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

REPLY BRIEF OF APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
NO. CV06-5195 RBL, HONORABLE RONALD B. LEIGHTON,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

Page

Page

Page

STATUTES AND REGULATIONS

A. INTRODUCTION

In Lawrence v. Texas, 539 U.S. 558, 576 (2003) the Supreme Court expressly condemned its prior decision in Bowers v. Hardwick, 478 U.S. 186 (1986) on the grounds that it "failed to appreciate the extent of the liberty at stake." 539 U.S. at 576. The Air Force would have this Court repeat the Bowers Court's mistake.

The Air Force ignores the fact that the Lawrence Court adopted the analysis set forth by Justice Stevens in his dissenting opinion in Bowers, where he said that the fundamental liberty right "to engage in nonreproductive, sexual conduct that others may consider offensive or immoral" was established long ago in the Supreme Court's prior decisions in Griswold v. Connecticut, 381 U.S. 479 (1965), Eisenstadt v. Baird, 408 U.S. 438 (1972), and Carey v. Population Services International, 431 U.S. 678 (1977). Since that dissent was adopted wholesale by the Lawrence Court, it is no longer a dissent and is now the law. Similarly, the Air Force ignores the fact that the only Court of Appeals to address the applicability of Lawrence to the military has concluded that servicemembers who challenge military laws which intruding upon the due process liberty right recognized by Lawrence are entitled to "heightened scrutiny" and that application of such laws to them must be conducted on an "as-applied" basis.

Adhering stubbornly to its view that the rational basis test is the only possible applicable constitutional standard for evaluating laws which limit the right recognized in Lawrence, the Air Force simply ignores the fact that several constitutionally protected

liberty rights have been accorded the protection of intermediate scrutiny. The Air Force does not even acknowledge the existence of these cases. Instead, it continues to assert that the Lawrence Court recognized a substantive due process liberty right which it afforded only the minimum level of constitutional protection, even though the Supreme Court has never before afforded a substantive due process liberty right this level of protection, and even though the Lawrence Court explicitly held that the right it was recognizing was entitled to "substantial protection."

Similarly, the Air Force refuses to admit that Major Witt's conduct falls within the ambit of the First Amendment right to intimate association, ignores the fact that this Court is bound by the Circuit precedent set in Thorne v. City of El Segundo, 726 F.2d 459 (9th Cir. 1998), and misrepresents the decisions of other circuits.

B. ARGUMENT

1. THE AIR FORCE MISREADS LAWRENCE.

a. The Court Expressly Adopted the Analysis of Justice Stevens' Dissenting Opinion in *Bowers*.

The Air Force contends that the Supreme Court's decision in Lawrence did not change the constitutional analysis applicable to the military policy of discharging personnel who engage in private consensual homosexual conduct. This argument flies in the face of the express language of Lawrence. Lawrence not only overruled the result reached in Bowers, it also overruled the reasoning of the Bowers majority and expressly adopted the analysis of the Bowers dissent authored by Justice Stevens.

In overruling Bowers, the Lawrence Court said that "Justice Stevens' analysis, in our view, should have been controlling in Bowers and should control here." Lawrence, 539 U.S. at 578. In that dissent, citing to "prior cases" such as Griswold and Carey, Justice Stevens accepted the claim of the homosexual plaintiffs that "individual decisions" by adults "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." Bowers, 478 U.S. at 216 (Stevens, J., dissenting). He went on to explicitly state that the Court's prior cases recognized that such intimate decisions were animated by a "fundamental" concern for the individual's right to make such decisions and a belief that any state interference with such decisions was an intolerable intrusion into the protected sphere of individual liberty:

> 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. . . "These cases do not deal with the individual's interest in protection from unwarranted public attention, comment or exploitation. They deal, rather, with the individual's right to make certain 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 how he will live his own life as intolerable.***"

Bowers, 478 U.S. at 217 (Stevens, J., dissenting) (bold italics added), *quoting* Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716, 719-720 (7th Cir. 1975).

Justice Stevens concluded:

> 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 (Stevens, J., dissenting) (bold italics added).

This is the analysis that the Lawrence Court expressly adopted and held to be controlling. The fundamental right analysis of Justice Stevens is the law of the land. The Air Force acknowledges, as it must, that Justice Stevens' dissent in Bowers expressly characterized the right at issue as being "fundamental," but argues nonetheless that this language should be ignored because "the Lawrence majority did not quote or otherwise endorse that portion of the Bowers dissent." *Brief of Appellees*, at 41-42. In fact, the Lawrence majority did not selectively endorse mere portions of Justice Stevens' dissent; instead it adopted his entire "analysis," stating that it "should have been controlling in Bowers and should control here." Lawrence, 539 U.S. at 578.

b. The Conclusion That *Lawrence* Recognized a Fundamental Right Is Not Inconsistent With *Glucksberg*. There was No "Expansion" of the Concept of Due Process in *Lawrence*, Since the Court Adopted Justice Stevens' Conclusion That the Substantive Due Process Right in Question Had Already Been Recognized in the Prior Cases of *Griswold*, *Eisenstadt* and *Carey*.

The Air Force attempts to rely upon Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) for the proposition that before a court may "expand the concept of substantive due process" by recognizing a new due process right, the court satisfy the

"threshold requirement" that the "challenged state action implicate[s] a fundamental right . . ."

But this requirement only applies when a court is asked to "expand" the boundaries of substantive due process by recognizing a new fundamental right. As Justice Stevens noted, the conclusion that there was a fundamental right that "***embrace[d] the right*** to engage in nonreproductive, sexual conduct" had *already* been established in "cases like Griswold, Eisenstadt and Carey," Bowers, 478 U.S. at 217 (Stevens, J., dissenting). Thus, Lawrence was not "expanding" the boundaries of substantive due process at all. It was simply enforcing a fundamental right that had been historically recognized.

The Air Force relies upon the Eleventh Circuit's clearly erroneous statement in Williams v. Attorney General of Alabama, 378 F.3d 1232 (11th Cir. 2004), *cert. denied,* 543 U.S. 1152 (11th 2005) that cases such as Griswold, Eisenstadt and Carey did not "recognize the overarching right to sexual privacy asserted here." Justice Stevens explicitly concluded the exact opposite when he wrote that "cases like Griswold, Eisenstadt and Carey" *did* "embraces the right to engage in [such] nonreproductive, sexual conduct . . ." Bowers, 478 U.S. at 217 (Stevens, J., dissenting). Since Lawrence expressly adopted Justice Stevens' analysis and said it was "controlling," 539 U.S. at 578, the Eleventh Circuit is simply wrong when it says that these past cases did not recognize this fundamental right. Thus, the Glucksberg threshold requirement has actually been

met several times. It was met in Lawrence when the Court expressly adopted Justice Stevens' dissent in Bowers, and, as Justice Stevens noted, the fundamental nature of the due process right to engage in intimate sexual conduct had *already* been established in the earlier cases of Griswold, Eisenstadt and Carey.

c. *Lawrence* Cited to Several State Court Decisions Which Recognized That The Liberty to Engage in Consensual Same-Sex Conduct Free From Governmental Interference is a Fundamental Right.

Further evidence that Lawrence involved fundamental rights is provided by this passage of the opinion:

> The courts of five different States have declined to follow [Bowers] in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment, see Jegley v. Picado, 349 Ark. 600, 80 S.W.3d 332 (2002); Powell v. State, 270 Ga. 327, 510 S.E.2d 18, 24 (1998); Gryczan v. State, 283 Mont. 433, 942 P.2d 112 (1997); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. App. 1996); Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992).

Lawrence, 539 U.S. at 576. In each of these state court cases, the courts held that the constitutional right to engage in private, consensual, same-sex conduct was a fundamental right, and in each case the statute burdening that right was subjected to strict scrutiny and found unconstitutional. Jegley, 349 Ark. At 632 (statute "infringes upon the fundamental right to privacy . . . we must analyze the constitutionality of [the statute] under strict-scrutiny review"); Powell, 270 Ga. At 333 ("the right of privacy is a fundamental right" and "a government-imposed limitation on the right to privacy will pass constitutional muster only if the limitation is shown to serve a compelling state

interest and to be narrowly tailored to effectuate only that compelling state interest"); Gryczan, 283 Mont. At 449 (same); Campbell, 926 S.W.2d at 262 (same); Wasson, 842 S.W.2d at 496 ("The fundamental rights of personal security and personal liberty, include the right of privacy . . ."). The Lawrence majority would not have cited these cases with approval if it had intended to accord the exact same liberty right a lesser degree of constitutional protection.

d. The *Lawrence* Court Deliberately Declined to Decide The Case Before It on Equal Protection Grounds.

The Air Force also mischaracterizes the Lawrence Court's discussion of Romer v. Evans, 517 U.S. 620 (1996). The Air Force notes that the Lawrence majority "cited and quoted approvingly" to Romer, a case where a state law was struck down *on equal protection grounds* because it "lacked a rational relationship to a legitimate state interest." Id. at 632. The Air Force infers that by citing to Romer with approval, the Lawrence Court "at least implied that the rational basis test is the appropriate standard when a case is attacked because of its classification of homosexual conduct." *Brief of Appellees*, at 39, citing State v. Limon, 280 Kan. 275, 122 P.3d 22 (Kan. 2005).

Lawrence implied no such thing, because the Lawrence majority deliberately *refused* to decide the case before it on equal protection grounds.

> As an alternative argument in this case, counsel for the petitioners and some amici contend that Romer provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether Bowers itself has continuing validity. Were we to hold the statute invalid

> under the Equal Protection Clause ***some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.***

Lawrence, 539 U.S. at 574-75 (bold italics added).

If the applicable equal protection analysis and substantive due process analysis both hinged on an identical rational basis form of scrutiny, there would have been little reason for the Lawrence majority to prefer one method over the other. Amending the Texas statute to eliminate the distinction between same-sex and different-sex partners would, under an equal protection analysis premised on the rational basis test, remove the irrationality of the legislative approach. Under that scenario, a subsequent substantive due process attack on the amended statute premised on the rational basis test would *not* be able to succeed. A gender-neutral sodomy statute would only violate substantive due process if the conduct was "protected by the substantive guarantee of liberty," Lawrence, 539 U.S. at 575, and only if the infringement of that liberty was required to meet a standard more rigorous than rational basis review. And that is precisely what the Lawrence Court held when it held that the defendants "right to liberty under the Due process Clause gives them the full right to engage in their conduct without intervention of the government." 539 U.S. at 578.

e. The One Sentence Which the Air Force Relies Upon Uses Language That is Not Consistent With the Rational Basis Test, A Fact Which The Dissent Itself Recognized.

The Air Force relies heavily on one sentence in Lawrence which states:

> The Texas statute furthered no legitimate interest which can ***justify*** its intrusion into the personal and private life of the individual.

Lawrence, 539 U.S. at 578. The Air Force argues that this sentence exemplifies the traditional rational basis test, but even the dissenting justices realized that this was not so. Justice Scalia referred to this sentence as "an unheard-of form of rational basis review." Id. at 586 (Scalia, J., dissenting). It is *true* that this is an "unheard-of" form of the rational basis test, but that is only because it is *not* a statement of the rational basis test.[1]

The word "justify" indicates that the rational basis test is *not* being employed. The rational basis test does not require any consideration of the degree to which a law has a negative impact on an individual. If the rational basis test is the applicable constitutional standard, then the impact of a law upon a citizen need not be "justified" by weighing its impact against the state interest involved. Although the Air Force claims that Lawrence phrased its holding in "classic" rational basis language, without requiring

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[1] The Air Force makes a similar argument, repeatedly quoting the language from Doe v. United States, 419 F.3d 1058, 1063 (9th Cir. 2005), which states that considering the "personal circumstances" of the litigant before the Court (in this case Major Witt) "when judging the reasonableness of" the military's policy would be "an impermissible attempt to ratchet up our standard of review from rational basis towards strict scrutiny." If the proper standard of judicial review was the traditional rational basis test, this observation would be on point. But the rational basis is *not* the proper standard, and therefore this statement from Doe is completely irrelevant. Since the proper standard of judicial review is strict scrutiny, or at least intermediate scrutiny, consideration of the application of the military's policy to the "personal circumstances" of Major Witt is entirely appropriate.

any "narrow tailoring" of the law in question to meet the asserted state interest, the word "justify" contradicts the Air Force's contention. In fact, by inquiring into whether the application of the statute "justifies the intrusion into personal and private life," the Lawrence Court did require a showing that the challenged law was narrowly tailored. See *Appellant's Opening Brief*, at 23.

The rational basis test does not require courts to weigh conflicting interests of the state against those of the individual. If a legitimate state goal is furthered at all – even if it is further in only *one* hypothetical situation out of millions of possible situations – then the degree to which the individual before the court is harmed by application of that statute to him is completely irrelevant. By contrast, the Lawrence opinion cautions that the liberty interest in personal autonomy in the area of sexual conduct militates against allowing government to intrude or limit that freedom "absent injury to a person or abuse of an institution." Lawrence, 539 U.S. at 567. This is a weighing process where the presumption is in favor of the individual right, quite the opposite of traditional rational basis review where the presumption is in favor of the governmental regulation. In the context of this case, the balancing demanded by Lawrence requires the government to *prove* (not simply assume) that the presence of openly homosexual servicemembers actually injures the military. Unless Major Witt's presence in the Air Force cause some kind of injury to her unit, then the legitimate interest in maintaining the good morale of the 446th Aeromedical Evacuation Squadron does *not* "justify" the

intrusion into "her personal and private life" caused by her discharge and the termination of her exemplary military career.

f. The Air Force Ignores the *Marcum* Decision of the Court of Appeals for the Armed Forces.

This, of course, is exactly what the Court of Appeals for the Armed Forces held in United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004), a case the Air Force chooses to ignore because it was not decided by an Article III court. But the C.A.A.F. is the one federal court most familiar with military life, military law issues, and the rights of military service members. In Marcum the Air Force argued that Lawrence was only applicable to civilian life, and thus did not apply in the military context. Marcum, 60 M.J. at 206. But the Court of Appeals for the Armed Forces specifically rejected this contention:

> Constitutional rights identified by the Supreme Court generally apply to members of the military unless by text or scope they are plainly inapplicable. Therefore, we consider the application of Lawrence to Appellant's conduct.

Id. Indeed, the U.S. Supreme Court has said the same thing: Rotsker v. Goldberg, 453 U.S. 57, 71 (1981) (refusing to apply "a different equal protection test because of the military context"); Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 126 S.Ct. 1297 (2006) (applying ordinary constitutional test); Schlessinger v. Ballard, 419 U.S. 498 (1975)(same).

Marcum held, however, that in the military the application of Lawrence must be conducted on an as-applied basis:

> [W]e conclude that its application must be addressed in context . . . In the military setting, as this case demonstrates, an understanding of military culture and mission cautions against sweeping constitutional pronouncements that may not account for the nuance of military life. This

> conclusion is also supported by this Court's general practice of addressing constitutional questions on an as applied basis where national security and constitutional rights are both paramount interest.

Id. at 206.[2]

In order to decide whether his conviction for non-forcible sodomy was constitutional after Lawrence, the Court of Appeals for the Armed Forces looked at the specific facts pertaining to Tech. Sgt. Marcum's consensual sexual activity with "a subordinate airman within his chain of command." Id. at 200. The Court "as-applied analysis require[d] consideration of three questions."

> First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in Lawrence? 539 U.S. at 578, 123 S.Ct. 2473. Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the Lawrence liberty interest?

Id. at 206-7.

The Court described the conduct of Sgt. Marcum as follows:

> The act of sodomy occurred in Appellant's off-base apartment during off-duty hours; no other members of the military were present at the time of the conduct; Appellant was an E-6 and the supervising noncommissioned officer in his flight. His duties included training and supervising airmen. SrA Harrison, an E-4, was one of the airman Appellant supervised. As a

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[2] The United States Court of Claims has chosen to follow Marcum, and engaged in an "as-applied" analysis of the constitutionality of article 125 of the UCMJ in Loomis v. United States, 68 Fed. Cl. 503, 519 (2005) ("[A]rticle 125, as applied to plaintiff, does not violate due process").

> result, SrA Harrison was subordinate to, and directly within, Appellant's command.

Id. at 207. Based on these facts, the Marcum Court concluded that the conduct in question was within the liberty interest recognized by the Supreme Court in Lawrence. Id., at 207.

As to the second question, the Court noted that Sgt. Marcum's sexual partner was a subordinate within his chain of command, which took his conduct beyond the scope of the protected liberty interest for reasons described in Lawrence:

> As the supervising non-commissioned officer, Appellant was in a position of responsibility and command within his unit with respect to his fellow airmen. He supervised and rated SrA Harrison. Appellant also testified that he knew he should not engage in a sexual relationship with someone he supervised. Under such circumstances, which Appellant acknowledged was prohibited by Air Force policy, SrA Harrison, a subordinate airman within Appellant's chain of command, was a person "who might be coerced" or who was "situated in [a] relationship [] where consent might not easily be refused." Lawrence, 539 U.S. at 578, 123 S.Ct. 2472. Thus, based on this factor, Appellant's conduct fell outside the liberty interest identified by the Supreme Court.

Marcum, 60 M.J. at 208.

Because Marcum's conduct fell outside the liberty interest identified by Lawrence, the Court of Appeals found it unnecessary to consider the third question in its three-part as-applied analysis.

In the present case, Major Witt engaged in sexual conduct with a civilian partner. As the District Court recognized, "It is agreed that Witt did not ever engage in

homosexual conduct on the base, or with a member of the military." ER 383. Thus the Lawrence-disqualifying factor present in Marcum is not present in this case.

The Marcum Court's third area of inquiry is whether "there [are] additional factors relevant solely in the military environment that affect the nature and reach of the Lawrence liberty interest." Id., at 207. The Air Force points out that Congress has found that "unit cohesion" is "one of the most critical elements in combat capability," and that in the view of General Schwarzkopf it "is the single most important factor in a unit's ability to succeed on the battlefield." *Brief of Appellees,* at 23. Major Witt has never disputed this. Instead, she has argued that there is no evidence that the presence of homosexuals in the United States armed forces has any negative impact upon unit cohesion, and that all of the evidence from the 23 countries that decided to permit homosexuals to serve openly in their armed forces have concluded that this decision had no negative impact on unit cohesion. ER 111-113. The military's own studies have reached the *same* conclusion. ER 123-124.[3]

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[3] General John Shalikashvili, who was chairman of the Joint Chiefs of Staff when 10 U.S.C. § 654 was enacted, has recently stated: "I now believe that if gay men and lesbians served openly in the United States military, they would not undermine the efficacy of the armed forces." John Shalikashvili, "Second Thoughts On Gays In The Military," *New York Times*, January 2, 2007. He relied in part on polling data showing that of 500 recent veterans returning from Iraq and Afghanistan, 75% said they were comfortable interacting with gay people. Id. Among the findings of that poll were that "Of those who were certain that a member of their unit was gay or lesbian, two thirds did not believe that their presence created an impact on either their personal morale (66%) or the morale of their unit (64%)." Zogby International, "Opinions of

In an as-applied analysis, it is unnecessary for any court to decide whether or not allowing all homosexuals to serve openly in the military would have a negative impact upon unit cohesion. It is only necessary to decide whether permitting the particular homosexual servicemember to serve would have a negative impact upon the unit cohesion of *her* unit. The question in this case, then, is whether allowing Major Witt to continue to serve in the 446th AES would have a negative impact upon that unit.

That is obviously not a question that Congress ever posed or answered. Moreover, answering that question is easy, particularly on a 12(b)(6) motion. Taking all inferences in her favor, as required by that rule, the record is undisputed that allowing her to serve in her unit would *not* have any negative impact upon unit cohesion or morale. The members of her unit vigorously assert that Major Witt "plays an important role in ensuring the ***good*** order, morale and cohesion of our Unit," ER 62 (bold italics added), and they want her to come back to their unit. ER 64, 69, 75-76, 81, 86, 90-91, 96, 100-101. As Major Oda has stated, "Assuming she is a lesbian . . . this fact makes

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Military Personnel on Sexual Minorities in the Military" (December 2006), available online at http://www.palmcenter.org/files/active/0/ZogbyReport.pdf.

A group of 14 retired military officers filed an amicus brief in Cook v. Rumsfeld, No. 06-2313 (1st Cir. 2006) arguing that Congress's finding that gays and lesbians serving in the Armed Forces "would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion" cannot reasonable be conceived to be true." *Amicus Brief of Retired Military Officers*, available online at

http://www.sldn.org/templates/law/record.html?section=92&record=3329.

absolutely no difference to me . . . it makes no difference to anyone else in the 446th either." ER 106.

On the contrary, the removal of Major Witt from her unit is what has had a negative impact. Her removal from duty was "seriously deflating to everybody in the 446th AES." ER 68. Members of her unit agree that the institution of discharge proceedings against her has *hurt* unit morale and will continue to do so. ER 64, 75-77, 82, 86, 91-92, 96-97, 101, 106-07. In one instance outrage over her removal from the unit was strong enough to lead a career Air Force Sergeant to apply for retirement because he no longer wanted to serve in an organization that mistreats people the way the Air Force is mistreating Major Witt. ER 67-68.

The Air Force trumpets the fact that "for over 25 years this Court and every other court of appeals to address the issue have uniformly rejected substantive due process and equal protection challenges to the military's policy prohibiting homosexual acts." *Brief of Appellees,* at 21. However, every single one of these court of appeals decisions cited by the Air Force was handed down *before* Lawrence was decided. When one looks at the post-Lawrence decisions of the federal Courts of Appeal on these same

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Other amicus briefs in Cook may be found online at http://www.sldn.org/templates/law/index.html?section=92.

issues, there is only *one*, and that is the Marcum case.[4] Using the three factor analysis adopted by the Court of Appeals for the Armed Forces in that case, it is clear that the Air Force's policy of discharging homosexuals in unconstitutional as applied to Major Witt.

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[4] The Air Force also claims that in Sylvester v. Fogley, 465 F.3d 851 (8th Cir. 2006), in a nonmilitary context, the Eighth Circuit decided that Lawrence did not recognize a fundamental constitutional right. That is simply incorrect. The Eighth Circuit said: "[W]e will simply assume, without deciding, that the fundamental right to privacy under either the United States Constitution or the Arkansas Constitution encompasses Sylvester's conduct. Based on that assumption, we will apply strict scrutiny to the ASP's investigation of Sylvester's sexual relations . . ." 465 F.3d at 858-59. The Eighth Circuit proceeded to hold that in that case the civilian governmental agency had several compelling state interests which justified the intrusion into the employee's private sexual affairs, and that its investigation into his affair "was narrowly tailored to serve the state's compelling interest in administering a fair and unbiased criminal-justice system." Id. at 859-860.

The Air Force also relies upon Muth v. Frank, 412 F.3d 808 (7th Cir. 2005). While that court's interpretation of Lawrence's constitutional standard is similar to the Air Force's, its statements on that subject are obviously dicta. The sex in that case was incestuous sex between a brother and a sister. Quite properly the Seventh Circuit held that Lawrence "did not announce, as Muth claims it did, a fundamental right, protected by the Constitution, for adults to engage in all manner of consensual sexual conduct, specifically, in this case, incest." Since incest is not within the scope of the liberty right recognized by Lawrence, all of the Seventh Circuit's statements about the applicable standard of judicial review to statutes burdening conduct that is within the scope of that right were obviously unnecessary to the decision in that case.

2. THE AIR FORCE IGNORES THE SUBSTANTIVE DUE PROCESS CASES EMPLOYING INTERMEDIATE SCRUTINY.

In her opening brief, Major Witt argued in the alternative that even if strict scrutiny were not the appropriate standard, that there are a host of substantive due process cases that recognize protected liberty interests and accord them substantial protection under the intermediate scrutiny standard. See *Brief of Appellant,* at pp. 43- 45, *citing* Sell v. United States, 539 U.S. 166, 178 (2004); Riggins v. Nevada, 504 U.S. 127, 136 (1992); Cruzan v. Director, 497 U.S. 261, 278 (1990); Youngberg v. Romeo, 457 U.S. 307, 321 (1982); and Aptheker v. Secretary of State, 378 U.S. 500, 505 (1964). In its response, the Air Force ignores this argument and these cases.

Although the Air Force does not explain *why* it has ignored these cases, the explanation is not hard to find. If this Court were to hold that Lawrence recognized a "non-fundamental" liberty interest that triggered only intermediate scrutiny, the narrow tailoring requirement of mid-tier scrutiny would apply, as it has in every other instance of intermediate scrutiny. Similarly, if intermediate scrutiny is the appropriate choice for laws burdening the Lawrence liberty interest, then an as-applied challenge is clearly proper, and the record strongly suggests that Major Witt would prevail in an as-applied challenge to the military's policy of discharging homosexual servicemembers. Thus the Air Force persists in pretending that there are only two possible choices, strict scrutiny or traditional rational basis scrutiny, and that the Lawrence liberty interest triggers only the latter.

The Air Force's insistence that Lawrence employed the rational basis test also leads to a startling conclusion that is virtually impossible to defend. While the Air Force argues that the liberty right recognized by Lawrence is not a "fundamental" right, it does not argue, and indeed it could not possibly argue, that Lawrence does not recognize any substantive due process liberty interest. The Air Force insists that liberty is not of "fundamental" stature because the word "fundamental" was not placed immediately next to the word "right"[5] But indisputably the right Lawrence recognized was described as a substantive due process liberty right. Lawrence, 539 U.S. at 567[6]; 572[7]; 574[8]; and 578.[9]

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[5] However, the word "fundamental" *was* placed in the phrase "fundamental human rights" when describing the Court's prior decision in Eisenstadt. Lawrence, 539 U.S. at 565. It was also used when the Court described Roe v. Wade, 410 U.S. 113 (1973) as "confirming once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person." Lawrence, at 565.

[6] "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."

[7] "[L]iberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."

[8] "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."

This leaves the Air Force in the impossible situation of arguing that in Lawrence, for the first time ever, the Supreme Court recognized a substantive due process liberty interest and yet chose the rational basis test as the appropriate standard for evaluating infringements of this constitutional right. Appellant submits that since the Supreme Court had *never* done that before, it is illogical to assume that it did so in Lawrence. No judicially recognized substantive due process liberty right has ever been afforded merely the protection of minimum rational basis scrutiny. All of the Supreme Court's prior substantive due process cases have afforded protected substantive due process liberty rights either strict scrutiny or some kind of intermediate scrutiny protection. Thus the Air Force is reduced to arguing that in Lawrence the Supreme Court did something that it has never done in any other case.

Appellant submits that the far more logical conclusion is that the Lawrence Court decided that the right it was recognizing was entitled to strict scrutiny, or at the very least, to some kind of intermediate level of scrutiny. This conclusion is further buttressed by the Court's pronouncement that ""[L]iberty gives *substantial* protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." Id. at 572 (italics added). Appellant previously noted that it is virtually impossible to reconcile the use of the phrase "substantial protection" with the

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[9] "[The petitioners'] right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."

conclusion that the only protection afforded is that provided by the rational basis test. The Air Force has not offered an answer to this riddle.

That can only be because there is no viable answer. As the Air Force correctly points out, under the rational basis test, it is incumbent on the party challenging the law to prove that there is no hypothetical set of facts where the law would ever be rational. Heller v. Doe, 509 U.S. 312, 320-21 (1993). Thus, unless Major Witt could show that there has *never been*, and *never will be*, any homosexual servicemember whose open military service would have a negative impact on the cohesion of his unit, Major Witt's constitutionally protected "full right to engage in their conduct without intervention of the government" would not get any protection at all. And neither would any other homosexual servicemember in our nation's armed forces. Since no one could carry the Heller burden of negativing any positive effect of the law under every conceivable set of factual circumstances, the right recognized by Lawrence would be utterly worthless to every homosexual member of our armed forces. Appellant respectfully submits that our Supreme Court does not recognize constitutional rights that are incapable of affording any protection to those deprived of the right. Yet that is the ultimate conclusion that the Air Force is advocating in this case.

3. THE AIR FORCE'S EFFORTS TO DISTINGUISH OR EVADE THE FORCE OF THIS COURT'S DECISION IN THORNE ARE FLAWED. THIS COURT, AND SEVERAL OTHER CIRCUIT COURTS, HAVE EXPLICITLY RECOGNIZED THAT A

NEGATIVE EMPLOYMENT DECISION WHICH DIRECTLY AND SUBSTANTIALLY PENALIZES A PERSON FOR DECIDING TO ENTER INTO AN INTIMATE RELATIONSHIP WITH ANOTHER PERSON VIOLATES THE FIRST AMENDMENT.

In her opening brief, Major Witt argued that her discharge would violate her First Amendment right of intimate association, and in support of that argument she cited to Thorne v. City of El Segundo, 726 F.2d 459 (9th Cir. 1983), *cert. denied*, 469 U.S. 979 (1984). The Thorne Court held that the sexual relationship between an unmarried woman and a married man was protected by *both* the constitutional right to privacy and the First Amendment right to freedom of intimate association. In Thorne this Court explicitly applied "heightened scrutiny" to the government's employment decision to fire the woman, held that her discharge was unconstitutional given the absence of any evidence to show that her affair caused any morale problem in the police department where she worked, and cited to Moore v. City of East Cleveland, 431 U.S. 494 , 506 (1977) in support of its decision. Thorne, 726 F.2d at 471.

The Air Force responds that "Thorne did not involve military personnel or homosexual acts, and rested upon the rights to privacy and free association, rather than substantive due process and equal protection." *Brief of Appellees*, at 46, n.9. But these attempts to distinguish Thorne are unpersuasive for several reasons.

First, the contention that Thorne did not rest upon substantive due process principles is belied by the fact that the Thorne Court explicitly relied upon Moore, and

the holding in Moore rested *entirely* upon substantive due process grounds. Moore, 419 U.S. at 499-500. Second, Thorne's reference to "privacy" rights drew on the long line of cases that recognize that "privacy" -- in the sense of the right to make independent decisions about intimate matters -- is at the very heart of many substantive due process cases. See, e.g., Carey, 431 U.S. at 684 ("This right of personal privacy includes 'the interest in independence in making certain kinds of important decisions'"). Moreover, as noted in Roe v. Wade, 410 U.S. 113, 152 (1973) the Court has specifically held that *all* such privacy rights are "fundamental" constitutional rights: "[The Court's] past decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' [citation] are included in this guarantee of personal privacy."

But even if one were to accept the Air Force's contention that Thorne was not a substantive due process case, it would still be controlling on First Amendment freedom of association grounds. The Air Force acknowledges the First Amendment aspects of Thorne's holding, but then argues that courts *in other circuits* have rejected the contention that the right of intimate association applies to cases involving same-sex intimate conduct, citing to Shahar v. Bowers, 114 F.3d 1097, 1102 (11th Cir. 1997), *cert. denied*, 522 U.S. 1049 (1998) and Marcum v. McWhorter, 308 F.3d 635 (6th Cir. 2002). This panel is bound to follow Thorne as prior Circuit precedent that has never been overruled,

whatever may have transpired in other Circuits – especially in cases that were decided *before* Lawrence.[10]

Moreover, the Air Force confuses the First Amendment right of intimate association and the First Amendment right of expressive association. The Court distinguished between these two different types of rights in Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984):

> In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect freedom of association receives protection as a ***fundamental*** element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion.

The Air Force relies upon a case in the second category, Boy Scouts of America v. Dale, 530 U.S. 640 (2000) for the proposition that the right of expressive association "is limited to groups such as the Jaycees and Boy Scouts." *Brief of Appellees*, at 63. Appellant Witt, however, has never argued that her right of "expressive association" was infringed. As both Roberts and Board of Directors v. Rotary Club, 481 U.S. 537 (1987) make clear, the right of intimate association is one that is enjoyed by individuals living together as a family. Roberts, 468 U.S. at 619; Rotary, 481 U.S. at 545. Furthermore,

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[10] The Shahar case actually relies upon Bowers v. Hardwick, supra, which, of course, was overruled by Lawrence.

Rotary Club explicitly reaffirmed that this right is a "fundamental" liberty right in unambiguous terms. Rotary, 481 U.S. at 544 ("the freedom to enter into and carry on intimate or private relationships is a fundamental element of liberty").

As for the Air Force's point that Thorne did not involve military personnel, once again Appellant points out that it is settled law that the *same* constitutional standard applies in both the military and civilian contexts. See Marcum, 60 M.J. at 206; Rotsker, 453 U.S. at 71, and the other cases cited on page 12, *infra*. Finally, in this case the association between Major Witt and her partner was far more intimate than the association between Sgt Marcum and his subordinate Airman Harrison. Major Witt and her partner lived together for six years; so far as the Marcum decision discloses, the relationship between Marcum and Harrison was limited to a few sexual encounters, and they never lived together at all. Accordingly, if Marcum's sexual conduct with another military member was entitled to "heightened protection" and to an "as-applied" judicial review of the application of military's sodomy statute to his conduct, then *a fortiori* Major Witt is entitled to significantly greater constitutional protection, because her association with her civilian partner was far more intimate, and far more enduring.[11]

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[11] As the Air Force has noted, the factual basis for an additional First Amendment claim pertaining to the evidence offered, and closing arguments made, by counsel for the Air Force at Major Witt's administrative discharge proceeding, (which was finally held in September of 2006 long after Major Witt filed her lawsuit, and several months after the District Court dismissed her suit) is outside the record on appeal. Moreover, it was not presented to the District Court (because the acts which

4. PROCEDURAL DUE PROCESS DOES NOT ALLOW DISCHARGE OF MAJOR WITT IN THE ABSENCE OF A REASONABLY PROMPT HEARING.

The essential constitutional principle of the procedural due process line of cases that includes Barry v. Barchi, 443 U.S. 55 (1979), and FDIC v. Mallen, 486 U.S. 230 (1988), is that the government must offer a person threatened with deprivation of important rights a prompt opportunity to present evidence and argument in an attempt to prevent, or at least reverse, that deprivation. The Air Force does not deny these holdings, yet still argues that it may take whatever action it wishes against Major Witt and provide a hearing whenever it wishes. Indeed, the logical end point of the Air Force argument is that discharge hearings for homosexual conduct (or any other reason) are not required at all, since neither suspension nor discharge *ever* implicates *any* protected interest so long as the final discharge papers are sufficiently late in arriving, or sufficiently vague in their wording. The military services could simply suspend officers without hearing and never bother to formally discharge them, thus leaving them without any remedy. More fairness than this is required in a military that must operate within "the

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provide basis for the claim had not yet occurred). Thus, Major Witt agrees that this claim cannot be presented at this time to this Court. However, Major Witt reserves the right to raise this additional First Amendment claim, either in a new suit filed in District Court, or in this case upon remand to the District Court for further proceedings, at which point in time a motion to amend her complaint to add this claim would be procedurally proper.

limitations of the Due Process clause." Rostker v. Goldberg, 453 U.S. 57, 67 (1981).

Tellingly, the Air Force continues to offer no explanation for why it waited nearly two years before a discharge hearing was held, when Major Witt would have earned her 20-year retirement benefits in the interim. The constitutional timeliness of a hearing is judged in part by "the justification offered by the Government for the delay and its relation to the underlying governmental interest." Mallen, 486 U.S. at 242. Since the Government offers no justification at all for its delay, this Court should either find a due process violation, or at the very least reverse the 12(b)(6) dismissal and remand for development of the record.

The Air Force rationale for allowing indefinite delays in providing a discharge hearing is, in essence, that no deprivation occurs until it says that one has occurred. Phrased another way, the Air Force claims that it can impose debilitating "plus" factors (suspension from points and pay, denial of the opportunity to serve and progress toward promotion, and halting progress toward eligibility for pension), doing so because of a stigmatizing accusation of unfitness for duty, and yet deny Major Witt any opportunity for a hearing because it has chosen not to issue the final piece of paper that cements the stigma. In reality, the Air Force has already taken steps to discharge Major Witt for service for allegedly "substandard performance of duty." AFI 36-3209, § 2.26.1. It is formalism to assert that the November 2004 suspension

was somehow not connected to the Air Force's overall course of action. And because stigma in connection with a discharge does not hinge solely on its characterization as honorable or otherwise, see Opening Brief at 59-60 (collecting cases), whether Major Witt receives a nominally honorable discharge is beside the point. On a 12(b)(6) motion, the trial court must credit Major Witt's allegations (further supported by declarations) that people within her unit knew of the stigmatizing accusation. This means at the very least, the Court should reverse for further proceedings on the question of when the stigma occurred in this case.

C. CONCLUSION

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

DATED this 25th day of January, 2007.

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