a Fundamental Liberty Interest that Gives Major Witt the Full Right to a Private, Intimate Life.

Appellant's brief illuminates many of the textual and case law references in *Lawrence* that plainly confirm the Supreme Court's recognition that it was protecting a fundamental right and liberty interest, Witt Br. at 19-25, and *amicus* will not belabor them. There is no reason, semantic or otherwise, to attribute to the Court an intent to bathe its opinion in these references and fundamental rights case law, yet hold the liberty interest in *Lawrence* to be *de minimis*. Indeed, the district court fails to explain in light of Supreme Court precedent how the decision could recognize a protected substantive due process right and *not* involve a fundamental right and liberty interest. Nor did the lower court heed the *Lawrence* majority's adoption of the fundamental rights analysis of Justice Stevens' opinion in *Bowers*, 478 U.S. at 216-18 (Stevens, J., dissenting).

1. The Supreme Court Adheres to the View That There is No Substantive Due Process Protection Absent a Fundamental Right, and So Must the Lower Courts.

The Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). According to *Glucksberg*, where personal autonomy and privacy are implicated, there *is* no substantive due process protection, or none to speak of, save for liberty interests and rights of a fundamental character:

> In addition, ***by establishing a threshold requirement – that a challenged state action implicate a fundamental right*** – before requiring more than a reasonable relation to a legitimate state interest to justify the action, [the Court's substantive due process jurisprudence] avoids the need for complex balancing of competing interests in every case.

Id. at 722 (emphasis added). This is not to say that there are not voices for a different approach. Nor does it follow that every infringement of a fundamental right is subjected to strict scrutiny; numerous cases demonstrate that the Constitution does not always require an all-or-nothing choice between strict scrutiny if a fundamental right is acknowledged, and rational basis review if it is not. *See* Section III, *infra*. But it *does* mean that, when the Supreme Court indicates that a liberty interest is substantively protected under the Due Process Clause, a lower court must conclude that a fundamental right is at stake. The lower

courts cannot infer that, unless a case uses the exact phrase "fundamental right," the Supreme Court is not discussing such a right, or is stripping rights of their previously fundamental character.[6]

Thus, in *Lawrence*, "liberty" could not have been said to give "***substantial protection*** to adult persons in deciding how to conduct their private lives in matters pertaining to sex," *Lawrence*, 539 U.S. at 572 (emphasis added), or the "**full right** to engage in their conduct without intervention of the government," *id.* at 578 (emphasis added), absent recognition of the fundamental character of this right. Likewise, a woman's right to elect an abortion could not be afforded "real and substantial protection as an exercise of her liberty under the Due Process Clause," *id.* at 565, were it not fundamental. *Roe v. Wade*, 410 U.S. 113, 152 (1973); *see*

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[6] The district court's methods cannot stand. The court adopts an interpretation of *Lawrence* that controls its decision but is flawed in similar ways to the ruling recently reversed in *United States v. Extreme Assocs.*, 431 F.3d 150, 157-59 (3d Cir. 2005), citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("'[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'"). The district court in *Extreme Associates* had read *Lawrence* to require that federal obscenity statutes be struck down, notwithstanding Supreme Court decisions holding the opposite in challenges applying the privacy precedents underlying *Lawrence*. In language very pertinent here, the Third Circuit stated: "The fact that such analysis ...[did not make] use of the talismanic phrase "substantive due process" ... does not negate the binding precedential value of the Supreme Court cases employing that analysis." *Extreme Assocs.*, 431 F.3d at 159. Justice Souter usefully catalogued Supreme Court cases that "have used various terms to refer to fundamental liberty interests" in his concurrence in *Glucksberg*, 521 U.S. at 768 n.10.

also id. ("only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' are included in this guarantee of personal privacy"). *See also Glucksberg*, 521 U.S. at 720 (recognizing abortion as fundamental right, citing *Casey*). This remains true even though the Court set limits on that right in *Roe* and adopted an undue burden test in *Casey*, 505 U.S. at 874.

2. *Lawrence* Adopts Justice Stevens' Fundamental Rights Dissent in *Bowers*.

Further confirmation of *Lawrence*'s fundamental rights holding is found in the Court's statement that "Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here." *Lawrence*, 539 U.S. at 578. Justice Stevens' conclusion, quoted in *Lawrence*, *id.*, includes this statement:

> [I]ndividual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.

Bowers, 478 U.S. at 216 (Stevens, J., dissenting), citing *Griswold*, 381 U.S. 479; *Carey v. Population Services International*, 431 U.S. 678 (1977), and *Eisenstadt*, 405 U.S. 438. Were these references to protected liberties and recognized fundamental rights not enough to confirm that Justice Stevens and the *Lawrence* majority (of which he was a member) both were speaking of fundamental rights, Justice Stevens' analysis goes on to state:

In consideration of claims of this kind, the Court has emphasized the individual interest in privacy, but its decisions have actually been animated by an even more **fundamental** concern. As I wrote some years ago:

> "These cases . . . deal, rather, with the individual's right to make certain unusually important decisions that will affect his own, or his family's destiny. The Court has referred to such decisions as implicating 'basic values,' as being '**fundamental**' and as being dignified by history and tradition. The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom – the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable.
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> * * *
>
> **The essential 'liberty' that animated the development of the law in cases like *Griswold*, *Eisenstadt*, and *Carey* surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral.**

Bowers, 478 U.S. at 217-18 (Stevens, J., dissenting) (emphasis added).

II. JUSTICE SCALIA'S DISSENT IN *LAWRENCE* RESTS ON A REJECTED PREMISE AND, CONTRARY TO THE DISTRICT COURT'S ASSUMPTION, WAS ANSWERED BY THE COURT.

Justice Scalia's dissent in *Lawrence* clings stubbornly to *Bowers*' narrow, act-and-actor-based formulation of the fundamental right supposedly contended for in both cases – framing it again as the right to engage in "homosexual sodomy." *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting). The rest of the dissent's analysis goes further astray because it proceeds from that repudiated starting point. It is only upon this faulty premise that the dissent unaccountably declares that the *Lawrence* Court has left intact the "central legal conclusion" of *Bowers*. *Id.*

Likewise, Justice Scalia's conclusion that the majority found no fundamental right at stake and employed rational basis review reflects the *dissent's* stubborn formulation of the right at issue, not the majority's:

> *Bowers* concluded that a right to engage in homosexual sodomy was not "'deeply rooted in this Nation's history and tradition,'" *id.* at 192.
>
> The Court today does not overrule this holding. Not once does it describe homosexual sodomy as a 'fundamental right' or a 'fundamental liberty interest,' nor does it subject the Texas statute to strict scrutiny. Instead, having failed to establish that the right to homosexual sodomy is "'deeply rooted in this Nation's history and tradition,'" the Court concludes that the application of Texas's statute to petitioners' conduct fails the rational-basis test[.]

Id. at 594.[7]

The district court overlooked the flawed legal premise driving the dissent when it concluded that the *Lawrence* majority failed to respond to – and thus must be understood as in *sub silentio* agreement with – Justice Scalia. *Witt*, 444 F. Supp. 2d at 1144. In fact, although not referring to Justice Scalia by name, the majority could not have rejected more plainly the *Bowers* analysis and Justice Scalia's flawed premise:

> The Court began its substantive discussion in *Bowers* as follows: 'The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to

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[7] In critiquing the *Lawrence* majority's application of precedent and history, Justice Scalia again fails to accept that the Court was "not deciding whether the constitutional concept of 'liberty' extends to some hitherto unprotected aspect of personal well-being." *Reno v. Flores*, 507 U.S. 292, 318 (1993) (O'Connor, J., concurring).

> engage in sodomy . . .' That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. **To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward,** just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. . . .The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.
>
> . . . [A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. . . .The liberty protected by the Constitution allows homosexual persons the right to make this choice.
>
> **[The Bowers Court] misapprehended the claim of liberty there presented to it [by] thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy[.]**

Lawrence, 539 U.S. at 566-67 (emphasis added; citation omitted).

After concluding from its flawed premise that the majority had employed a rational basis standard, the *Lawrence* dissent went on to protest that the majority "appl[ies] an unheard-of form of rational-basis review." *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting). Justice Scalia is referring to the Court's one-line statement that the Texas statute "***furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.***" *Lawrence*, 539 U.S. at 578 (emphasis added). It is true that this is an "unheard-of" form of rational-basis review but that is simply because *it is not a statement of the*

rational basis standard.[8] Instead, the Court was applying a higher level of scrutiny.

The district court's belief that the Lawrence majority employed "classic language used in rational basis analysis" also is wrong. The "classic language" of the rational basis test is that a challenged law must only "***be rationally related to legitimate government interests***." *Glucksberg*, 521 U.S. at 702 (applying rational basis test in substantive due process analysis) (emphasis added). *See also Romer*, 517 U.S. at 635 (in equal protection case, holding that "conventional and venerable" rational basis test is that "a law must bear a rational relationship to a legitimate governmental purpose"). The *Lawrence* formulation, however, requires significantly more. Indeed, except for a passing reference to its holdings in *Romer*, 539 U.S. at 574, "rational relationship" language is entirely absent from *Lawrence*.[9]

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[8] Justice Scalia also complains, as he did in *Romer*, 517 US. at 640-43 (Scalia, J., dissenting), that government advancement of the view that homosexuality is bad or immoral is not an illegitimate government purpose, but he concedes that *Romer* already "'eroded' the 'foundations' of *Bowers*' rational-basis holding" on this point. *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting).

[9] In reading *Lawrence* to have applied minimal rational basis scrutiny, which permits consideration of any "conceivable" government interest raised from any source, neither the district court below, *Witt*, 444 F. Supp. 2d at 1145, nor the court in *Cook v. Rumsfeld*, 429 F. Supp. 2d 385, 399 n.19, 405 n.27 (D. Mass. 2006), acknowledge that the *Lawrence* Court rejected rationales other than the State's uncouched desire to express that homosexuality is immoral. Several *amici* attempted discredited "public health" rationales. *E.g.*, Brief of Concerned Women

The differences between the classic rational basis test and the *Lawrence* Court's holding stand out more clearly when one breaks that holding down into three parts – "The Texas statute [(a)] furthers no legitimate state interest [(b)] which can justify its intrusion [(c)] into the personal and private life of the individual" – and examines each element:

(a) The Court's statement in *Lawrence* that the statute "furthers no legitimate state interest," does not signal it is applying rational basis review. First, the rest of the sentence modifies this language, which tells us that not just *any* legitimate state interest will suffice to uphold the statute, as is typically the case under minimal rational basis scrutiny. Second, the necessity of having a legitimate state interest behind a law applies under *any* standard of scrutiny and the presence or absence of legitimate purposes is a relevant consideration in every case. *See, e.g., Roe*, 410 U.S. at 155 ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the *legitimate* state interests at stake.") (emphasis added); *Weber v. Aetna*, 406 U.S. 164, 173 (1972) ("The essential inquiry in all [equal protection] cases is ... a dual

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for America, 2003 WL 469900 at *26. *Amici* also offered interests in "protect[ing] marital intimacy and opposite sex relationships that are likely to result in marriage," *e.g., id.* at *24, and similar "marriage-promotion" rationales. E.g., Br. of Family Research Council et al. at *22-23. If this Court is to affirm the district court's reading of *Lawrence*, it must conclude that *Lawrence* determined all proffered explanations reflected illegitimate government purposes.

one: What *legitimate state interest* does the classification promote? What fundamental personal rights might the classification endanger?") (emphasis added).

(b) Critically, the Court's second requirement of a legitimate interest "which can justify [the law's] intrusion" is flatly inconsistent with a usual rational basis standard. The requirement of a "rational relationship to" a legitimate governmental purpose in due process cases does not require any consideration of the negative impact (or "intrusion") of the law on the affected individuals, let alone that such an intrusion be specifically justified. In *Glucksberg*, 521 U.S. at 728-35, for example, the Court's lengthy rational basis analysis focused solely on whether the law was rationally related to the interests put forward by Washington State; there was no mention of an "other side of the equation" looking at intrusions upon the class of individuals before the Court. Such inquiries are the stuff of elevated standards of scrutiny and balancing formulas. Indeed, as the district court elsewhere stated as to traditional rational review: "Rational basis review does not allow for the kind of balancing test between government interest and interest of the individual advocated by the plaintiff." *Witt*, 444 F. Supp. 2d at 1145.

(c) The Court's additional reference to intrusions "into the personal and private life of the individual" further separates the standard at work from the usual rational basis review and emphasizes the Court's concern with the individual's personal autonomy in intimate matters. Likewise, the sentence leading into this

one confirms the Court's understanding of the strength of the right, saying that petitioners' "right to liberty under the Due Process Clause gives them a full right to engage in their conduct without intervention of the government." *Lawrence*, 539 U.S. at 578.

The *Lawrence* Court also made clear in other places that the government would not be able to uphold the Texas sodomy law with a minimal showing. It announced "as a general rule" that the importance of the liberty interest and its grounding in matters of personal autonomy "should counsel against attempts by the State, or a court, to define the meaning of the relationship ***or to set its boundaries absent injury to a person or abuse of an institution the law protects.***" *Lawrence*, 539 U.S. at 567 (emphasis added). The district court made no attempt to satisfy this requirement. Similarly, in pointing out that "[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct" and discussing its recognition as an "integral part of human freedom" in many countries, the Court noted there has "been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate ***or urgent***." *Lawrence*, 539 U.S. at 577 (emphasis added). *See also Roper v. Simmons*, 543 U.S. 551, 578 (2005) (Kennedy J., for the Court) ("It does not lessen our fidelity to the [U.S.] Constitution or our pride in its origins to acknowledge that the express affirmation

of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.").

III. THE COURT SHOULD APPLY STRICT SCRUTINY OR ANOTHER FORM OF BALANCING THAT GIVES UTMOST WEIGHT TO WITT'S LIBERTY INTEREST IN A PRIVATE INTIMATE LIFE IN HER HOME, A RIGHT THE GOVERNMENT PENALIZES AND DENIES WHOLESALE.

A. Strict Scrutiny is Appropriate Here; at Minimum, a Heightened Scrutiny Balancing Test is Required.

The Supreme Court consistently has recognized that the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). *Glucksberg*, 521 U.S. at 721, recognized that direct and substantial invasions of fundamental rights of personal autonomy and privacy generally trigger strict scrutiny and must be narrowly tailored to serve a compelling government interest.[10] Major Witt's autonomy to engage in same-sex intimacy and relationships is an essential liberty, the exercise of which is truly no concern of government. *Griswold*, 381 U.S. 479; *Eisenstadt*, 405 U.S. 438; *Roe*, 410 U.S. 113; *Carey v. Population Services Int'l*, 431 U.S. 678 (1977). *Amicus* agrees with

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[10] In *Lawrence*, counsel for the State conceded below that he could not "even see how he could begin to frame an argument that there was a compelling State interest" for the law, *Lawrence v. State*, 41 S.W.3d 349, 383 (Tex. App. 2001) (Anderson, J., dissenting).

Major Witt that the nature and locus of her exercise of liberty and the gravity of the government's intrusion under the sweeping policy applied against her, make application of a strict scrutiny standard appropriate.

Amicus recognizes that the Court does not always apply strict scrutiny – itself a balancing test that starts heavily tilted toward the individual – to infringements on fundamental rights. Some contexts regularly involve interests of another person that may be independently asserted or that the government may protect, such as the interests of another fit and involved parent, or of a child, as where custody or visitation is in dispute. *See, e.g., Troxel*, 530 U.S. at 88-89. Other cases involve the asserted government interest in the potentiality of human life; this interest at times may be balanced against a woman's liberty and autonomy interests. *Casey*, 505 U.S. at 871-79. Such countervailing interests may be judged uniquely important so as to make strict scrutiny of the government's actions as to one side's interests too imbalanced a standard. *See, e.g., Troxel*, 530 U.S. at 101 (Kennedy, J., dissenting) ("a fit parent's right vis-a-vis a complete stranger is one thing; her right vis-a-vis another parent or a *de facto* parent may be another").

Similarly, practical complications often prevent unfettered honoring of personal liberties, such as in contexts in which a person is incarcerated, or medically or psychologically impaired to a great degree, or has been committed to a live-in facility where the State has interests in maintaining safety and security in

the facility and its occupants overall. Calibrated balancing tests short of strict scrutiny may be used and appropriate in many such cases. *E.g., Youngberg v. Romeo*, 457 U.S. 307 (1982) (balancing the liberty of a civilly committed individual against "the demands of an organized society").

The military setting and the unique requirements of military life are, of course, in many respects unique. Major Witt properly acknowledges this while reminding the Court of the limits of deference to the military or to Congress in matters affecting military life. Witt Br. at 49-51. "National security" and "unit cohesion" are not trump cards that the military may play successfully whenever military laws are challenged. At the very least, Witt's interest must be given very substantial weight in a balancing test reflecting a heightened form of scrutiny.[11]

B. The Application of DADT Here So Completely Denies Major Witt Her Right to an Intimate Refuge and Relationship As To Be Unconstitutional.

DADT inflicts wholesale deprivation on Major Witt, not merely incidental harm or even only significant restrictions. Defendants required celibacy – not only the utmost professional discretion – at all times, in all settings, including her distant home; banned her from engaging in any other "homosexual act" such as

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[11] *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004), holds that *Lawrence* requires "searching constitutional review" of criminal law impositions on personal liberty in private sexual matters, even in a military setting.

hand-holding or kissing a person of the same sex, regardless of actual impact on the military; and prohibited her from acknowledging or disclosing her sexual orientation.

There is literally no one who may engage in intimate conduct with another, let alone have a sustained relationship, without anyone knowing. The other person knows, and others may come to find out despite sincere efforts of the servicemember at discretion. As applied here, moreover, it is the military itself through its investigation and separation proceedings that assumed the prerogative to "tell" Witt's unit what she did not, that she is a lesbian. The government's application of DADT makes Witt responsible not only for her own discretion within the military but for those who would choose to "out" her, in or outside of the military.

Throughout the case law of protected liberties and fundamental rights, the government's application of policies or laws so as to leave no meaningful room for exercise of a fundamental right has counted very heavily in favor of individuals burdened by such approaches. The Supreme Court often has noted that an intrusive, uncalibrated government policy is highly vulnerable, even when the government's interest is national security, and especially when "'less drastic'" means of serving legitimate ends (if any) have been bypassed. *Aptheker*, 378 U.S. at 512-13. In *Aptheker*, for example, the Court noted that:

> "[a] world of difference exists, from the standpoint of sound policy and constitutional validity, between making . . . membership in an organization designated by the Attorney General a felony, and recognizing such membership, as does the employee loyalty program . . . as merely one piece of evidence pointing to possible disloyalty."

Id. at 513 n.12 (internal citation omitted).

Likewise, in the abortion rights context, the Court in *Roe*, 410 U.S. at 153-54, struck down a Texas law criminalizing all abortions except to save the life of the mother. The Court rejected the argument that the fundamental right was absolute,[12] but noted numerous intimate factors that an individual could justly consider according to her own circumstances and beliefs in choosing an abortion, and held that "[t]he detriment that the State would impose upon the pregnant woman ***by denying this choice altogether*** is apparent." *Id.* (emphasis added). In *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 69 (1976) the Court likewise struck down a requirement that a husband give his consent as a condition precedent to his wife's ability to obtain an abortion.

In *Troxel v. Granville*, 530 U.S. 57, 73 (2000), the Court held that a visitation order granted without the state court judge giving *any* deference to the fit parent's view of the child's best interest – under a "breathtakingly broad" statute,

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[12] "The pregnant woman cannot be isolated in her privacy. She carries an embryo. . . .The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold, Stanley, Loving, Skinner* and *Pierce* and *Meyer* were respectively concerned." *Roe*, 410 U.S. at 159.

id. at 67, that permitted "any person" to petition for visitation at "any time" – imposed an unconstitutional burden on the parent in that case. Justice O'Connor reviewed numerous state statutory approaches imposing far less of a burden on parental care, custody and control, and rejected the state judge's mere substitution of his views for the parent's as to the child's best interests. *Id.* at 70-72. The Court found it unnecessary to articulate the particular standard it applied, although the fundamental right of parental autonomy was at stake.

In the current case, the government asserts a right absolutely to substitute its views for Major Witt's as to acceptable intimate conduct and relationships privately engaged in off base, with a civilian, through penalties including loss of one's military career, stigmatization and economic and personal hardship. The Supreme Court long ago made clear that the Constitution "excludes any general power of the state to standardize its children" because '[t]he child is not the mere creature of the state." *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925). Nor may the government claim a power to standardize adult soldiers like Major Witt to the degree of compelling absolute conformity in this most private and intimate personal realm. "[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and

the extent to which they are served by the challenged regulation." *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977).

IV. DADT AS APPLIED TO MAJOR WITT VIOLATES THE OVERLAPPING EQUAL PROTECTION AND LIBERTY CONCERNS OF THE FIFTH AMENDMENT.

"Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects." *Lawrence*, 539 U.S. at 575. DADT was passed when the Supreme Court had not definitively ruled that giving effect to private anti-gay bias was an illegitimate government purpose. *See Romer*, 517 U.S. at 634-35.[13] Likewise, the Court had not yet struck down laws criminalizing private sexual intimacies for same-sex couples nor faulted such laws as "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Lawrence*, 539 U.S. at 575. *Lawrence* confirmed a principle of ***equal liberty*** in holding that "[p]ersons in a homosexual relationship" have the "right" to "seek autonomy for these [intimate] purposes, just as heterosexual persons do." *Lawrence*, 539 U.S. at 574.

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[13] As with *Lawrence*, the Court in *Romer* was offered numerous proposed rational bases for the anti-gay Colorado constitutional amendment challenged there that the Court deemed insufficient; the Court concluded the sweeping law was grounded in *animus* and was an impermissible form of class-targeted legislation. *Romer*, 517 U.S. at 633-35.

Equal protection requires the government to demonstrate that a discriminatory law serves an *independent* and legitimate purpose. *Romer*, 517 U.S. at 633, 635; *see Pruitt v. Cheney*, 963 F.2d 1160, 1165 (9th Cir. 1992) (private anti-gay bias may not legitimately be given effect by military, rejecting use of such rationales in *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), *cert. denied* 452 U.S. 905 (1981) in light of *Palmore v. Sidoti*, 466 U.S. 429 (1984)); *see also Lawrence*, 539 U.S. at 579-85 (O'Connor, J., concurring). DADT impermissibly disfavors gay people as a class. *Id.* at 583-84. The explanations offered by the military for the sweeping DADT law simply cannot be separated from a desire to accommodate the private biases of people who harbor anti-gay sentiments or fear of gay people. To this end the government orders gay people deeply into the closet and demands of them (and them alone) silence, chastity and not the slightest display of affection. Certainly as applied to Major Witt's case, in which the military "cuts off its nose to spite its face" by investigating and separating her, the policy is exposed as an entirely irrational means of serving any legitimate military interest in unit cohesion or otherwise. DADT reflects anti-gay attitudes and invades personal relationships, and thus any rational review must be done in its "more searching" form. *Id.* at 579-584.

Because defendants' application of DADT invades Major Witt's fundamental rights, *Lawrence*, 539 U.S. 558; denies her the equal protection of

fundamental rights accorded similarly situated heterosexuals, *Eisenstadt*, 405 U.S. 438; and lacks a sufficiently close connection to any compelling or substantial or even an independent and legitimate government purpose, it must be declared unconstitutional as applied to her. That DADT would reach so deeply into the private life of one of our finest flight nurses – while leaving heterosexual unit members free to engage in identical sexual intimacies in private – not only sends what *Lawrence*, 539 U.S. at 573; *id.* at 583, 584 (O'Connor, J., concurring), found to be a powerful and improper signal of government condemnation of all lesbian and gay people, but threatens to cause a profound and senseless loss to Major Witt, our nation's fighting forces and the country as a whole.

CONCLUSION

For all the reasons stated above and in the Brief of Appellant, *amicus curiae* Lambda Legal Defense and Education Fund, Inc. respectfully asks the Court to reverse the decision below.

Respectfully submitted,

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Dated: October 25, 2006

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1

Case No. 06-35644

I certify that, pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 5855 words or less.

DATED: October 25th, 2006

By: _____

Patricia M. Logue
Attorney for Amici Curiae
Lambda Legal Defense and Education Fund, Inc.

CERTIFICATE OF SERVICE

I hereby certify that the following documents were sent via U.S. Mail, postage prepaid, to the following on this 25th day of October 2006:

1. Brief of Amici Curiae Lambda Legal Defense and Education Fund, Inc. in Support of Plaintiff-Appellant and Reversal;
2. Certificate of Compliance; and
3. Certificate of Service.

Aaron Caplan Staff Attorney American Civil Liberties Union of Washington 705 Second Ave., Third Floor Seattle, WA 98104 ***ATTORNEYS FOR PLAINTIFF-APPELLANT***	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivered ☐ Overnight Mail (via FedEx) ☐ Facsimile Transmission ☐ E-Mail Transmission– *Brief Only*
Anthony J. Steinmeyer Appellant Staff – Civil Division 950 Pennsylvania Ave., NW – Room 7529 Washington, D.C. 20530 (202) 514-3388 (202) 307-2551 – fax Anthony.steinmeyer@usdoj.gov ***ATTORNEYS FOR DEFENDANTS-APPELLEES***	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivered ☐ Overnight Mail (via FedEx) ☐ Facsimile Transmission ☐ E-Mail Transmission– *Brief Only*

I certify and declare that the foregoing is true and correct to the best of my knowledge.

DATED this 25th day of October 2006 at Chicago, Illinois.

Patricia M. Logue