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To be argued by:
MARC WOLINSKY

No. 91-5409

Oral argument
scheduled for
September 13, 1993

United States Court of Appeals
for the
District of Columbia Circuit

JOSEPH C. STEFFAN,

Plaintiff-Appellant,

—v.—

LES ASPIN, Secretary of Defense, ADMIRAL FRANK B. KELSO II,
Acting Secretary of the Navy, REAR ADMIRAL THOMAS C. LYNCH,
Superintendent, United States Naval Academy, and CAPTAIN JOHN B.
PADGETT III, Commandant of Midshipmen,
United States Naval Academy,

Defendants-Appellees.

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF PLAINTIFF-APPELLANT
JOSEPH C. STEFFAN

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SUMMARY OF REPLY ARGUMENT

The government's defense of its continuing policy of discrimination against gay men and lesbians ultimately rests on a single argument: that because homosexuals — "rightly or wrongly" — are disfavored and disliked by some members of our society, it is rational for the armed services to cater to this prejudice. Thus:

- The government contends that because "many members of the military services" would find the presence of individuals who have a "propensity" to engage in homosexual conduct to be "disturbing," gay men and lesbians whose conduct is faultless must be excluded to avoid "the tensions and effect on morale" that could result if they were permitted to serve their country. Def. Br. 40.
- The government contends that "there are privacy concerns to be considered" in support of the ban. The government candidly admits, however, that the "concern" is not that gay men and lesbians *will* invade the privacy of heterosexuals, but that heterosexuals will "*fear*" that they will. Def. Br. 40 (emphasis added).
- The government contends that "retention and recruitment" could suffer if individuals who state that they are gay are not excluded (Def. Br. 41), relying upon the work of a thoroughly discredited, anti-gay crusader who posits that this adverse effect will result because "homosexuals and prostitutes lack modesty and proper decorum and . . . are generally socially disruptive given the perversity of their sex lives." P. Cameron, *et al.*, *Homosexuals in the Armed Forces*, 62 Psychological Reports 211, 218 (1988).

If the principle of equal protection has any meaning, arguments like these — rooted in prejudice and stereotype — cannot prevail. It is undisputed that the fundamental tenets of our constitution prohibit discrimination against one group in order to cater to the biases of another. *Palmore v. Sidoti*, 466 U.S. 429 (1984), a case that is not even mentioned in the govern-

ment's opposition, acknowledges "the reality of private biases and the possible injury they might inflict." The Supreme Court went on to hold, however, that while "[t]he Constitution cannot control such prejudices . . . neither can it tolerate them" and that under the principle of equal protection, however real prejudices may be, "the law cannot, directly or indirectly give them effect." 466 U.S. at 433.

While the government contends that the recent adoption of a new policy on lesbians and gay men in the military argues for restraint, that new policy in fact underscores the constitutional flaws in the old policy. The new policy provides that "homosexual orientation is not a bar to service entry or continued service"; that "the Department of Defense recognizes that individuals with a homosexual orientation have served with distinction in the armed services of the United States;" that "Commanders and investigating agencies will not initiate inquiries or investigations solely to determine a member's sexual orientation"; and that "[s]ervicemembers will not be asked or required to reveal their sexual orientation." The new policy goes on, however, to subject individuals who merely state that they are gay to discharge because "[t]he constraints of military service require servicemembers to keep certain aspects of their personal lives private for the benefit of the group."

Thus, by acknowledging that gay men and lesbians are well-suited to serve, the new policy puts the lie to the government's contention here that individuals who have a "propensity" to engage in homosexual conduct must be denied the honor of serving their country. And by requiring the discharge of gay men and lesbians who do not stay deep in the closet, the new policy even more plainly demonstrates that it is the feared reaction of heterosexual servicemembers to their gay and lesbian colleagues that creates the alleged threat to good order, discipline and morale. In short, the new policy and the old policy are identical for purposes presented here. Both cater to the "irrational prejudice" and "negative attitudes" that some heterosexuals harbor against homosexuals. *City of Cleburne v.*

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Cleburne Living Center, Inc., 473 U.S. 432, 448, 450 (1985).
And both are unconstitutional.

Assuming that the principle of deference is applicable in the
equal protection context — an assumption that is unwarranted
under the applicable precedents — no amount of deference can
save this policy. *United States v. Robel*, 389 U.S. 258, 263
(1967), rejects the notion that "the phrase 'war power' " can
"be invoked as a talismanic incantation to support any exercise
of . . . power which can be brought within its ambit." The
"concept of 'national defense' cannot be deemed an end in
itself, justifying . . . the subversion" of the "democratic ide-
als enshrined" in the constitution that "make[s] the defense of
the Nation worthwhile." 389 U.S. at 264. One such ideal is that
government action cannot be based on nothing more than pri-
vate prejudice, and only an abandonment of that ideal can save
the military's invidious discrimination against lesbians and gay
men.

The government's argument that the regulation in issue is
directed at sexual conduct only and not sexual orientation is
equally unavailing. Under the regulations, a celibate "homo-
sexual" is still that, a "homosexual," and as such is subject to
mandatory discharge. Moreover, by stating that gay men and
lesbians may serve so long as they keep their sexual orientation
"private for the benefit of the group," the new regulation
proves beyond peradventure that the military is concerned with
status, not conduct, and that homosexuals may serve so long as
they do not "disturb" others by acknowledging their sexual ori-
entation. Ceb

Finally, the government has utterly failed to rebut Steffan's
showing that he was singled out for treatment that was more
harsh than that afforded others similarly situated. Accordingly,
the decision to deny him a diploma was both arbitrary and
capricious and violative of the constitutional guarantee of equal
protection.

Argument

POINT I

THE MILITARY'S CONTINUING POLICY OF DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION VIOLATES EQUAL PROTECTION.

- A. The regulation in issue discriminates on the basis of status, not conduct.

DOD Directive 1332.14 defines a "homosexual" as a person who "engages in, desires to engage in, or intends to engage in homosexual acts." It further requires the discharge of any servicemember who states that he or she is a homosexual "unless there is a further finding that the member is not a homosexual or bisexual." The government's argument that it was open to Steffan to "rebut" a regulatory presumption that he had a propensity to commit homosexual acts with "credible proof" that he was and intended to remain celibate was rejected on the prior appeal in this case because it had "no support in the record," 920 F.2d at 76 n.*, and is simply belied by the regulation. So long as Steffan harbored a sexual "desire" for individuals of the same gender, i.e., so long as he was a "homosexual," the regulation required his discharge, even if he convinced the military that he had committed himself to celibacy. Thus it is simply indisputable that Steffan was discharged for "being a homosexual."¹ See also *Gay Veterans Association, Inc.*

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¹ The government's citation to Judge Reinhardt's dissent in *Watkins v. United States Army*, 847 F.2d 1329, 1362 (9th Cir. 1988), vacated, 875 F.2d 699 (9th Cir. 1989), cert. denied, 498 U.S. 957 (1990), is unavailing. The majority opinion rejected Judge Reinhardt's view. 847 F.2d at 1339 n.13. And the later decision by the Ninth Circuit in *Pruitt v. Cheney*, 963 F.2d 1160, 1163 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992), held that the "Army . . . is not discharging members just for homosexual conduct, or even primarily for homosexual conduct. It is discharging members because of their status as homosexuals." (Emphasis added.) See also *Opinion of the Justices*, 522 A.2d 989, 990 (N.H. 1987) ("'homosexual' is understood generally to refer to a person who sexually prefers another of his or her own sex").

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v. Secretary of Defense, 850 F.2d 764, 766 (D.C. Cir. 1988)
(regulations distinguish between "separation . . . based solely
on homosexuality" and separations where "the discharged
servicemember engaged in a homosexual act").

Any doubt as to whether the military is concerned with con-
duct as opposed to status is put to rest by the fact that the new
policy that goes into effect on October 1, 1993, provides that
gay men and lesbians can serve so long as they keep "certain
aspects" of their "personal lives private for the benefit of the
group"—i.e., that is not what they do but who they are that bars
them. Accordingly, the policy infringes on fundamental rights
protected by the First and Fifth Amendments. See *Wooley v.*
Maynard, 430 U.S. 705, 714 (1977); *Aboud v. Detroit Board of*
Education, 431 U.S. 209, 234-35 (1977); *Planned Parenthood*
of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791, 2807
(1992). See also *Uniformed Sanitation Men Ass'n v. Commis-*
sioner of Sanitation, 392 U.S. 280, 284 (1968) (impermissible
to coerce waiver of Fifth Amendment privilege on penalty of
loss of employment); *Sandstrom v. Montana*, 442 U.S. 510
(1979) (rebuttable presumption of intent violates due process).

The government's related contention that it is reasonable to
presume that an individual who acknowledges a "desire" or
"propensity" to engage in homosexual conduct will compro-
mise the military mission by engaging in "homosexual conduct
within a naval or military unit," *Dronenburg v. Zech*, 741 F.2d
1388, 1398 (D.C. Cir. 1984), or by violating the criminal pro-
visions of the UCMJ is equally meritless. As shown in Steffan's
opening brief (at 30, 31-32), case law and common sense teach
that "propensity" cannot be equated with "action," particularly
given the adverse consequences that can befall a servicemember
who violates the military's code of conduct.²

² Indeed, any such notion would unconstitutionally penalize individuals
on the theory that they are predisposed to committing unlawful or pro-
hibited acts because they identify themselves as being members of a dis-
favored group. See *Noto v. United States*, 367 U.S. 290, 298-99 (1961);
United States v. Robel, 389 U.S. 258, 264-66 (1967); *Aptheker v. Secretary*
of State, 378 U.S. 500, 507-8, 514 (1964). See also *Robinson v. California*,
370 U.S. 660 (1962).

Moreover, in light of the fact that the policy that goes into effect on October 1, 1993, *permits* homosexuals — *i.e.*, individuals who have a “sexual attraction to individuals of [the same] sex” — to serve, and the Commander-in-Chief’s admission that homosexuals are not predisposed to engage in “misbehavior,”³ the government cannot credibly argue that a servicemember who merely harbors a “propensity” or “desire” to engage in prohibited conduct will, in fact, engage in such conduct. While the new policy continues to provide for the discharge of servicemembers who state that they are gay, certainly the government cannot rationally contend that homosexuals who acknowledge that they are gay are more likely to engage in prohibited conduct than those who stay in the closet. Thus, although the court’s conclusion in *Ben-Shalom v. Marsh*, 881 F.2d 454, 460-61 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990), that the military “does not have to take the risk that an admitted homosexual will not commit homosexual acts which may be detrimental to its assigned mission” was itself indefensible, any conceivable justification for this logic has been vitiated now that the military concedes that this “risk” is ephemeral and has adopted a “don’t ask, don’t tell, don’t pursue” policy.⁴

³ Remarks of President William Clinton, July 19, 1993, *reprinted in Washington Post*, July 20, 1993 at A 11.

⁴ The government’s argument that Steffan’s compelled resignation from the Academy precludes him from “avoid[ing] the burdens of his settlement by seeking his diploma and commission through the courts” is absurd. Def. Br. 24-25. There was no “settlement” and nothing in the documents that the government prepared and presented to Steffan for his signature expressly or impliedly waived his right to seek judicial relief. A. 106. Moreover, the district court considered and rejected the government’s motion to dismiss on this ground over four years ago, 733 F. Supp. 115 (D.D.C. 1989), the government ~~never~~ raised the issue again in the district court, and the government has never ~~appealed~~ from the ruling denying its motion even though it has had two opportunities to do so. Accordingly, the law of the case doctrine precludes the government from selectively relitigating the issue. See *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987); *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1089-90 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1181 (1985). In any event, the Secretary’s refusal to accept Steffan’s request to withdraw his resignation on the ground that “homosexuality is incompatible with naval service” (A. 95) is itself subject to judicial review. See *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979).

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F.2d 914, 920 (D.C. Cir. 1979).

B. The military's continuing policy of discrimination against homosexuals should be subjected to the same equal protection analysis applicable in any other context.

In its recent decision in *Heller v. Doe*, 61 U.S.L.W. 4728 (U.S. June 24, 1993), the Supreme Court held that heightened scrutiny must be applied to a governmental classification if it involves " 'fundamental rights' " or " 'proceed along suspect lines.' " 61 U.S.L.W. at 4730. The Court in *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993), explained that a suspect classification is evidenced where there is " 'some reason to infer antipathy' " against the group in question.

The government seeks to justify the ban on the service of lesbians and gay men by arguing unabashedly that prejudice against gay men and lesbians justifies discrimination against them. Def. Br. 22, 40.⁵ Moreover, as shown in Point I.A above, the regulations penalize individual servicemembers on the basis of their thoughts and desires and thereby trample upon fundamental rights guaranteed by the First and Fifth Amendments. Accordingly, *Heller* and *Beach Communications* require that heightened scrutiny be applied here.

The government's attempt to avoid the application of heightened scrutiny rests on the proposition that there is a "military exception" in equal protection jurisprudence. No such "exception" exists. *Frontiero v. Richardson*, 411 U.S. 677 (1973) — the first case to articulate the principle that laws that discriminate on the basis of gender must be subjected to heightened scrutiny—arose in the military context. Nowhere in that decision does the Supreme Court even hint that any special deference was due even though Congress was acting pursuant to its express constitutional powers.

Similarly, in *Rostker v. Goldberg*, 453 U.S. 57, 71 (1981), the Supreme Court noted that it has not applied "a different

⁵ The government admits that "homosexuals undoubtedly have been subject to discrimination in many contexts," and does not dispute that sexual orientation is "immutable" for purposes of constitutional analysis, that gays are politically powerless and that sexual orientation is unrelated to an individual's ability to contribute to society. Def. Br. 33, 34.

equal protection test" simply because a case arises in "the military context." *Id.* citing *Schlesinger v. Ballard*, 419 U.S. 498 (1975). *Rostker* then went on to uphold Congress' decision to exclude women from registering for the draft only after it found that "[t]he exemption of women from registration is not only sufficiently but also closely related to Congress' purpose in authorizing registration," that it did not reflect " 'invidious' " discrimination, and that it " 'was not the "accidental byproduct of a traditional way of thinking about females." ' " 453 U.S. at 74, 79.⁶

Rostker thus recognizes that military judgments are not immune to passion, prejudice and stereotype⁷ and that because of this, the doctrine of deference to the military does not have talismanic significance in the context of an equal protection challenge. Indeed, given that the principle of equal protection stands as the bulwark to protect disfavored groups from discrimination, acceptance of the argument advanced by the government "in the name of national defense" "would sanction the subversion" of one of the ideals "which makes the defense of the Nation worthwhile." *United States v. Robel*, 389 U.S. 258, 264 (1967).

⁶ Similarly, in *Dronenburg v. Zech*, 741 F.2d 1388, 1391, 1398 (D.C. Cir. 1984), this Court applied a rational basis test in reviewing a military regulation only after it concluded that stricter scrutiny was not required because no fundamental rights were implicated. Since both fundamental rights and a suspect classification are implicated here, *Dronenburg* indicates that heightened scrutiny is warranted. See also *Goldman v. Weinberger*, 475 U.S. 503, 512-13 (1986) (Stevens, J., concurring) (equal protection and First Amendment issues would be raised if the military permitted Jews to wear yarmulkes but prohibited Sikhs from wearing turbans).

⁷ E.g., A. 1064 (senior Naval officer testifies in 1942 that "[t]he colored race is very musical and they are versed in all forms of rhythm"; because of this, "possibly" they could serve with whites in the "musician branch"); *Hohri v. United States*, 782 F.2d 227, 230-37 (D.C. Cir. 1986), vacated, 482 U.S. 64 (1987) (armed services contended in World War II that military necessity required that 120,000 Japanese-Americans had to be forcibly removed from their homes and placed in internment camps); *Owens v. Brown*, 455 F. Supp. 291, 306 (D.D.C. 1978) (Navy contended in 1948 that excluding women from naval vessels other than hospital ships was necessary because "duty at sea is part of an essentially masculine tradition").

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The deference doctrine is also inapplicable to this case because the premises underlying the doctrine are inapposite. Thus, the regulations in issue do not stem from the application of any military expertise, but from the indulgence of prejudices that infect some members of our society. The subject regulation therefore is entitled to no more deference than would be appropriate if the military were to attempt to resurrect the racist or sexist regulations and practices of decades past. Moreover, a decision in Steffan's favor will not involve the courts in a continuing oversight of "the composition, training, equipping, and control of" the armed services. *Gilligan v. Morgan*, 413 U.S. 110 (1973). Inappropriate or illegal sexual conduct will remain grounds for discharge and — consistent with the requirements of the constitution and applicable statutes and regulations — the military will remain free to recruit, promote, assign and discharge servicemembers as it sees fit.⁸ Finally, affirmance of the principles of equal protection will not undermine the " 'respect for duty and . . . discipline' " that is necessary for the military to "foster instinctive obedience, unity, commitment and esprit de corps," *Goldman*, 475 U.S. at 507, since invalidation of the military's discriminatory policies will not inject the courts into policing the relationships among servicemembers.⁹

⁸ See Remarks of President William Clinton, July 19, 1993, *supra* (sexual "misconduct [by homosexuals] is already covered by the laws and rules which also cover activities that are improper by heterosexual members of the military"). Cf. *Owens v. Brown*, 455 F. Supp. 291, 301 (D.D.C. 1978) (invalidation of ban on service of women on navy vessels would not "involve the court in supervision of military activities").

⁹ The doctrine also rests on the premise that the Commander-in-Chief is satisfied with the policy in question. Cf. *United States v. Robel*, 389 U.S. 258, 261 n.1 (1967) (invalidating act of Congress adopted over Presidential veto). That is decidedly not the case here. See Remarks of President William Clinton, July 19, 1993, *supra* (describing new policy as a "compromise" that "is not identical with some of my own goals" and acknowledging that an attempt to repeal the ban would have been overridden by Congress).

C. The military's continuing policy of discrimination on the basis of sexual orientation cannot survive scrutiny under any constitutional standard.

Even if the Court were to find that the rational relationship test and the deference doctrine are applicable here, the military's continuing policy of discrimination on the basis of sexual orientation cannot withstand scrutiny. Deference does not equate to "abdication." *Rostker*, 453 U.S. at 67. Nor does the doctrine of deference mean that servicemembers are "'stripped of basic rights simply because they have doffed their civilian clothes.'" *Chappell v. Wallace*, 462 U.S. 296, 304 (1983), quoting Warren, *The Bill of Rights and the Military*, 37 N.Y.U. Law Rev. 181, 188 (1962). See also *Emory v. Secretary of the Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987) ("The military has not been exempted from constitutional provisions that protect the rights of individuals.") (citations omitted).¹⁰

Thus, even where deference has been extended, the courts have recognized that there are some lines that the constitution prohibits the military and Congress from crossing. Nothing in *Heller v. Doe*, *supra*, changes this. To the contrary, by holding that a governmental classification "must find some footing in the realities of the subject addressed" and by citing *Cleburne* with approval, 61 U.S.L.W. at 4730 (emphasis added), the Supreme Court recognized that whatever level of scrutiny or

¹⁰ Fulfilling their responsibility, the courts have consistently struck down military policies that run afoul of constitutional mandates. See *Frontiero*, 411 U.S. at 677; *Trop v. Dulles*, 356 U.S. 86 (1958) (penalty for desertion violates Eighth Amendment); *Reid v. Covert*, 354 U.S. 1 (1957) (extension of court martial jurisdiction violates Articles III and Fifth and Sixth Amendments); *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir.), *cert. denied*, 409 U.S. 1076 (1972) (mandatory chapel attendance at service academies violates First Amendment); *Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976) (mandatory discharge for pregnancy violates equal protection and due process); *Owens v. Brown*, 455 F. Supp. 291 (D.D.C. 1978); *Meinhold v. U.S. Dep't of Defense*, 808 F. Supp. 1455 (C.D. Cal. 1993). See also *Waldie v. Schlesinger*, 509 F.2d 508 (D.C. Cir. 1974) (remanding equal protection challenge to policy of excluding women from service academies for plenary trial); *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 655 (1992).

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deference is applied, prejudice and stereotype can *never* pro-
vide a legitimate rationale for discrimination. The policy chal-
lenged here thus fails any conceivable test because each of the
four rationales that the government offers is insufficient.

First, the government claims that discrimination against gay
men and lesbians is necessary to avoid the "tensions and effect
on morale" that would arise from the fact that "many members
of the military services, *whether rightly or wrongly*,"¹¹ would
find the presence of homosexuals to be "disturbing." Def.
Br. 39-40 (emphasis added). *Palmore* and *Cleburne* prohibit the
military from relying on any such rationale.

Second, the government argues that it is rational to exclude
gay men and lesbians to avoid the "fear or embarrassment" that
heterosexuals may feel if they believe that they "are being
viewed as sex objects." Def. Br. 40. As shown in Steffan's
opening brief (at 26-28), there is simply no "footing in the real-
ities of" homosexuality, *Heller*, 61 U.S.L.W. at 4730, for con-
cluding that gay men and lesbians by their very nature represent
such a threat to privacy. Such unfounded "fears" rest on the
stereotype that "homosexuals are psychologically disturbed and
socially disturbing" and that "homosexuals and prostitutes lack
modesty and proper decorum and . . . are generally socially
disruptive given the perversity of their sex lives" propounded
in the article from the "vanity" press by Paul Cameron that the
government cites. This stereotype, like Cameron himself, has
been totally discredited and should be rejected here.¹² Indeed,
the government concedes that it is not that gay men and les-
bians *will* invade the privacy of their fellow servicemembers,

¹¹ Notably, the government has abandoned the district court's contention
that servicemembers would be "rightly" disturbed because gay men and
lesbians are immoral people.

¹² The hateful propaganda that individuals like Cameron have advanced as
"science" has been rejected by the scientific community, the courts, the
United States Public Health Service and the military's own studies. See
A. 624-44, 1412-22, 1870, 1877-83; Public Health Service, 56 Interpreter
Releases 398-99 (Aug. 17, 1979); *Gay Rights Coalition v. Georgetown*
University Law Center, 536 A.2d 1, 34-35 (D.C. 1987) (*en banc*); *Com-*
monwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992).

(footnote continued)

but the *fear* that they will that requires their exclusion. Fears like these that rest on irrational stereotypes cannot provide a legitimate rationale for the policy. *Rostker*, 453 U.S. at 74, 79.

Third, the government contends that permitting service by individuals who merely state that they are gay "might adversely affect retention and recruitment," again citing Paul Cameron. Def. Br. 41. The fact that in its new policy the government provides that "homosexual orientation is not a bar to service entry or continued service" puts the lie to this contention. Even if the government's speculation were to be given credence, however, it remains that any theoretical impact on recruitment and retention would result from the "reality" that gay men and lesbians are disliked by certain members of our society.¹³ The "reality" of these private biases cannot provide legitimate grounds for discrimination.

Finally, the government contends that discrimination on the basis of status is rational because it spares the military the task of conducting "intrusive investigations" to ferret out homosexual conduct. Def. Br. 41. The government's claim is inherently illogical. The lack of privacy in certain aspects of military life makes the detection of disruptive sexual conduct non-intrusive; no "ferreting" is required in an open barracks. What is intrusive is questioning of and inquiry into service-members' thoughts and it is precisely for this reason that the military has adopted a "don't ask, don't pursue" policy. Thus,

(footnote continued)

The patent disregard for the truth reflected in Cameron's writings and activities led to his censure by the American Psychological Association, the Nebraska Psychological Association and the American Sociological Association. Cameron's "expert" testimony was rejected in *Baker v. Wade*, *supra*, and *Gay Student Services v. Texas A & M University*, 737 F.2d 1317, 1330 (5th Cir. 1984). The government's reliance on the rantings of "one of the country's most outspoken anti-homosexuals," C.E. Koop, *Koop: The Memoirs of America's Family Doctor* 208 (1991), is shameful and demonstrates beyond peradventure the indefensibility of the policy under review.

¹³ Cf. A. 1068 (if Southerners were "forced to serve with Negroes, they will cease to volunteer . . . and will not serve with the enthusiasm and high morale that has always characterized the soldiers and sailors of the southern states' ").

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Ben-Shalom's acceptance of this strained rationale for the pol-
icy can no longer be justified.

POINT II

STEFFAN WAS UNLAWFULLY DEPRIVED OF HIS DEGREE.

The government's attempt to defend the district court's find-
ing that Steffan's whirlwind discharge was actually "an
accommodation to an accomplished young man" is belied by
the facts. It remains undisputed that at every stage of the pro-
ceedings, Steffan was seeking to preserve his ability to com-
plete the remaining six weeks of his senior year and receive his
degree. A. 87-90, 378-79, 381-82, 534. Likewise, it remains
undisputed that Steffan waived 72 hours notice of the Perfor-
mance Board hearing only after he was told by the Comman-
dant of Midshipmen that he would not be permitted to complete
his studies, and that he submitted his involuntary resignation
only after he was suspended from class and told that any appeal
of the Academic Board's ruling would be futile. A. 88-91, 381-
82, 535, 1352, 2354. Plainly, the only "accommodation" that
was afforded Steffan was the rushed implementation of his
expulsion from the Academy once it was determined that he
would not be permitted to graduate.¹⁴

The government's further claim that Steffan was not treated
more harshly than other servicemembers facing discharge is
untenable. Since all officers facing discharge for homosexuality
have a right to 30 days notice of their initial hearing, and Navy
and Army officers have the right to "reasonable additional
time" to prepare their defense, it would have been *impossible*
for the discharge proceedings of a Navy, Army or Air Force
officer to be initiated and concluded in one week as was the
case here. A. 1718, 1767-68, 1820.

¹⁴ Thus, the government's speculation that Steffan sought to expedite the
demise of his career in order "to forestall the NIS investigation that was
already in progress" (Def. Br. 45) is unsupported and unsupportable.

The government's final claim that Steffan's sexual orientation distinguishes this case because homosexuals are *sui generis* is also unavailing. The fact remains that Steffan was subjected to psychological evaluation, *i.e.*, that he was treated as though he had a disqualifying psychological condition. A. 536. The related contention that it was not arbitrary to deprive Steffan of his degree because his presence at the Academy for a few more weeks would have undermined discipline, good order and morale is laughable in light of the Navy's "goal" that discharge proceeding be concluded in four months (A.1648) and in light of the terms of the policy that goes into effect on October 1.

CONCLUSION

Accordingly, for the reasons set forth herein and in Steffan's opening brief, the district court's order granting the government's motion for summary judgment should be reversed, and plaintiff-appellant should be granted summary judgment.

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No. 93-55242

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VOLKER KEITH MEINHOLD,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANTS

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Meinhold's
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-55242

VOLKER KEITH MEINHOLD,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,

Defendants-Appellants.

BRIEF FOR THE APPELLANTS

QUESTIONS PRESENTED

1. Whether the district court erred in declaring the military's former policy regarding service by homosexuals unconstitutional where: (1) plaintiff had not exhausted his intramilitary remedies; and (2) plaintiff raised nonconstitutional claims that the court left unresolved.

2. Whether the district court erred in holding that the military's former policy regarding homosexuals violates equal protection and in failing to consider material evidence submitted by the Department of Defense supporting the rationality of that policy.

3. Whether the district court exceeded its authority in granting injunctive relief to persons other than plaintiff in a non-class action where plaintiff sought to enjoin only his own discharge.

STATEMENT OF JURISDICTION

The district court exercised jurisdiction pursuant to 28 U.S.C. § 1331, and it entered a final order and judgment on January 29, 1993. See Excerpts of Record ("ER") at 75. The Government served a timely Rule 59(e) motion, which the court denied by order entered February 19, 1993. See ER at 101. The Government noticed an appeal on March 3, 1993. See ER at 103. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

A. Nature Of The Case. Volker Keith Meinhold, while on active duty as an enlisted member in the Navy, announced his homosexuality on television on May 19, 1992. On August 12, 1992, the Navy honorably discharged Meinhold pursuant to regulations that mandate the discharge of members who declare their homosexuality and thus, "by their statements, demonstrate a propensity to engage in homosexual conduct." See Department of Defense ("DOD") Directive 1332.14.¹ Meinhold, without exhausting his intramilitary remedies, brought this suit alleging that his discharge was substantively and procedurally defective, barred by estoppel, and unconstitutional. Meinhold asked the court to order his reinstatement, declare the relevant regulations unconstitutional, and enjoin DOD from separating him based on his homosexuality.

¹ For this Court's convenience, relevant regulations may be found in the addendum to this brief.

By order entered January 29, 1993, the district court (Judge Terry J. Hatter, Jr.) granted summary judgment for Meinhold, holding that the regulations violated equal protection. The court rescinded Meinhold's discharge and "permanently enjoined [DOD] from discharging or denying enlistment to any person based on sexual orientation in the absence of sexual conduct which interferes with the military mission of the armed forces of the United States." ER at 76. On February 12, 1993, the Government filed a motion under Rule 59(e) advising the court of the on-going policy review directed by the President, and requesting that the court's order, inter alia, be confined to Meinhold. The court denied the motion.

On January 29, 1993 -- the same day that the district court entered its injunctive order -- President Clinton announced that DOD would conduct a comprehensive review of the military's policy regarding homosexuality and submit a draft executive order based on that review by July 15, 1993. The President stated that during the pendency of DOD's review, an interim policy would be implemented whereby service members would no longer be questioned regarding their sexual orientation on induction applications. Further, pursuant to the interim policy, although the military would continue to process members for separation pursuant to the former policy, where the member was subject to separation based solely on his acknowledgement of homosexuality the Attorney General would be authorized to suspend the final discharge and

transfer the member to the standby reserve pending completion of the policy review.²

On July 19, 1993, the President announced a new policy regarding homosexuals in the military. Under the new policy, homosexual conduct will continue to be grounds for separation from the military services,³ but sexual orientation is considered a personal and private matter and will not be a bar to service entry or continued service unless manifested by homosexual acts or evidence that reveals a propensity to commit homosexual acts. The new policy will become effective October 1, 1993.

B. Factual Background And District Court Proceedings.

1. Plaintiff, Volker Keith Meinhold, served in the Navy for about twelve years when, in May 1992, he appeared on television as part of a news segment for ABC's World News Tonight and stated that he was gay. Because military regulations at that time barred service to "persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in

² Persons in the standby reserve do not receive military pay and do not perform military duties on an active-duty basis. Rather, they belong to a military reserve component that is subject to recall in the event of an emergency requiring national mobilization.

³ Homosexual conduct, under the new policy, is a homosexual act, a statement by the service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a service member that he or she is homosexual or bisexual creates a rebuttable presumption that the service member is engaging in homosexual acts or has a propensity or intent to do so. The service member has the opportunity to present evidence that he does not engage in homosexual acts and does not have a propensity or intent to do so.

homosexual conduct," see DOD Directive 1332.14, the Navy convened an administrative discharge board to assess Meinhold's continued suitability for service. Evidence submitted at the board included a tape of the news segment in which Meinhold declared his homosexuality, as well as a critique sheet in which a military subordinate and former student of Meinhold's stated:⁴

I was counseled by [Meinhold] during training and treated in the most irregular and unprofessional way. I'm concerned [sic] about students that come through here in future classes . . . and I hope to see something done about it. . . . I don't think homosexuals should be allowed to serve in the Navy or any military force for that matter. I don't understand where any instructor has the authority or audacity to approach a student and ask him over for dinner and make him aware of the fact that his instructor is "gay." Something needs to be done about this.

ER at 2.

By unanimous vote, the board found that the evidence supported a conclusion that, based on Meinhold's own statement, he was homosexual and therefore unsuitable for continued military service. See DOD Directive 1332.14. The board recommended that Meinhold be discharged, and on August 12, 1992, Meinhold received an honorable discharge. See ER at 24, 27.

On October 6, 1992, without having pursued his administrative remedies before the Board for Correction of Naval Records ("BCNR"), Meinhold brought this suit asking that his discharge be rescinded on the grounds that it was procedurally defective, the Navy was estopped from separating him, and the relevant regula-

⁴ Meinhold's military duties included teaching classes in airborne sonar, aircraft safety, and sonar analysis. See ER at 23.

tions were unconstitutional. The suit was not a class action. Meinhold sought injunctive relief solely on his own behalf in the form of reinstatement and an injunction barring the Navy from discharging him based on his homosexuality. See ER at 16, 32.

On November 6, 1992, the district court granted Meinhold's motion for a preliminary injunction reinstating Meinhold to active duty. See ER at 5. The Government appealed, but the appeal was rendered moot by the district court's subsequent issuance of a permanent injunction, which is the subject of this appeal. See ER at 89, 102.

2. By order entered January 29, 1993, on the parties' cross motions for summary judgment, the court held that the military's policy violated equal protection. See ER at 75, 88. At the outset, the court ruled that the futility doctrine excused Meinhold from exhausting his military remedies. See ER at 84. Then, bypassing Meinhold's nonconstitutional arguments, the district court proceeded straight to the equal protection issue.

The court stated that, to sustain its policy against Meinhold's equal protection challenge, DOD "must establish, through a factual record, that its policy is rationally related to its permissible goals." ER at 84-85. The court then stated -- erroneously -- that DOD's factual record consisted "solely [of] a report produced by the United States General Accounting Office in June of 1992," which the court found was insufficient to sustain the military's policy. The court disregarded three declarations of high-level DOD officials explaining the factual

basis supporting the military's policy. See Declarations of Christopher Jehn, Assistant Secretary of Defense, ER at 52-55; Rear Admiral S. Frank Gallo, U.S. Navy, ER at 65-74; and Captain Gregory A. Markwell, U.S. Navy, ER at 56-64. Based on its review of "scientific and sociological analyses" in the record critical of the military's policy, the court held that the policy violated equal protection. See ER at 85-87.

On this basis, the court rescinded Meinhold's discharge and permanently enjoined DOD "from discharging or denying enlistment to any person based on sexual orientation in the absence of sexual conduct which interferes with the military mission of the armed forces of the United States." ER at 76.

3. On February 12, 1993, the Government served a Rule 59(e) motion requesting that the district court's order be altered to specify that DOD could implement the President's interim policy (see supra pp. 3-4) as to persons other than Meinhold, or that the order be altered so as to be applicable solely to Meinhold. Alternatively, the Government moved for a stay pending appeal to the extent that the order granted relief extending beyond Meinhold. By order entered February 19, 1993, the district court denied the motion. See ER at 101.

4. This appeal followed. On March 3, 1993, the Government filed an emergency motion for a stay pending appeal of the injunctive order to the extent it conferred relief on persons other than Meinhold. On March 12, 1993, this Court denied the motion, observing that "[w]hile there is a legitimate dispute as

to whether the permanent injunction entered by the district court should extend beyond Meinhold, it is difficult to see how appellants will be substantially harmed pending appeal . . . [because] there does not appear to be a conflict between the district court's January 28, 1993 permanent injunction and the [President's interim policy]." ER at 105 (citation omitted).

STANDARD OF REVIEW

This Court reviews grants of summary judgment de novo, viewing evidence in the light most favorable to the non-moving party to determine whether there are any genuine issues of material fact. See High Tech Gays v. DISCO, 895 F.2d 563, 570 (9th Cir. 1990).

SUMMARY OF THE ARGUMENT

Without having exhausted his intramilitary remedies, Meinhold brought this suit seeking reinstatement on the grounds that his discharge lacked an adequate explanation, was procedurally defective, was barred by estoppel principles, and was unconstitutional because application of the Navy's policy regarding homosexuality constituted an unlawful bill of attainder and violated equal protection. Significantly, he repeatedly averred that the district court would not have to reach the constitutional issues because his nonconstitutional arguments mandated reinstatement. Despite these averments, the district court looked past the nonconstitutional arguments and issued a broad constitutional ruling, accompanied by an equally broad injunctive order extending beyond Meinhold, striking down the

Navy's policy on equal protection grounds. We will show that this was reversible error.

In Part I, we show that the court's decision should be vacated and the case remanded for the following alternative reasons: (1) the court erred in adjudicating Meinhold's reinstatement claim without first requiring Meinhold to exhaust his intramilitary remedies, see Part I.A; and (2) the court erred in adjudicating Meinhold's equal protection claim without first resolving the nonconstitutional claims that, according to Meinhold, mandated his reinstatement, see Part I.B.

We show in Part II that the district court erred on the merits in holding that DOD's former policy violated equal protection. Under that policy, military officials concluded as a matter of "considered professional judgment," Goldman v. Weinberger, 475 U.S. 503, 509 (1986) that "the presence of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission." DOD Directive 1332.14. We submit that previous decisions of this Court foreclose debate that it is constitutionally permissible for DOD to conclude that homosexual conduct adversely affects the military. Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981). In an effort to avoid this Ninth Circuit precedent upholding the military's right to separate members for homosexual conduct, the district court here defined the classification in question as

"gays and lesbians who do not engage in prohibited conduct." ER at 84. However, the regulatory language, DOD's reasonable interpretation, and judicial precedent make plain that the policy targets members who have engaged or, as relevant here, will likely engage in homosexual conduct. The policy targets homosexual "conduct -- past, present, and future, but conduct nonetheless." Watkins v. Army, 847 F.2d 1329, 1362 (9th Cir. 1988) (Reinhardt, J., dissenting), vacated, 875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990).

DOD's policy of discharging all members who, through their acts or statements, demonstrate a propensity to commit homosexual acts has repeatedly been held to be a rational exercise of the military's broad discretion to determine the appropriate composition and regulation of the Armed Forces. See Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068, 1074 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990). Moreover, here the Government established, consistent with Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992), by reference to record evidence that the district court failed to consider, that the military's prior policy has a rational basis amply sufficient to survive constitutional scrutiny in the special military context.

Thus, if this Court reaches the merits -- which we argue should be unnecessary given available nonconstitutional grounds for overturning the district court's judgment -- it should

reverse and remand with instructions to enter judgment in favor of DOD. See High Tech Gays v. DISCO, 895 F.2d 563, 574 (9th Cir. 1990).⁵

Finally, we show in Part III that the district court's order is overbroad. Meinhold's suit was not a class action, and he sought injunctive relief only on his own behalf in the form of rescission of his discharge and reinstatement. The district court, instead of resolving the case before it, exceeded its authority in enjoining DOD from "discharging or denying enlistment to any person based on sexual orientation" The district court's ruling may interfere with implementation of the President's new policy regarding homosexuality in the military. The unbridled scope of the district court's order could be construed to require that the new policy be subjected to district court scrutiny before it can be implemented -- a complete reversal of the relationship between the courts and the Political Branches, which are given primary constitutional

⁵ Although the district court did not address it, we note that Meinhold's bill of attainder claim is insubstantial for two reasons. First, this Court has squarely held that the prohibition on bills of attainder does not apply to action, like this, that is administrative in nature, but rather to legislative action that is designed to impose punishment without a judicial trial. Marshall v. Sawyer, 365 F.2d 105, 111 (9th Cir. 1966), cert. denied, 385 U.S. 1006 (1967). Second, and in any event, the policy challenged by Meinhold is not punishment. Rather, it is "an exercise of the [military's] legitimate regulatory power to purge its ranks" of persons it deems unsuitable for further military service. See Alberico v. United States, 783 F.2d 1024, 1028 (Fed. Cir. 1986) (citing cases). Accord Garrett v. Lehman, 751 F.2d 997, 1002 (9th Cir. 1985) (administrative discharge process does not impose punishment, but determines suitability for military service).

responsibility for military matters. Separation of powers principles require the district court to defer to the Political Branches and permit them to make in the first instance their own determination of the appropriate policy concerning homosexuals in the military free from the threat of a potential contempt sanction. Only after that new policy has been applied to individual service members would it be appropriate for the courts to hear and decide challenges to its constitutionality. Because Meinhold can be provided with complete relief by an injunction limited solely to barring his discharge, the injunctive order must be vacated to the extent it provides benefits to nonparties.

ARGUMENT

I.

THE DISTRICT COURT PREMATURELY ADJUDICATED MEINHOLD'S CONSTITUTIONAL CLAIM WITHOUT REQUIRING EXHAUSTION, AND WITHOUT FIRST RESOLVING THE NONCONSTITUTIONAL CLAIMS.

A. The District Court Erred In Not Requiring Meinhold To Exhaust His Intramilitary Remedies.

Binding precedent requires that service members exhaust their intramilitary remedies before attempting to adjudicate military-related claims. See Trerice v. Pedersen, 769 F.2d 1398, 1401 (9th Cir. 1985); Mollnow v. Carlton, 716 F.2d 627, 631-32 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984). The exhaustion doctrine applies with particular force in cases, like this, where a discharged service member seeks reinstatement, because premature or unnecessary judicial intervention in such cases implicates separation of powers concerns and may adversely affect military morale and discipline. See Muhammad v. Secretary of the

Army, 770 F.2d 1494, 1495 (9th Cir. 1985) ("Strict application of the exhaustion requirement in military discharge cases maintains the balance between military authority and the federal courts."). Accord Pruitt v. Cheney, 963 F.2d 1160, 1166-67 & n.6 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992).

Strict application of the exhaustion doctrine in discharge cases also promotes judicial economy in several respects. First, the military review process produces a record for judicial review, which is particularly beneficial in cases, such as Meinhold's, involving factual issues or questions regarding the proper construction and application of military regulations. See Muhammad, 770 F.2d at 1495. Second, the military review process may accord the member the relief he seeks, thereby obviating the need for judicial review. See Noyd v. Bond, 395 U.S. 683, 696 (1969). Finally, requiring a service member to exhaust administrative remedies may moot a member's constitutional claim and thereby "vindicate the fundamental doctrine that courts should avoid passing on unnecessary constitutional questions." Bois v. Marsh, 801 F.2d 462, 468 n.11 (D.C. Cir. 1986) (quoting Sohm v. Fowler, 365 F.2d 915, 919 (D.C. Cir. 1966)). Accord Schlesinger v. Councilman, 420 U.S. 738, 757-60 (1975).

Thus, significant policy concerns -- both constitutional and practical in nature -- support vigorous application of the exhaustion doctrine to discharged service members who seek reinstatement. Exceptions are not favored and are limited to the

rare instance where: (1) the administrative process does not provide plaintiff with an opportunity for adequate relief; (2) exhaustion would be futile; (3) the plaintiff will suffer irreparable harm absent immediate judicial relief; or (4) substantial constitutional questions are raised. See Muhammad, 770 F.2d at 1495. None of these exceptions applies here.

First, the intramilitary appeal process provides Meinhold with an opportunity for adequate relief. Meinhold sought reinstatement on regulatory, statutory, equitable, and constitutional grounds. See ER at 27-32. Because the BCNR is fully empowered to review these claims and, acting through the Secretary, provide appropriate relief, including reinstatement, retroactive promotion, and back pay, exhaustion was required. See 10 U.S.C. § 1553(b); 32 C.F.R. § 723.3(e).

Second, by Meinhold's own concession, this is not the type of case that implicates the futility exception to exhaustion. Meinhold himself characterized this case as being "intensely factual" See Supplemental Memorandum of Volker Keith Meinhold at 19, No. 93-1077 (Fed. Cir.). Meinhold advanced three nonconstitutional and two constitutional arguments supporting his reinstatement, and he argued that "it was doubtful that [the constitutional] arguments would ever be reached," because his nonconstitutional arguments (i.e., his APA claim that the discharge lacked a reasoned explanation, his claim that the Navy violated its own regulations, and his claim that the military was estopped from discharging him) mandated reinstatement. Id. at 3-

4.⁶ Under these circumstances, where the nonconstitutional issues involve questions of fact, procedure, and regulatory construction that Meinhold contends should be dispositive of his reinstatement claim, exhaustion should be the rule.

The district court's invocation of the futility exception was therefore error. Contrary to the district court's suggestion, see ER at 84, the Government did not concede that BCNR review would be futile. Further, contrary to the district court's ruling, see id., this Court's decision in Watkins does not support applying the futility exception here, because unlike the claimant in Watkins, Meinhold contended that issues of fact, procedure, and regulatory construction exist that should be dispositive of his reinstatement claim.⁷ Under these circumstances, exhaustion is clearly warranted. Even if Meinhold did not obtain the desired relief from the BCNR, the military appeal process would have the laudatory effect of preparing a record for judicial review. As the Federal Circuit stated:

To arrive at the prediction that pursuit of a remedy [with the BCNR] would be "useless," a court must in effect hear the case, thus often strangling the exhaustion requirement at the outset. Beyond the

⁶ See also Plaintiff's Response to Defendants' Application for a Stay of Proceedings at 3, 5 (Oct. 20, 1992) (Meinhold asserts that the equal protection argument "need not even be reached" because the other arguments "are determinative of the outcome of this action"); id. at 3 (Meinhold asserts that "the equal protection claim 'is [not] central to this case'").

⁷ As we show infra Part I.B, to the extent that Watkins is relevant here, it requires that the district court's decision be vacated and the case be remanded for further proceedings, because the court improperly resolved the constitutional issue while leaving the nonconstitutional issues unresolved.

purely conjectural context of many "futility" predictions, they tend to defeat the very purpose of the requirement, which is to give the military decision-maker a chance to determine whether a complainant's pursuit in that particular case may be meritorious and, if not, a chance to say why.

Williams v. Secretary of the Navy, 787 F.2d 552, 559 (Fed. Cir. 1986). Accord Councilman, 420 U.S. at 757-60; Noyd, 395 U.S. at 696. In short, the district court's application of the futility exception, in addition to ignoring precedent, disregarded Meinhold's own arguments. Cf. Health Equity Resource Urbana, Inc. v. Sullivan, 927 F.2d 963, 966 (7th Cir. 1991) (claimant's administrative appeal "may, probably will, fail, but that does not make it futile; most appeals fail").

Third, this is not a case where Meinhold would have suffered irreparable harm if he had been required to exhaust his administrative remedies. Meinhold alleged that immediate judicial review was warranted because he would otherwise be "deprive[d] . . . of his lifelong career and sole livelihood," and his skills as a sonar analyst and instructor would deteriorate. See ER at 28. This type of harm, however, is "common to most discharged employees . . . [and] will not support a finding of irreparable injury, however severely [it] may affect a particular individual." Hartikka v. United States, 754 F.2d 1516, 1518 (9th Cir. 1985) (emphasis added) (quoting Sampson v. Murray, 415 U.S. 61, 92 n.68 (1974)).

Finally, this is not a case where the existence of a substantial constitutional question rendered exhaustion inappropriate. As this Court has held, the existence of constitutional

claims does not alone absolve a service member from exhausting administrative remedies, because the military review process will benefit judicial review by creating a record, explicating the proper construction and application of the relevant regulations, and possibly mooting some claims. See Muhammad, 770 F.2d at 1496; Trerice, 769 F.2d at 1401 (citing cases). Exhaustion was especially warranted in this case where, by Meinhold's own assertion, the constitutional challenges were incidental in the sense that they would likely be mooted by resolution of the nonconstitutional challenges. See supra note 6.

In sum, the district court's failure to adhere to the exhaustion doctrine was reversible error. Its precipitous adjudication of Meinhold's suit: (1) deprived the Navy of the opportunity to consider Meinhold's claims in the first instance; (2) deprived the judiciary (both the district court and this Court) of the benefit of the military's review; and (3) resulted in the premature, and perhaps unnecessary, resolution of a constitutional claim that, by Meinhold's own assertion, should have been deferred. This Court should therefore vacate and remand with instructions to dismiss Meinhold's complaint pending Meinhold's exhaustion of administrative remedies.

The Supreme Court's recent decision in Darby v. Cisneros, 61 U.S.L.W. 4679 (U.S. June 21, 1993), does not absolve Meinhold from exhausting his intramilitary remedies. There, the Supreme Court held that courts may not "impose an exhaustion requirement

as a rule of judicial administration where the agency order has already become 'final' under § 10(c) [of the APA, 5 U.S.C. § 704]." 61 U.S.L.W. at 4684. That holding is no bar to exhaustion here for two reasons. First, as the Court stated, "the exhaustion doctrine continues to apply as a matter of judicial discretion in cases not governed by the APA." Id. Because Meinhold brought four distinct claims, only one of which purports to be "governed by the APA," see ER at 27-31, the exhaustion doctrine "appl[ies] as a matter of judicial discretion" and binding precedent. Second, and in any event, absent legislative evidence mandating a contrary result, exhaustion should continue to be the rule for service members who bring APA claims for grievances related to military service. Pursuant to its "plenary constitutional authority over the military, [Congress] has established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure." Chappell v. Wallace, 462 U.S. 296, 302 (1983). See 10 U.S.C. §§ 1551 et seq. Congress did not intend that service members circumvent their intramilitary remedies by the expedient of rushing to the courthouse with an APA claim. Cf. Feres v. United States, 340 U.S. 135, 146 (1950) (in military context, conventional tools of statutory construction yield to the imperative that, absent an "express congressional command," courts may not impute to Congress an intent to have the judiciary unnecessarily interfere in military matters).

B. The District Court Erred In Resolving The Constitutional Issue While Leaving The Nonconstitutional Issues Unresolved.

It is firmly established that a court ought not reach out and resolve constitutional issues when a case can be resolved on nonconstitutional grounds. See Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501-02 (1985); Allen v. Wright, 468 U.S. 737, 750-52 (1984); United States v. Raines, 362 U.S. 17, 21 (1960); Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). In the instant case, despite the fact that Meinhold raised three nonconstitutional issues that he asserted should mandate his reinstatement, the district court looked past these issues and resolved Meinhold's equal protection claim. This was serious error.

Dispositively, in Watkins, this Court admonished that a court should refrain from "reach[ing] constitutional issues when the case could have been decided narrowly under the doctrine of equitable estoppel." See Watkins, 875 F.2d at 706. Because the district court failed to consider or resolve Meinhold's equitable estoppel claim pursuant to Watkins before reaching the equal protection issue, this Court should vacate the court's decision and remand for disposition of that issue.

II.

THE DISTRICT COURT ERRED IN HOLDING THAT THE MILITARY'S FORMER POLICY REGARDING HOMOSEXUALITY VIOLATES EQUAL PROTECTION.

1. The President, in consultation with Congress, is given the responsibility by the Constitution for commanding the Armed Forces in a manner that protects our national security. In recognition of this significant constitutional mandate, the courts have accorded significant deference to the "considered professional judgment" of the "appropriate military officials" regarding the proper composition of the Armed Forces. Goldman v. Weinberger, 475 U.S. 503, 509 (1986). The Supreme Court has observed that with respect to the "complex, subtle, and professional decisions as to the composition . . . and control of a military force," it is "difficult to conceive of an area of governmental activity in which the courts have less competence." Rostker v. Goldberg, 453 U.S. 57, 65 (1981). Thus, whatever standards might apply in the civilian context, on questions of the appropriate composition and regulation of the Armed Forces, the courts must extend great deference to any rational exercise of professional military judgment.

Under DOD's former policy, "[a]ppropriate military officials" concluded, as a matter of "considered professional judgment," Goldman, 475 U.S. at 509, that "the presence of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual

conduct, seriously impairs the accomplishment of the military mission." See DOD Directive 1332.14.

We submit that previous decisions of this Court foreclose debate over whether it is constitutionally permissible for DOD to have concluded that homosexual conduct adversely affects the military. In Beller v. Middendorf, this Court upheld the military's policy "requiring discharge of all who have engaged in homosexual conduct." 632 F.2d 788, 812 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981). In sustaining the Navy's policy as constitutionally permissible, this Court stated that the Navy acted within its discretion in concluding that its policy was necessary "to protect the fabric of military life, to preserve the integrity of the recruiting process, to maintain the discipline of personnel in active service, and to insure the acceptance of men and women in the military, who are sometimes stationed in foreign countries with cultures different from our own." 632 F.2d at 811. The Beller holding remains the law of this Circuit, and was recently reaffirmed in Schowengerdt v. United States, 944 F.2d 483, 489-90 (9th Cir. 1991), cert. denied, 112 S. Ct. 1514 (1992). Accord High Tech Gays v. DISCO, 895 F.2d 563 (9th Cir. 1990).

In an effort to avoid this line of Ninth Circuit precedent upholding the military's right to separate members for homosexual conduct, the district court defined the classification as "gays and lesbians who do not engage in prohibited conduct." ER at 84. That is wrong. Under the military's regulations, the relevant

classification is persons who the military reasonably concludes either have committed or, as relevant here, are likely to commit, homosexual acts based on their admitted "desire" and "propensity" to engage in homosexual conduct. The regulatory language makes plain that the policy targets members who have engaged or, as relevant here, will likely engage in homosexual conduct. The military policy applicable to Meinhold states, inter alia, that the "presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission." See DOD Directive 1332.14. Similarly, the regulatory definition of "homosexual" is linked to homosexual conduct and the propensity to engage in homosexual conduct. See id. ("homosexual" defined as person who "engages in, desires to engage in, or intends to engage in homosexual acts").

As Judge Reinhardt has concluded, "the regulations are targeted at conduct -- past, present, and future, but conduct nonetheless." Watkins v. Army, 847 F.2d 1329, 1362 (9th Cir. 1988) (Reinhardt, J., dissenting), vacated, 875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990). The Seventh Circuit and the Federal Circuit have both held that the regulations target past and prospective homosexual conduct. See Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068, 1074 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990).

In admitting his homosexuality, Meinhold admitted under the regulations -- at the very least -- that he had a "desire" and "propensity" to commit homosexual acts. See DOD Directive 1332.14. Absent a contrary showing or assertion by Meinhold, the Navy permissibly could infer that he would probably commit such acts, if he had not already done so. See Department of Navy v. Egan, 484 U.S. 518, 527-30 (1988) (courts must show the "utmost deference" to "[p]redictive judgment[s]" by the Executive Branch in matters relating to the military); cf. NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 788-89 (1990) (rebuttable presumptions are valid when "proof of one fact renders the existence of another fact 'so probable that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it'").⁸

⁸ In Pruitt, this Court stated that the relevant classification was homosexual "status," but did not explain its use of the term precisely. See 963 F.2d at 1163. Notably, the term homosexual "status" is not to be found in the regulations, which, as discussed supra, speak in terms of homosexual conduct and the propensity to engage in such conduct. The meaning that DOD attributes to the regulatory term "desire" is informed by its context and by the term "propensity." Pursuant to DOD's interpretation, a service member's expressed "desire" to commit homosexual acts evidences more than an abstract, ephemeral, or suppressible whim. Like acts themselves and like intentions, "desire" in the relevant sense evidences a "propensity," or an "often intense natural inclination," Webster's New Collegiate Dictionary 943 (9th ed. 1990), to commit serious regulatory violations. Absent a credible contrary showing by the member, the military reasonably concludes that a member who expresses a homosexual "desire" will act on the basis of his sexual "propensity." If a member shows that he has no such propensity, the regulations do not mandate his separation. As discussed above, DOD's reasonable interpretation of its own regulations must be accepted as the basis for evaluating Meinhold's equal protection challenge. See Rostker, 453 U.S. at 75.

In sum, the relevant classification is not, as the district court erroneously held, homosexuals "who do not engage in [homosexual] conduct." ER at 84. Rather, both precedent and DOD's reasonable construction of its regulations show that the relevant classification is persons who the Navy has concluded have committed or, as pertinent here, will likely commit homosexual acts. In holding to the contrary, the district court failed to test the policy, as the Supreme Court has directed, "in light of the purposes [DOD] sought to achieve." Rostker, 453 U.S. at 75.

In Beller, this Court found that the military's policy with respect to homosexual conduct satisfied even heightened constitutional scrutiny. Subsequently, this Court held that only rational basis review was required. See High Tech Gays, 895 F.2d at 571. The narrow question presented here is whether, in the special context of the Armed Forces, equal protection principles require the military to retain members who it believes have committed homosexual acts or are sufficiently likely to commit future homosexual acts, when it has made the policy determination that retention of such individuals impairs its ability to maintain an effective fighting force. Stated differently, the question is whether the Constitution compels the military to retain members who it reasonably concludes will commit acts that it has further concluded will impair the accomplishment of the

military mission. See DOD Directive 1332.14. To ask this question is to answer it.⁹

2. In Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992), this Court reversed a district court's dismissal of a service member's challenge to the military's policy on homosexuality, and remanded for the court to determine whether the military could produce a rational basis in the record, to be evaluated by the district court, to justify the policy. This Court indicated that, on remand, the reasons put forth on the record underlying the military's policy would be entitled to the utmost deference. See Pruitt, 963 F.2d at 1166-67.¹⁰

⁹ DOD's policy to process for discharge members who, through their acts or statements, demonstrate a propensity to commit homosexual acts serves to protect what this Court has found to be a reasonable prospect of interference with the unique requirements of military effectiveness, see Beller, 632 F.2d at 811-12, while at the same time conserving scarce resources and attempting to accommodate individual privacy. See Ben-Shalom, 881 F.2d at 464.

¹⁰ The Supreme Court's recent decision in Heller v. Doe, 61 U.S.L.W. 4728 (U.S. June 24, 1993), shows that this Court incorrectly viewed Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), as requiring the military to produce objective record evidence, to be weighed by the court, to justify its policy. In Heller, the Supreme Court stated that a challenged classification evaluated under the rational basis standard "must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." 61 U.S.L.W. at 4730 (quoting FCC v. Beach Communications, Inc., 61 U.S.L.W. 4526, 4528 (U.S. June 1, 1993)). Moreover, such classifications are "not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." Id. (citing cases). The "burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it whether or not the basis has a foundation in the record." Id. (quotation marks and citation omitted). Contrary
(continued...)

Here, consistent with Pruitt, the Government supported its then-existing policy by reference to record evidence, including a GAO Report of June 1992, see ER at 84, a Navy Times article discussing the policies of foreign militaries, see Memorandum In Opposition to Plaintiff's Motion For Summary Judgment (Jan. 11, 1993), and three declarations of high-ranking DOD officials explaining and justifying the policy Meinhold challenges. See Declarations of Assistant Secretary of Defense Christopher Jehn; Rear Admiral S. Frank Gallo; Captain Gregory A. Markwell, ER at 52-74. This record evidence showed that the military could rationally conclude that the former policy promoted, inter alia: (1) the privacy interests of heterosexual members; (2) the military's interest in discharging service members before their propensity to commit impermissible acts ripened into regulatory or criminal misconduct; (3) discipline, recruitment, and retention, because a less broad prohibition might be understood as tacit approval or tolerance of misconduct; and (4) economy, because a less broad prohibition could have a significant budgetary impact if it required constructing separate berthing and sanitary areas for homosexuals.

Without explanation, the district court failed to consider DOD's declarations. The district court stated -- erroneously -- that the Navy "rest[ed] solely on [the GAO Report of June 1992],"

¹⁰ (...continued)
to this Court's understanding in Pruitt, the Supreme Court did not "purport to apply a different standard of rational-basis review [in Cleburne]." Id.

ER at 85, and the court found (also erroneously we submit) that this Report in conjunction with the military's considered professional judgment was insufficient to sustain the homosexual policy. The court then proceeded to strike down the policy based on its assessment of record evidence that was critical of the policy. See ER at 85-88. This was error.¹¹

The declarations submitted by DOD, especially when read against the backdrop of precedent and DOD's policy statement, support the rationality of DOD's policy regarding homosexuality. Every court of appeals, including this one, that has reached the merits has upheld DOD's policy against constitutional attack. See Schowengerdt v. United States, 944 F.2d 483 (9th Cir. 1991), cert. denied, 112 S. Ct. 1514 (1992); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984); Rich v. Secretary of the Army, 735 F.2d 1220

¹¹ Meinhold may argue that the district court properly ignored DOD's declarations because they "exceeded the proper scope of [DOD's] reply brief" for summary judgment, and they were not written "on 28-lined paper" as required by local rule. See Plaintiff's Ex Parte Application For Order Striking Improperly Submitted Declarations (Jan. 28, 1993). Such an argument would lack merit. First, the court did not strike the declarations, so they were indisputably part of the record that the court was obliged to consider. Second, even assuming that the submission of the declarations was procedurally defective in some respect, it would have been reversible error -- given the magnitude of the issue involved -- for the district court to strike the declarations sub silentio and adjudicate the issue without first giving DOD an opportunity to cure the defect. The court certainly could not enter a nationwide injunction and pretermitt a process of policy review by the Political Branches on that basis.

(10th Cir. 1984); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981). See also Steffan v. Cheney, 780 F. Supp. 1 (D.D.C. 1991) (appeal pending).

Moreover, this Court may take notice of the testimony given during extensive hearings before Congress in the recent reconsideration of the military's policy regarding homosexuals. In particular, the Secretary of Defense, the Chairman of the Joint Chiefs of Staff ("JCS"), the Vice Chairman of the JCS, and each service chief supported with forceful and unambiguous testimony the policy of discharging persons who commit, or have a propensity to commit, homosexual acts. See Hearing Before the Senate Committee on Armed Services To Receive Testimony On DOD Policy On The Service Of Gay Men And Lesbians In The Armed Forces, 103rd Cong., 1st Sess. at 38-39, 78, 88, 113, 134 (July 20, 1993). Indeed, the reasons that this Court and other courts have accepted as sufficient to support the military's former homosexual discharge policy were discussed at length in this hearing and explicitly ratified by political and military officials who are entrusted under the Constitution with establishing suitability criteria for service in the Armed Forces. See, e.g., id. at 16 (policy promotes morale in all-volunteer military); id. at 17, 25, 28 (policy respects privacy of service members who, because of unique nature of military service, must live in close quarters); id. at 25, 30, 31, 33, 37 (policy promotes unit cohesion); id. at 31, 35 (policy promotes military discipline, dedication, and selfless service); id. at 53

(policy promotes recruiting ability); id. at 54-55 (policy promotes combat readiness); id. at 88 (policy promotes compliance with regulatory and statutory standards of conduct); id. at 129 (policy promotes acceptability of service in Armed Forces). It would be remarkable to conclude that such policy considerations so recently reaffirmed at the highest levels of the military after thorough review are constitutionally irrational.¹²

Meinhold may object to the policy as being overbroad and unfair as applied to him. But see Declaration of Captain Gregory A. Markwell, ER at 56-64 (Meinhold's commanding officer discusses how "Meinhold's presence . . . has reduced morale, efficiency, and mission focus within the command"). Such objections are irrelevant in the context of an equal protection challenge involving the rational basis test: "Nearly any statute which classifies people may be irrational as applied in particular cases. See Weinberger v. Salfi, 422 U.S. 749 (1975). Discharge of [Meinhold] would be rational, under minimal scrutiny, not because [his] particular case[] present[s] the dangers which justify Navy policy, but instead because the general policy . . . is rational." Beller, 632 F.2d at 808-09 n.20.

3. Finally, in Pruitt, 963 F.2d at 1165, this Court suggested that, in light of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), this Court's decision in Beller may require reexamination. We submit that the applicability of

¹² The above-cited transcript of the Senate Armed Services hearing has not yet been issued in final form. We will submit a copy of the published transcript when it is issued.

Cleburne in the present context is extremely limited because Cleburne was not a military case. See Rostker, 453 U.S. at 67 ("the [constitutional] tests and limitations to be applied [in the military] may differ [from the civilian] context"); Middendorf v. Henry, 425 U.S. 25, 43, 49-50 (1976) (same). To the extent Cleburne is relevant, however, it does not cast doubt on the validity of DOD's policy.

The Supreme Court stated in Cleburne that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like." 473 U.S. at 448. As we showed supra, the instant record explains how the military could reasonably conclude that the policy at issue in this case promoted operational efficiency and effectiveness in the military context. These concerns unquestionably are "properly cognizable" by the military when it establishes suitability criteria for service members, see Cleburne, 473 U.S. at 448, and this Court has held that these concerns have a "basis in fact [and] are adequate to sustain the regulation in its military context." Beller, 632 F.2d at 812. See also High Tech Gays, 895 F.2d at 571-73.

III.

IN ANY EVENT, THE DISTRICT COURT'S INJUNCTION IS OVERLY BROAD INsofar AS IT EXTENDS BEYOND MEINHOLD'S OWN DISCHARGE.

The district court enjoined DOD from "discharging or denying enlistment to any person based on sexual orientation in the absence of sexual conduct which interferes with the military mission of the armed forces of the United States." ER 76 (emphasis added). Even if this Court were to uphold the decision below on the merits, this order is plainly overly broad. It should apply only to Meinhold, not to "any person."¹³ This suit is not a class action, and Meinhold, the only plaintiff, can be provided complete relief by an injunction limited solely to barring his own discharge. Indeed, he sought no broader injunction. Moreover, the order cannot properly apply to enlistments. Neither Meinhold's nor any other person's enlistment was ever an issue in this case. Thus, even if it were otherwise correct, the injunction must be narrowed.

It is a fundamental principle that an injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Califano v. Yamasaki, 442 U.S. 682, 702 (1979). This Court has squarely held that district courts may not extend injunctive relief to nonparties where no class action has been certified, except in the narrow circum-

¹³ This Court did not decide this issue in its order on our emergency stay motion, but it stated that "there is a legitimate dispute as to whether the permanent injunction entered by the district court should extend beyond Meinhold" ER at 105.

stance where that relief is incidentally necessary to give the named parties a complete remedy. Zepeda v. United States INS, 753 F.2d 719, 727-730 & n.1 (9th Cir. 1983) (holding that, in the absence of class certification, preliminary injunctive relief may cover only the named plaintiffs). Although Zepeda involved a preliminary injunction, the same principles are applicable to permanent injunctions. See Bresgal v. Brock, 843 F.2d 1163, 1170-1171 (9th Cir. 1987).

In the instant case, Meinhold, the only plaintiff, never sought class certification, and he requested injunctive relief only on his own behalf. ER at 16, 32. That Meinhold sought no broader injunction is sufficient in itself to render the nationwide injunction improper. See Thomas v. County of Los Angeles, 978 F.2d 504, 510 (9th Cir. 1992); Meyer v. Brown & Root Constr. Co., 661 F.2d 369, 374 (5th Cir. 1981). Further, an order reinstating Meinhold and enjoining the Navy from applying its policy to him would have provided him with complete relief. The district court's order, however, sweeps with the generality of a legislative enactment rather than a judicial decree in providing relief to "any person" who seeks enlistment or retention in the military. The order cannot be justified as necessary to redress any legal wrong to any party before the court, and, for that reason also, it exceeded the court's remedial authority.

If district courts were empowered, in the absence of class certification, to grant injunctive relief to persons other than

the named plaintiffs, there would be no need for class actions.

As this Court explained in Zepeda:

Whenever any individual plaintiff suffered injury as the result of official action, he could merely file an individual suit as a pseudo-private attorney general and enjoin the government in all cases. But such broad authority has never been granted to individual plaintiffs absent certification of a class.

* * * * *

[O]ur legal system does not automatically grant individual plaintiffs standing to act on behalf of all citizens similarly situated. A person who desires to be a "self-chosen representative" and "volunteer champion" . . . must qualify under [Fed. R. Civ. P.] 23. To be sure, failure to grant class relief may leave a government official -- temporarily -- in a position to continue treating nonparties in a manner that would be prohibited with respect to named plaintiffs. But that is the nature of the relief.

753 F.2d at 730 n.1 (citation omitted). Similarly, in Bresgal v. Brock, 843 F.2d 1163, 1170-1171 (9th Cir. 1987), this Court held that "[w]here relief can be structured on an individual basis, it must be narrowly tailored to remedy the specific harm shown," and an injunction should not extend beyond giving the "prevailing parties the relief to which they are entitled."

In opposing our emergency stay, Meinhold advanced four arguments in an attempt to defend granting injunctive relief to other individuals. These arguments lack merit.

First, Meinhold made the breathtaking argument that a nationwide injunction is "appropriate because the DOD is a party to the suit." Stay Opp. at 12. Under that view, every injunctive action against the Government becomes a class action even though the plaintiffs fail to meet the standards for class certification

established by Federal Rule of Civil Procedure 23. As discussed above, this Court has already specifically rejected that view. Zepeda v. United States INS, 753 F.2d 719, 730 n.1 (9th Cir. 1983).¹⁴

Second, Meinhold claimed "the [nationwide] injunction is necessary to provide Meinhold complete relief. . . . [A]bsent [a nationwide] injunction, the relief granted Meinhold would be illusory because . . . he . . . would be perpetually subject to future unlawful and discriminatory discharges" Stay Opp. at 12. Notably, the nationwide injunction which Meinhold contended in this Court is essential is not the relief he requested in the district court. See ER at 32.¹⁵ In any event, Meinhold's argument provides no justification at all for any injunction extending beyond Meinhold. If he believes that an injunction provides "illusory" relief and leaves him "perpetually subject to

¹⁴ If Meinhold were correct that class-wide relief can appropriately be entered in every individual case against the Government, the Government would have a powerful incentive to appeal every adverse merits decision for fear that, after the time for appeal had run and the decision had become final, it would be supplemented by a nationwide injunction. The number of appeals could then create an overwhelming burden for the courts of appeals. In part for this reason, the Supreme Court held that the Government is entitled to rely on the fact that a judgment applies only against the particular plaintiff so the Government is not estopped from relitigating the same issue in another case brought by a different plaintiff. United States v. Mendoza, 464 U.S. 154, 159-161 (1984).

¹⁵ Meinhold's amended complaint did seek "any and all relief, other than money damages, as the Court deems just." ER at 32. As the D.C. Circuit has recently held, that "boilerplate language . . . is too slender a reed upon which to rest a nationwide injunction" in a non-class action. Lever Brothers Co. v. United States, 981 F.2d 1330, 1338 (D.C. Cir. 1993).

future unlawful" action, the remedy is to seek modification of the injunction as it applies to him. Thousands of employment discrimination cases involving both civilian and military employees are resolved each year by the federal courts in which the individual plaintiff is provided complete relief by an injunction limited solely to that individual. Meinhold's case is no different.

Third, Meinhold argued that a nationwide injunction is appropriate "because Meinhold challenged the constitutionality of the Navy's regulations on their face" Stay Opp. at 12. That Meinhold sought a declaration striking down the regulations on their face, however, does not justify the broad injunction issued by the district court. There is an important difference between injunctive and declaratory relief that Meinhold's argument neglects. Under United States v. Mendoza, 464 U.S. 154 (1984), a declaration that the Navy's regulations are invalid would be binding only as between the Navy and Meinhold, and would not have left the defendants potentially subject to contempt sanctions for implementing their regulations as to all other service members. See Steffel v. Thompson, 415 U.S. 452, 471 (1974); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 155 (1963). There is no warrant for Meinhold to use contempt proceedings in this suit as a means for controlling the military's policy as to other homosexual service members with respect to either their enlistments or their discharges. See Ameron, Inc. v. United States Army Corps of Eng'rs, 787 F.2d 875, 887-891, modified on

other grounds, 809 F.2d 979 (3d Cir. 1986), cert. dismissed, 488 U.S. 918 (1988) (narrowing injunction in constitutional case to bar the enforcement of agency circular only against the named plaintiff).¹⁶

Fourth, Meinhold argued (Stay Opp. at 13-14) that a nationwide injunction is appropriate under Soto-Lopez v. New York City Civil Service Comm'n, 840 F.2d 162 (2d Cir. 1988). There, the Second Circuit stated that "an injunction is an appropriate remedy especially when . . . it is conceded that the officials will otherwise continue to enforce the unlawful provisions against some who are not parties to the suit." 840 F.2d at 168. That test conflicts with the test that this Court adopted in Zepeda and Bresgal. The Soto-Lopez test renders Federal Rule of Civil Procedure 23 superfluous for injunctive actions against the Government in that it allows individuals to obtain class-wide injunctions without satisfying the requirements for a class action even where such broad relief is not necessary to redress the individual claims before the court. Soto-Lopez is also inconsistent with the Supreme Court's holding in Baxter v. Palmigiano, 425 U.S. 308, 311 n.1 (1976), that an "action is not properly a

¹⁶ Meinhold relied (Stay Opp. at 12-13) upon Decker v. O'Donnell, 661 F.2d 598 (7th Cir. 1980), but that precedent dealt with a different issue. Decker affirmed an injunction barring the Secretary of Labor from placing federally funded CETA workers in sectarian schools nationwide. Decker shows only that an injunction can impose burdens on the defendants nationwide with respect to the named plaintiffs; it provides no support for an injunction that confers benefits upon nonparties.

class action" without the identification of the class and its certification, neither of which occurred in the present action.

Soto-Lopez stands alone. The Second Circuit has never relied upon its holding regarding the scope of injunctions. The other courts of appeals that have addressed this issue agree with this Court, not the Second Circuit. E.g., Lever Brothers Co. v. United States, 981 F.2d 1330, 1338 (D.C. Cir. 1993); Brown v. Trustees of Boston Univ., 891 F.2d 337, 361 (1st Cir. 1989), cert. denied, 496 U.S. 937 (1990); Everhart v. Bowen, 853 F.2d 1532, 1538-1539 (10th Cir. 1988), rev'd on other grounds, 494 U.S. 83 (1990); Ameron, Inc. v. United States Army Corps of Eng'rs, supra; Professional Ass'n of College Educators v. El Paso County Community College Dist., 730 F.2d 258, 273-274 (5th Cir.), cert. denied, 469 U.S. 881 (1984); Davis v. Romney, 490 F.2d 1360, 1366 (3d Cir. 1974); Tape Head Co. v. RCA Corp., 452 F.2d 816, 819 (10th Cir. 1971).¹⁷

¹⁷ Some decisions indicate that injunctive relief can extend beyond the parties in a non-class action under Title VII. Gregory v. Litton Systems, Inc., 472 F.2d 631, 633-634 (9th Cir. 1972) (dicta); Evans v. Harnett County Bd. of Educ., 684 F.2d 304, 306 (4th Cir. 1982); Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1136 (11th Cir. 1984) (dicta); Meyer v. Brown & Root Constr. Co., 661 F.2d 369, 373-374 (5th Cir. 1981) (dicta). See also, 7A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1771 at p. 409 (2d ed. 1986). Those decisions were supported by the broad provision in Title VII that "the court may enjoin the respondent from engaging in [an] unlawful employment practice" 42 U.S.C. 2000e-5(g). No comparable remedial statute applies to this case. In addition, the remedy sought in discrimination cases often is a desegregated workplace or facility, and, to accomplish that objective, the decree must provide benefits to other members of the group discriminated against who are not parties to the suit. Zepeda v. United States INS, 753 F.2d at 728-729 n.1. Here, however, Meinhold challenges only his
(continued...)

The leading treatise, relying upon Zepeda, states plainly: "Injunctive relief . . . cannot be granted to persons who are not before the court." 7 J. Moore, J. Lucas, & K. Sinclair, Moore's Federal Practice ¶ 65.17 at 65-167 (2d ed. 1993). That position, not the conflicting Second Circuit's view in Soto-Lopez, accords with the Supreme Court's principle that an injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Califano v. Yamasaki, 442 U.S. 682, 702 (1979).

Similarly, there was no basis for the district court to use its injunctive powers to control the enlistment policies of all branches of the Armed Forces. Meinhold's amended complaint raised no challenge to any enlistment policy, and his own enlistment in the Navy was simply never an issue in this suit. The injunction below violates the settled rule "that injunctive relief should be narrowly tailored to remedy the specific harms shown by plaintiffs, rather than to enjoin all possible breaches of law." Zepeda v. United States INS, 753 F.2d at 728 n.1 (citations and internal quotations marks deleted) (quoting inter alia, Hartford-Empire Co. v. United States, 323 U.S. 386, 410 (1945)).

Finally, the scope of the district court's injunction is an abuse of its equitable discretion. See Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944). The court's hasty action imposing a

17 (...continued)
own discharge from the Navy. He has not requested that the Navy, let alone the other military services, enlist or retain other homosexuals. The Title VII cases, therefore, do not support the nationwide injunction granted in this case.

nationwide ban ignored the principle that "where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity should act with caution and only upon clear showing that its intervention is necessary in order to prevent an irreparable injury." Hurley v. Kincaid, 285 U.S. 95, 104 n.3 (1932). Accord Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982); see also De Arellano v. Weinberger, 788 F.2d 762, 764 (D.C. Cir. 1986) (en banc) (per curiam) (it is improper for courts to order injunctive relief that unnecessarily "intrudes into the conduct of . . . military affairs").

The district court's injunction may improperly interfere with the implementation of the new policy regarding homosexuals in the military announced by the President on July 19, 1993, after full consultation with the Congress and the Department of Defense, including the Joint Chiefs of Staff. The unbridled scope of the court's injunction could be construed to require that the President's new policy be totally consistent with the court's views in this case, even though the policy is not applicable to Meinhold, the only party-plaintiff before this Court.

To subject the President's new policy to the injunction in this case, even though it is not applicable to Meinhold, would conflict with the well-settled principle that civilian courts are not to establish military personnel policies. The Constitution vests the Political Branches with "plenary" authority to make

decisions affecting the "composition" of the military. Chappell, 462 U.S. at 301; Rostker v. Goldberg, 453 U.S. 57, 65 (1981). The district court's expansive injunction plainly constitutes "interfere[nce] with legitimate [military] matters" and an improper arrogation of constitutional authority. See Orloff v. Willoughby, 345 U.S. 83, 94 (1953).

The President, acting with the Congress and military leaders, undoubtedly has the authority to establish a reasonable policy regarding service by homosexuals free from the threat of potential contempt sanctions. In light of the uniquely "complex [and] subtle" nature of decisions about "the composition . . . and control of a military force," Rostker, 453 U.S. at 65, separation of powers principles require the Judiciary to defer to the Political Branches and permit them to make in the first instance their own determination of the appropriate policy concerning homosexuals in the military. Only after that new policy has been applied to individual service members would it be appropriate for the courts to hear and decide challenges to its constitutionality. On the basis of its improper interference with the President's new policy alone, the present injunction must be vacated to the extent it applies to "any person" other than Meinhold.

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's order and remand with instructions to dismiss Meinhold's complaint pending exhaustion of intramilitary

remedies. Alternatively, this Court should vacate and remand with instructions to defer adjudication of the constitutional issues pending resolution of the nonconstitutional issues, with the proviso that if the district court reaches the equal protection claim, it must consider and accord appropriate deference to record evidence supporting the military's policy. Alternatively, this Court should reverse the district court's entry of summary judgment for Meinhold, and remand for entry of judgment in favor of DOD on the equal protection issue. Alternatively, this Court should vacate the injunctive order to the extent it goes beyond enjoining Meinhold's own discharge.

Respectfully submitted,

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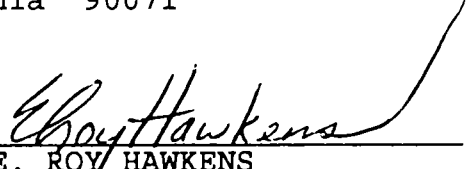
STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel states that he is unaware of any related case pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July 1993, I served copies of the Brief For The Appellants and Excerpts of Record on opposing counsel by causing copies to be sent by Federal Express to:

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R E G U L A T O R Y
A D D E N D U M

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VOLKER KEITH MEINHOLD,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-55242

VOLKER KEITH MEINHOLD,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,

Defendants-Appellants.

REPLY BRIEF FOR THE APPELLANTS

This brief responds to the arguments Meinhold has presented in defense of the district court's injunction entered on January 29, 1993. Point I will show that Meinhold's claim that exhaustion of administrative remedies would have been futile is inconsistent with his contention regarding the scope of the regulatory definition of "homosexual." Point II will then show that controlling decisions of this Court and the Supreme Court foreclose Meinhold's claim that the district court could properly decide his constitutional claim before disposing of his nonconstitutional estoppel claim. Even if the equal protection claim were properly presented, Point III will show that the military's former policy excluded homosexuals based upon their past homosexual acts or their propensity to commit future homosexual acts, and that this policy should be sustained under the applicable rational-basis standard of review. Finally, Point IV will show that, even if it were otherwise proper, the district court's injunction is plainly overbroad insofar as it extends to "any person," rather than being limited to Meinhold's own discharge.

I.

CONTRARY TO MEINHOLD'S ARGUMENT, EXHAUSTION WOULD NOT HAVE BEEN FUTILE BECAUSE HE CONTESTS THE SCOPE OF DOD'S REGULATORY DEFINITION OF "HOMOSEXUAL."

Our opening brief, see Gov't Br. 12-18, demonstrated that the district court should have dismissed Meinhold's complaint pending exhaustion of intramilitary remedies. Exhaustion was particularly appropriate given Meinhold's own statement that "the equal protection claim is [not] central to this case" and it "need not even be reached" because the nonconstitutional arguments "are determinative of the outcome of this action." See Plaintiff's Response to Defendants' Application for a Stay of Proceedings 3, 5 (Oct. 20, 1992).

Meinhold defends the district court's holding that exhaustion would have been futile. See Meinhold Br. 7-9. At the same time, however, Meinhold disputes which categories of persons fall within the regulatory definition of "homosexual" so as to be dischargeable. As our opening brief explained, see Gov't Br. 21-24, DOD's regulations apply to those who either have engaged in past homosexual acts or who by their statements indicate a propensity to engage in future homosexual acts. Meinhold argues for a much more expansive construction, contending that the regulations "mandate[] the discharge of all gay and lesbian service members solely on the basis of their status . . . regardless of their conduct." See Meinhold Br. 11.

Meinhold's two arguments are incompatible. Exhaustion cannot be held to be futile when the administrative process could have provided a definitive agency resolution of any dispute over the construction of the regulation as applied to Meinhold. See McKart v. United States, 395 U.S. 185, 194-95 (1969). Alternatively, if

Meinhold is correct that exhaustion would have been futile, it is only because he does not dispute that he falls within DOD's regulatory definition of "homosexual."

Meinhold states that he "has repeatedly acknowledged that he is gay. It follows inexorably that exhaustion of administrative remedies in the Navy would have resulted in Meinhold's discharge." Meinhold Br. 7. This statement may be intended to mean that he commits, or will likely commit, homosexual acts, in which case exhaustion would have been futile. In any event, Meinhold cannot both: (1) dispute that he falls within DOD's narrower regulatory definition of "homosexual"; and (2) claim that exhaustion of his administrative remedy would have been futile.

II.

THE DISTRICT COURT ERRED IN RESOLVING THE CONSTITUTIONAL ISSUE WHILE LEAVING THE NONCONSTITUTIONAL ESTOPPEL ISSUE UNRESOLVED.

Meinhold's amended complaint alleges, see ER 29, that the Navy discharged him "in violation of traditional principles of equitable estoppel." In Watkins v. United States Army, 875 F.2d 699, 706 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990), this Court squarely held that a court should not reach the constitutional issues in a military homosexual case "when the case could have been decided narrowly under the doctrine of equitable estoppel." Meinhold seeks to distinguish this controlling precedent by arguing that his equal protection claim was appropriate for summary judgment, but a triable issue of fact was presented on his estoppel claim. See Meinhold Br. 9-10. Even assuming the existence of an issue of material fact, but see Record Entry No. 68, Defendants' Memorandum In Support Of Motion For Summary Judgment 10-16 (Jan. 4,

1993), the doctrine against deciding constitutional issues unnecessarily cannot be so easily evaded.

Spector Motor Co. v. McLaughlin, 323 U.S. 101 (1944), disposes of Meinhold's claim. There the Court stated: "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." 323 U.S. at 105. The Court held that the court of appeals had improperly reached the constitutional issue of whether a state tax violated the Commerce Clause. The Supreme Court remanded the case to the district court with the direction to hold the case until a proceeding could be brought in state court to resolve the issues regarding the construction of the state statute and its validity under the state constitution. Thus, Spector Motor Co. dispositively rejects Meinhold's argument that a court can properly decide the federal constitutional issue simply because further proceedings would be necessary to resolve the other issues. See also New York City Transit Auth. v. Beazer, 440 U.S. 568, 582-83 (1979).¹

¹ This same doctrine required the district court to dispose of Meinhold's claim under the Administrative Procedure Act before reaching the constitutional issue. Meinhold, however, appears to have abandoned his APA claim by arguing in his brief, see Meinhold Br. 8, 9 n.7, that the alleged procedural error would not affect the outcome of the Navy discharge proceeding. Plainly, Meinhold cannot continue to press his APA claim and at the same time urge this Court to skip over the merits of that claim to reach the constitutional issue.

III.

**THE DISTRICT COURT ERRED IN HOLDING THAT THE MILITARY'S
FORMER POLICY REGARDING HOMOSEXUALS VIOLATES EQUAL PRO-
TECTION.**

Even assuming that the constitutional issue were properly before it, the district court erred in holding that the military's former policy, which is set forth in DOD Directive 1332.14, see Gov't Br. Addendum 1, violates equal protection. In responding to our brief on this issue, Meinhold makes basically two arguments. First, as indicated in Point I above, he disputes our construction of the Directive as directed toward persons who have committed or are likely to commit homosexual acts, arguing instead that the policy is directed toward homosexual status unrelated to conduct. Second, he argues that, so construed, the policy is invalid because it lacks the necessary rational basis. We address each point in turn.

**A. DOD's Former Policy Excluded Persons Who DOD Concluded
Have Committed Or Were Likely To Commit Homosexual Acts.**

1. Meinhold does not contest DOD's authority to discharge service members who commit proscribed sexual acts, nor could he in light of binding precedent from the Supreme Court, this Court, and other courts of appeals. See, e.g., Solorio v. United States, 483 U.S. 435 (1987); Schowengerdt v. United States, 944 F.2d 483 (9th Cir. 1991), cert. denied, 112 S. Ct. 1514 (1992); Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir.), cert. denied, 454 U.S. 864 (1981); Gov't Brief at 27-28 (citing cases). As this Court held in Beller v. Middendorf, 632 F.2d 788, 812 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981): "In view of the importance of the military's role, the special need for discipline and order in the service, the potential for difficulties arising out of

possible close confinement aboard ships or bases for long periods of time, and the possible benefit to the recruiting effort," the Navy acted within its discretion in concluding that a blanket-discharge policy for homosexual conduct was necessary to preserve military effectiveness.

Meinhold attempts to avoid the settled law on this issue by arguing that, because he was discharged based solely upon his statement that he was a homosexual, rather than on evidence of specific homosexual acts, the former policy was directed to homosexual orientation unrelated to conduct. See Meinhold Br. 10-18. His argument, however, misconstrues DOD's policy.

As we explained in our opening brief, see Gov't Br. 21-24, the pertinent classification challenged in this case is persons who the military has reasonably concluded have committed or are likely to commit homosexual acts. DOD's interpretation of its own regulation is reasonable and must be accepted as the basis for the constitutional analysis. See Stinson v. United States, 113 S. Ct. 1913, 1919 (1993). "Any other approach would not be testing the [policy] in light of the purposes [DOD] sought to achieve." Rostker v. Goldberg, 453 U.S. 57, 75 (1981).²

² Meinhold incorrectly asserts, see Meinhold Br. 17-18, that DOD is advancing a newly minted argument that finds no support in the administrative record or the district court proceedings. The administrative board and the district court were both apprised that Meinhold was processed for discharge based on his statement that he was a homosexual, and that the regulations target persons who, by their conduct or statements, demonstrate a propensity to engage in homosexual conduct. See Record Entry No. 69, Transcript of Admin. Discharge 15, 47 (June 30, 1992); Record Entry No. 68, Defendants' Memorandum In Support Of Motion For Summary Judgment 24, 25, 28 (Jan. 4, 1993). Moreover, as we show in text, the regulatory language reveals, and precedent supports the conclusion, that DOD's policy targets members who commit, or will likely commit, homosexual acts.

DOD's construction is plainly consistent with the language of the Directive, which states: "The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission." DOD Directive 1332.14.H.1.a (emphasis added). The Directive provides for the separation of any service member who "has stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual." Id. 1332.14.H.1.c(2). "Homosexual" is defined as a person who "engages in, desires to engage in, or intends to engage in homosexual acts." Id. 1332.14.H.1.b(1).

Our opening brief explained that DOD has construed "desire" narrowly, in accordance with the requirement for a "propensity to engage in homosexual conduct." See Gov't Br. 23 n.8. In contrast, Meinhold construes that term broadly by equating it with "thoughts" and "feelings" unrelated to conduct. See Meinhold Br. 16. Not only must his construction be rejected as contrary to the reasonable agency construction, it also violates the principle that regulations should not be construed in a manner that may render the constitutional issue more problematic. See New York City Transit Auth., 440 U.S. at 582 n.22.

The Seventh Circuit and the Federal Circuit have both correctly held, contrary to Meinhold's argument, that the Directive targets past and prospective homosexual conduct. Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068, 1074 (Fed.

Cir. 1989), cert. denied, 494 U.S. 1003 (1990). As the Seventh Circuit explained:

[A person's admission of homosexuality] is compelling evidence that [he] has in the past and is likely to again engage in [homosexual] conduct. To this extent, therefore, the regulation does not classify . . . based merely upon [homosexual orientation], but upon reasonable inferences about . . . probable [homosexual] conduct in the past and in the future.

Ben-Shalom, 881 F.2d at 464.³

In the instant case, Meinhold stated that he was homosexual. Pursuant to the regulations, that statement constituted prima facie -- but rebuttable -- evidence that Meinhold engaged in, or would likely engage in, homosexual acts. Meinhold's failure to rebut the regulatory presumption mandated his discharge.

2. Meinhold errs in asserting that Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992), compels this Court to reject DOD's reasonable interpretation of its regulation and to hold that the classification at issue here is unrelated to homosexual conduct. See Meinhold Br. 12. In Pruitt, the district court dismissed a service member's First Amendment challenge to her discharge based on her admission of homosexuality.

³ DOD's former policy provided that a service member who has committed a homosexual act may, under exceptional circumstances, be retained if he shows that: (1) the act was a departure from his customary behavior; (2) the act under all the circumstances is unlikely to recur; (3) the act was not accomplished by use of force; (4) the member does not have a propensity to commit future acts; and (5) the member's continued presence in the military is consistent with the interest of the military. DOD Dir. 1332.14.H.c(1). Contrary to Meinhold's argument, see Meinhold Br. 11-12, this exception does not mean that the policy discriminates solely on the basis of homosexual status. Rather, it is consistent with the principle that the military will not retain persons who it concludes will likely commit homosexual acts. See Nordlinger v. Hahn, 112 S. Ct. 2326, 2335 (1992) ("For purposes of rational-basis review, the latitude of discretion is notably wide in . . . the granting of partial or total exemptions upon grounds of policy.") (internal quotation marks omitted).

Although this Court affirmed the dismissal of the First Amendment claim, it nevertheless remanded for further proceedings, holding that Pruitt could state an equal protection claim on a theory that the military's policy was based on homosexual status. See 963 F.2d at 1162-64.

In that part of its opinion rejecting Pruitt's First Amendment claim, this Court observed that the military is "not discharging members just for homosexual conduct, or even primarily for homosexual conduct. It is discharging members because of their status as homosexuals." 963 F.2d at 1163. Contrary to Meinhold's contention, this statement does not foreclose the Court from holding here, consistent with the regulatory language and DOD's reasonable construction, that the pertinent regulatory classification is persons who commit, or will likely commit, homosexual acts.

First, as shown in our opening brief, see Gov't Br. 23 n.8, the Pruitt Court did not precisely explain its use of the term homosexual "status" -- a term that is not found in the regulation itself, which speaks in terms of homosexual conduct and the propensity to engage in such conduct. To the extent that the term homosexual "status" is synonymous with a propensity to commit homosexual acts, the term accurately reflects the regulatory meaning.⁴ Second, the statement in Pruitt is not dispositive of the correct regulatory interpretation here because the statement --

⁴ The panel in Pruitt was correct that the plaintiff there was not discharged for specific homosexual acts. Rather, the plaintiff there -- like Meinhold -- was discharged because her admission of homosexuality gave rise to a presumption that she committed, or would commit, homosexual acts. Like Meinhold, she was unable or unwilling to rebut the presumption. The Court did not explore this aspect of the regulations, however, but instead remanded to the district court for further proceedings.

which appears in the First Amendment portion of the opinion -- was not essential to the Court's narrow holding that the district court erroneously dismissed Pruitt's equal protection claim for failure to state a claim.⁵ Third, the statement in Pruitt does not foreclose accepting DOD's reasonable construction of its regulations here because the Court there neither conducted an equal protection analysis nor considered whether the regulations permitted the retention of avowed homosexuals who showed that they did not commit, and would not commit, homosexual acts.⁶ Finally, this Court should accept DOD's reasonable construction of its own regulation to avoid passing on the constitutionality of a non-existent policy urged upon this Court by Meinhold. See Rostker, 453 U.S. at 75; New York City Transit Auth., 440 U.S. at 532 n.22.

3. Meinhold errs in asserting that DOD's regulatory inference is irrational. See Meinhold Br. 14-17. "The fact that . . . persons of 'homosexual orientation' engage in or seek to engage in homosexual conduct is as unremarkable as the fact that . . . persons of 'heterosexual orientation' engage in or seek to engage in heterosexual conduct. To pretend that homosexuality or heterosexuality is unrelated to sexual conduct borders on the absurd."

Watkins v. United States Army, 847 F.2d at 1361 n.19 (Reinhardt, J., dissenting), vacated, 875 F.2d 699 (9th Cir. 1989) (en banc),

⁵ United States v. Stanley, 483 U.S. 669, 680 (1987) (no holding can be broader than the facts before the court); Kastigar v. United States, 406 U.S. 441, 454 (1972) (language unnecessary to the court's decision is not binding authority).

⁶ See Miller v. California Pacific Medical Center, 991 F.2d 536, 541 (9th Cir. 1993) (decisions that do not consider issues are not binding as to those issues); United States v. Vroman, 975 F.2d 669, 672 (9th Cir. 1992) (same), cert. denied, 113 S. Ct. 1611 (1993); United States v. Faulkner, 952 F.2d 1066, 1071 n.3 (9th Cir. 1991) (same).

cert. denied, 498 U.S. 957 (1990). Of course, not everyone of a particular sexual orientation will necessarily act on that orientation. It is rational, however, for military authorities to presume that, absent contrary evidence, a person who states without qualification that he is a homosexual commits, or is likely to commit, homosexual acts.⁷ Indeed, DOD's regulations provide an opportunity for self-avowed homosexual members to demonstrate that they do not, and will not, commit homosexual acts.

DOD's regulatory presumption, moreover, allows DOD to forgo extensive investigations. It would be ironic, to say the least, to hold that precepts of individual liberty required DOD to initiate an unavoidably intrusive investigation into the intimate details of a service member's personal life rather than accept his statements at face value and act on the basis of reasonable, and unrebutted, administrative inferences therefrom. See Orloff v. Willoughby, 345 U.S. 83, 91 (1953).

Precedent and DOD's reasonable construction of its former policy mandate the conclusion that the relevant classification is persons who DOD determines have committed or are likely to commit homosexual acts. Meinhold had the opportunity to rebut the reasonable inference of homosexual acts. He declined to do so, and the military "need not shut its eyes to the practical realities of this

⁷ See Ben-Shalom, 881 F.2d at 464; Woodward, 871 F.2d at 1074; Steffan v. Cheney, 780 F. Supp. 1, 12-13 (D.D.C. 1991) (appeal pending). Accord High Tech Gays v. DISCO, 909 F.2d 375, 380 (9th Cir. 1990) (Canby, joined by Norris, JJ., dissenting from denial of rehearing en banc). Cf. NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 778-789 (1990) (rebuttable presumptions are valid when "proof of one fact renders the existence of another fact 'so probable that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it'").

situation, nor be compelled to engage in the sleuthing of soldiers' personal relationships for evidence of homosexual conduct in order to enforce its ban on homosexual acts, a ban not challenged here." Ben-Shalom, 881 F.2d at 464.

B. DOD's Former Policy Is Rationally Related To A Legitimate Governmental End.

1. Meinhold's equal protection challenge to this military policy involves application of the rational-basis test. Rational-basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." Heller v. Doe, 113 S. Ct. 2637, 2642 (1993) (quoting FCC v. Beach Communications, Inc., 113 S. Ct. 2096, 2101 (1993)). Classifications subjected to rational basis review are accorded "a strong presumption of validity," and they must be sustained "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." Heller, 113 S. Ct. at 2642. Contrary to this Court's decision in Pruitt, 963 F.2d at 1164, the Government "has no obligation to produce evidence to sustain the rationality of a statutory classification. '[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.'" Id. at 2643 (quoting Beach Communications, 113 S. Ct. at 2102).⁸ "[T]he

⁸ Meinhold incorrectly claims, see Meinhold Br. 20, that Heller does not affect the validity of the "active" rational-basis test announced in Pruitt. Heller plainly establishes that, contrary to Pruitt, DOD was not required to produce objective record evidence, to be weighed by the court, to defend its policy. See Gov't Br. 25 n.10. In any event, DOD satisfied the heightened evidentiary requirements of Pruitt by submitting record evidence to support its policy. See Gov't Br. 26-27. The district court, without explanation, ignored this evidence and struck down DOD's policy based on the court's analysis of evidence critical of the policy. This alone was reversible error. See id. at 27.
(continued...)

burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record." Id. at 2643 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)). Finally, "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends [and despite the fact that] 'in practice [the classification] results in some inequality.'" Id. at 2643 (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970), and Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)).

Significantly, this case involves rational-basis review in the context of matters involving "national defense and military affairs, and perhaps in no other area has the [Supreme] Court accorded [the Political Branches] greater deference." Rostker, 453 U.S. at 64-65. When promulgating rules for the governance of the military, the Political Branches are permitted to regulate "both with greater breadth and with greater flexibility" than in the civilian context. Id. at 66 (quoting Parker v. Levy, 417 U.S. 733, 756 (1974)). Thus, in deciding questions regarding the appropriate composition of the military, courts must be "particularly careful not to substitute [their] judgment of what is desirable for that of [the Political Branches], [nor should courts substitute their] own

⁸(...continued)

Meinhold now contends, see Meinhold Br. 36, that the Government's declarations should not have been considered because they were not offered in opposition to his motion for summary judgment. This contention is insubstantial. The declarations were offered in support of our own motion for summary judgment and that motion opposed Meinhold's motion.

evaluation of evidence for a reasonable evaluation by the [Political Branches]." Rostker, 453 U.S. at 68.

2. DOD's former policy of discharging service members who, through their acts or statements, demonstrate a propensity to commit homosexual acts is rational because it is designed to protect against what this Court has found to be a reasonable prospect of interference with military effectiveness, while conserving scarce resources and protecting individual privacy. See Schowengerdt, 944 F.2d at 490; Hatheway, 641 F.2d at 1382; Beller, 632 F.2d at 812, 813. Accord Ben-Shalom, 881 F.2d at 464; Woodward, 871 F.2d 1068; Dronenburg v. Zech, 741 F.2d 1388, 1397-98 (D.C. Cir. 1984).

Military life is fundamentally different from civilian life. The primary purpose of the Armed Forces is to prepare for and prevail in combat. That unique purpose makes the military a unique and specialized society characterized by extraordinary responsibility and accountability. The military is governed by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior that would not be acceptable outside the military context. See Goldman v. Weinberger, 475 U.S. 503, 508-10 (1986); Parker, 417 U.S. at 743-44.

Success in combat requires military units that are characterized by high morale, good order, discipline, and a degree of unit cohesion that is unparalleled elsewhere. Unit cohesion, in turn, involves building bonds of trust and mutual respect among individual service members that make the unit as a whole more effective than the sum of the effectiveness of individual unit members. Those bonds must be built and maintained in a context where service members must be prepared at all times for world-wide deployments

where they may be required to accept living and working conditions that are spartan and primitive, involving forced intimacy and leaving room for little or no privacy. Because of this constant need for readiness, military rules and standards of conduct apply to members of the Armed Forces at all times -- whether on base or off base, on duty or off. See Solorio v. United States, 483 U.S. 435, 439-41 (1987); Chappell v. Wallace, 462 U.S. 296, 300 (1983).

Military professionals have concluded that in light of the unique duties of the military and its specialized society, the longstanding prohibition against homosexual conduct in the military context is necessary, and that the presence in the Armed Forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order, discipline, and unit cohesion that are the essence of military capability. In view of that conclusion by those most directly responsible for the ordering of the Nation's military forces, rationality permits the military to adopt and enforce a policy of discharging a member whose statements reveal such a propensity or intent. As the Seventh Circuit has held, the military "does not have to take the risk that an admitted homosexual will not commit homosexual acts which may be detrimental to its assigned mission." Ben-Shalom, 881 F.2d at 460-61.

Rationality plainly permits those with responsibility for the military to prevent or remedy circumstances that they conclude would adversely affect military preparedness. "[N]othing in the Constitution . . . disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops . . . under his command." Greer v.

Spock, 424 U.S. 828, 840 (1976). "The [military] need not shut its eyes to the practical realities of this situation, nor be compelled to engage in the sleuthing of soldiers' personal relationships for evidence of homosexual conduct in order to enforce its ban on homosexual acts, a ban not challenged here." Ben-Shalom, 881 F.2d at 464.

Indeed, the military's interest in determining who might engage in future homosexual acts while in the military is similar to its interest in determining who has engaged in past homosexual acts. In both cases, the classification of "homosexuals" consists of persons who have a propensity to commit homosexual acts, and whose presence, under Schowengerdt, Hatheway, and Beller, may permissibly be determined to be detrimental to the accomplishment of the military mission. In one category, the propensity has already been acted upon; in the other, the military has a reasonable basis to believe that it will be acted upon. Just as the military may discharge members in the former category, so too it may discharge members in the latter category. In other words, if, as military authorities have concluded, morale is damaged and divisiveness among the troops is promoted by the presence of individuals who are likely to commit proscribed acts, the military need not wait until those acts in fact take place before taking steps to maintain an effective fighting force.

DOD's policy in this unique military context plainly is not "invidious" as that term has been used with respect to discrimination based on classifications that have been held to be suspect or quasi-suspect. See Ben-Shalom, 881 F.2d at 465-66; Dronenburg, 741 F.2d at 1398; Rich v. Secretary of the Army, 735 F.2d 1220, 1229

(10th Cir. 1984). DOD's policy affects persons who engage in or are reasonably considered likely to engage in acts that are explicitly and validly proscribed in the separate military society that they have voluntarily chosen to join. Behavior cannot be said to be wholly immutable in the same sense that applies to characterizations such as race and gender, see High Tech Gays v. DISCO, 895 F.2d 563, 573 (9th Cir. 1990); Woodward, 871 F.2d at 1070, and the military is entitled to impose restraints on behavior that might not be tolerated in other contexts. See Goldman, 475 U.S. at 507-10; Rostker, 453 U.S. at 66; Parker, 417 U.S. at 756.⁹

3. The DOD Policy Statement, DOD Directive 1332.14.H.1.a, sets forth ample reasons justifying DOD's conclusion that the presence of persons in the military environment whose statements reveal a propensity to commit homosexual acts may cause divisiveness. First, in assessing possible impairments to military effectiveness, the military leadership was not required to ignore the tensions and effect on morale that it found would be caused by the service of persons who have engaged in, or who by their statements exhibit a propensity to engage in, homosexual conduct that many members of the military services find to be disturbing, see Declaration ("Decl.") Ass't Secretary of Defense Jehn, ER 54-55; Decl. Rear Admiral Gallo, ER 69, 71, and that this Court has held may be proscribed by the military. See Schowengerdt, 944 F.2d at 490; Beller, 632 F.2d at 812. The need for good order, discipline, and unit cohesion in the military is unlike anything in civilian

⁹ In High Tech Gays, 895 F.2d at 573-74, this Court, relying on Bowers v. Hardwick, 478 U.S. 186 (1986), held that classifications based on homosexuality do not warrant heightened scrutiny.

society, and military authorities are entitled to consider how these crucial needs will be affected when determining the appropriate composition of the military services. See Rostker, 453 U.S. at 65-66.¹⁰

Second, in the unique military context, DOD could consider what it determined were significant concerns relating to privacy. In this regard, military officials have emphasized that despite the substantial privacy infringements that accompany military service, DOD attempts to separate men and women while they sleep, bathe, and use toilet facilities to preserve their privacy. DOD's efforts in this regard promote good order and discipline by accommodating concerns relating to modesty and decorum. See Decl. Rear Admiral Gallo, ER 70. Military officials have likewise concluded that in the unique military environment where members of the same sex sleep, bathe, and live in extremely close proximity, the presence of persons who commit or are likely to commit homosexual acts would be an intrusion into the privacy of personnel of the same sex because of discomfort or embarrassment that they are being viewed as sex objects. See id. at 69-70; Decl. Ass't Secretary of Defense Jehn, ER 55. This concern is especially acute in the military given the "potential . . . of possible close confinement aboard ships or bases for long periods of time" Beller, 632 F.2d

¹⁰ As we stated in our opening brief, see Gov't Br. 28-29, this Court may also take notice of the testimony given during extensive hearings before Congress when it examined the military's policy regarding homosexuals. See Hearing Before The Senate Committee On Armed Services To Receive Testimony On DOD Policy On The Service Of Gay Men And Lesbians In The Armed Forces, 103rd Cong., 1st Sess. (July 20, 1993). Contrary to Meinhold's assertion, see Meinhold Br. 37 & n.39, this Court, in adjudicating the important constitutional issue presented, need not ignore the national debate on the subject involved in this case.

at 812. This concern about privacy issues, which implicates military cohesion and morale, provides a constitutionally permissible basis for the military policy before this Court."

DOD also rationally concluded that a ban that did not prohibit service by those who are likely to engage in homosexual acts might adversely affect retention and recruitment, which could have a serious impact on our all-volunteer military force. See Beller, 632 F.2d at 812; Decl. Ass't Secretary of Defense Jehn, ER 54; Decl. Rear Admiral Gallo, ER 72.

Additionally, the use of reliable evidence such as the admission of a person that he or she is a homosexual prevents the military from having "to engage in the sleuthing of soldiers' personal relationships for evidence of homosexual conduct" in order to enforce its ban on such conduct. Ben-Shalom, 881 F.2d at 464. Thus, the privacy of service members is not unnecessarily invaded by unavoidably intrusive investigations. Id.

Meinhold nevertheless argues that this Court, guided by evidence contained in "expert testimony," "scientific studies," and "research reports" that are critical of DOD's policy, should hold that the policy is irrational. See Meinhold Br. 24 n.21. This argument ignores the admonition in Goldman, 475 U.S. at 509, that

" Meinhold asserts, see Meinhold Br. 26, that DOD's concern is based on the "unfounded assumptions that lesbians and gay men cannot (or do not) control their sexual urges; that they will satisfy their own sexual desires regardless of the appropriateness of doing so . . .; and that they will molest unwary heterosexuals." He is wrong. DOD's policy is based on concerns relating to privacy, modesty, and decorum, see Decl. Rear Admiral Gallo, ER 70, wholly apart from additional concerns regarding unwanted sexual contact. See id. Moreover, under the rational-basis test, DOD was permitted to consider the "adverse budgetary impact of constructing separate berthing and sanitary areas" for homosexual service members. See id.

"whether or not expert witnesses may feel that religious exceptions to [DOD's uniform regulations] are desirable is quite beside the point. The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment." Just as the Constitution "does not require the military to accommodate [religious] practices in the face of its view that they would detract from" military effectiveness, id., so too the Constitution does not require the military to accommodate homosexual conduct, or retain service members who demonstrate a propensity to engage in such conduct, in the face of its view that such conduct would detract from military effectiveness.

Moreover, to accept Meinhold's assertions that DOD's policy is irrational, this Court would have to dismiss as insignificant the serious problems that DOD has determined will occur if the military retains members who, through their acts or statements, reveal a propensity to engage in homosexual conduct. The Supreme Court has firmly stated that when military staffing decisions have been made on the basis of professional judgments as to practical problems that might otherwise arise, "[i]t is not for [the courts] to dismiss such problems as insignificant in the context of military preparedness." Rostker, 453 U.S. at 81. The Supreme Court also has recognized that DOD is entitled, in the exercise of its broad constitutional authority over the military, "to focus on the question of military need rather than 'equity.'" Id. at 80. The challenged policy reflected DOD's views as to how to maintain military preparedness and effectiveness. Meinhold's invitation to substitute the views of his experts for "the considered profes-

sional judgment" of the appropriate military officials must be rejected. Goldman, 475 U.S. at 509.

Of course, it is possible that not all of the concerns underlying DOD's policy will apply to all service members in all instances. But that fact does not mean that the policy fails to satisfy the rational-basis test. See Beller, 632 F.2d at 808-09 n.20. Rather, DOD's means of implementing the policy in question satisfies the rational-basis test because legitimate policy reasons support both a military decision to exclude from service individuals who engage in homosexual acts, and an implementing regulatory scheme that reasonably infers prohibited acts from a member's admission of homosexuality. Meinhold has failed to satisfy his burden of negating every conceivable rational basis that could support DOD's policy. See Beach Communications, 113 S. Ct. at 2102. Therefore, assuming that the district court properly addressed the constitutional issue, it erred in holding that DOD's former policy on homosexuals in the military violates equal protection.

IV.

IN ANY EVENT, THE DISTRICT COURT'S INJUNCTION IS OVERLY BROAD INsofar AS IT EXTENDS BEYOND MEINHOLD'S OWN DISCHARGE.

Our opening brief demonstrated that the district court's injunction conflicts with the controlling precedents of both the Supreme Court and this Court insofar as it enjoins the discharge or denial of enlistment of "any person," rather than being limited to Meinhold's own discharge. See Gov't Br. 31-40. Although Meinhold defends this nation-wide injunction in this non-class action, see Meinhold Br. 42-45, his argument cannot be reconciled with Bresgal

v. Brock, 843 F.2d 1163, 1170-71 (9th Cir. 1987), where this Court held: "Where relief can be structured on an individual basis, it must be narrowly tailored to remedy the specific harm shown," and an injunction should not extend beyond giving the "prevailing parties the relief to which they are entitled."¹²

Meinhold offers no colorable reason for extending injunctive relief beyond him. Despite his assertion now that he "consistently challenged the policy's application to all gay men and lesbians," see Meinhold Br. 43, the only injunctive relief he specifically requested in his amended complaint, see ER 32, was to "enjoin Defendants from continuing to separate Meinhold from the Navy" Having failed to seek or obtain class certification pursuant to Federal Rule of Civil Procedure 23, Meinhold may not assert the rights of other persons or obtain injunctive relief on their behalf. See Zepeđa v. INS, 753 F.2d 719, 727-30 & n.1 (9th Cir. 1983).¹³

¹² Notably, the district court's sweeping order not only invalidated DOD's former policy, it also obstructs implementation of the President's subsequently announced interim policy on homosexuality, as well as a new policy -- framed by the Executive and Legislative Branches following a comprehensive six-month review -- that DOD is prepared to implement this month. The Constitution vests the Political Branches with "plenary" authority to make decisions regarding the "composition" of the military. See Chappell, 462 U.S. at 301; Rostker, 453 U.S. at 65. Separation of powers principles require that the Judicial Branch permit the Political Branches, in the first instance, to determine suitability criteria for military service. Only after the new policy has been applied to individual service members would it be appropriate for the courts to decide challenges to its constitutionality. This provides an independent reason for reversing the injunction to the extent it confers relief on persons other than Meinhold.

¹³ Meinhold attempts to justify the instant injunction by reference to Soto-Lopez v. New York City Civil Service Comm'n, 840 F.2d 162 (2d Cir. 1988). See Meinhold Br. 42. He does not at all address our showing that Soto-Lopez: (1) is contrary to
(continued...)

Extending injunctive relief beyond Meinhold is improper, moreover, because he can be accorded full relief by an injunction tailored solely to him. See Meinhold Br. 44. If Meinhold believes that he suffers unlawful discrimination, the remedy is to seek modification of the injunction as it applies to him.

In that regard, Meinhold decries "the Navy's conduct toward [him] upon his return" to active duty in November 1992. See Meinhold Br. 44. Much of the challenged conduct, however, occurred prior to entry of the final injunction, and Meinhold states that the practices to which he objects "have ceased." Id. at 45 n.49. No further injunctive relief is warranted, of course, by practices that Meinhold concedes have ended. See City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983).¹⁴ In any event, any objectionable "conduct toward Meinhold" can be addressed by an injunction limited solely to him. The Navy's conduct toward Meinhold, in the context of this case, does not justify injunctive relief addressed to anyone else.

¹³(...continued)
Zepeda and Bresgal; (2) in conflict with United States v. Mendoza, 464 U.S. 154 (1984); and (3) has not been subsequently followed either in the Second Circuit or any other Circuit. See Gov't Br. 36-37. In addition, Soto-Lopez is distinguishable because of its special procedural setting. That decision was issued on remand from a Supreme Court decision that resolved the merits issue. Unlike the district court's decision here, the Supreme Court's Soto-Lopez decision was binding nationwide.

¹⁴ Meinhold relied upon these same assertions in seeking to have the Government held in contempt for violating the injunction. The district court declined to hold that the Government had violated its injunction, although it issued an amended injunction. We have appealed that new injunction. Pursuant to this Court's order of October 6, 1993, our two appeals have been consolidated, and we will address the new injunction in a supplemental brief.

We note that other homosexual service members have filed their own suits challenging both the President's interim policy and the new policy that is scheduled to become effective soon. E.g., Elzie v. Aspin, No. 93-1853-SS (D.D.C.) (challenging interim policy); Doe v. Aspin, No. 93-1519-TPJ (D.D.C.) (class action challenging new policy). There is no reason why the injunction in this action -- which involved DOD's former policy and was brought by Meinhold as an individual plaintiff seeking relief solely on his own behalf -- should be extended to encompass the rights of other service members who are challenging the interim and new policies, especially when they have demonstrated that they are fully capable of asserting their own challenges in suits brought in other courts. See supra note 12.¹⁵

CONCLUSION

For the foregoing reasons, as well as those discussed in our opening brief, this Court should vacate the district court's judgment of January 29, 1993, and remand with instructions to dismiss Meinhold's complaint pending exhaustion of his administrative remedy. Alternatively, this Court should vacate and remand with instructions to defer adjudication of the constitutional issue pending resolution of the nonconstitutional estoppel issue. Alternatively, this Court should reverse the district court's entry

¹⁵ The overbroad injunction should also be limited to Meinhold pursuant to the fundamental principle that courts should refrain from issuing unnecessarily broad constitutional proclamations. See Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 447 (1985) ("the preferred course of adjudication [is] to avoid making unnecessarily broad constitutional judgments"). Here, in derogation of this "preferred course of adjudication," the district court entered a nation-wide injunction that sweeps with the generality of a legislative enactment. See supra note 12. The district court's extension of relief to persons other than Meinhold was serious error and should be reversed.

of summary judgment for Meinhold and remand for entry of judgment in favor of DOD on the equal protection issue. Alternatively, this Court should vacate the injunctive order to the extent it goes beyond enjoining Meinhold's own discharge.

Respectfully submitted,

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OCTOBER 1993

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October 1993, I served copies of the Reply Brief For The Appellants on opposing counsel by causing copies to be sent overnight delivery to:

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Jeffrey S. Gordon, Esquire
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E. ROY HAWKENS
Attorney

File: Gay in the Military ✓/BLL

THE WHITE HOUSE

WASHINGTON

December 23, 1993

MEMORANDUM FOR THE PRESIDENT

FROM: CLIFFORD M. SLOAN *CS*
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Steffan gays-in-the-military case

Overview

As you know, DOJ and DOD have been considering whether to file a petition for rehearing en banc to the full U.S. Court of Appeals for the D.C. Circuit. (A copy of a prior memo on Steffan is attached). Until yesterday, DOD had been vigorously favoring a full appeal on all grounds, and DOJ had been resisting. At a DOD/DOJ/White House meeting yesterday, a tentative agreement was reached. Unless you disagree or have concerns, we will proceed based on this agreement.

The agreement

The meeting yesterday included DOD (Secretary Aspin, Shali, and the other Chiefs); DOJ (Webb Hubbell and Drew Days); and the White House (Tony Lake, George, Bruce, Joel Klein, and me). After considerable discussion, the following tentative agreement was reached:

First, DOJ will file a very limited petition for rehearing en banc, addressing only a narrow remedy issue regarding Steffan's commission. (The court ordered that Steffan receive his commission, along with his diploma and reinstatement. A commission, however, requires Presidential nomination and Senate confirmation. A court has no power to do away with these requirements or to order the President and the Senate to comply. The rehearing petition thus will ask the court to vacate the part of its decision ordering that Steffan be awarded his commission.)

Second, DOJ will not seek rehearing en banc on the fundamental point that the action taken against Steffan was unconstitutional, and will not seek to set aside the other relief awarded him. Instead, DOJ will explain that, although the government disagrees with the court of appeals' decision that the action under the old policy was unconstitutional, we have decided not to seek relief on anything besides the commission because the new policy is in place and the old policy has been formally superseded.

Both DOD and DOJ are satisfied with this approach. George, Bruce, Joel, and I agree that it is a sound strategy. The current

plan is to file the limited rehearing petition on Thursday, December 30. Let us know if you have any comments or concerns.

THE WHITE HOUSE
WASHINGTON

November 17, 1993

MEMORANDUM FOR THE PRESIDENT

FROM: CLIFFORD M. SLOAN *CS*
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: New gays-in-the-military decision

*I want to be
consulted before
final decision
is made to do
is made*

Overview

As you know, the U.S. Court of Appeals for the D.C. Circuit yesterday issued a major gays-in-the-military decision. In a decision by Chief Judge Mikva, the court held that adverse actions taken against a standout midshipman, on the basis of his statements of homosexuality, are unconstitutional.

The Steffan Decision

Joseph Steffan was an exceptional midshipman at the United States Naval Academy -- a recipient of numerous honors, a Battalion Commander (one of the Academy's ten highest ranking midshipmen), and a soloist singing the National Anthem at the Army-Navy game in his junior and senior years. In February 1987, during Steffan's senior year, the Naval Intelligence Service (NIS) received a report that Steffan had stated to another student that he was gay. Steffan was subsequently asked if he was a homosexual and twice answered, "Yes, sir." On the basis of these statements, academy officials instituted discharge proceedings, changed Steffan's ratings, and advised him to resign. Six weeks before his scheduled graduation from the Academy, he resigned.

Steffan filed suit, claiming that his constitutional right to equal protection had been violated. The D.C. Circuit agreed. It found that the military regulations in effect at the time were "not rationally related to any legitimate goal" and rejected each of the military's stated reasons for the former policy. The court concluded:

(1) the military's former policy addresses status, not conduct;

(2) it is unreasonable to use status as a basis for predictions about conduct or a "propensity" to conduct;

(3) the perceived effect on morale, discipline, and recruitment of heterosexuals cannot be accepted because "[t]he Constitution does not allow Government to subordinate a class of persons simply because others do not like them";

and

*This is in
President
D. Steffan*

(4) the "privacy" concerns are invalid -- the concerns represent either an untenable assumption that homosexuals will "stare" or an impermissible deference to "the irrational fears and stereotypes of third parties."

It should be noted that the court's panel in this case -- Mikva, Patricia Wald, and Harry Edwards -- is quite liberal and may not reflect the views of the entire D.C. Circuit.

Effect of the Steffan decision on the new policy

The court's opinion explicitly states that the new policy is "not at issue" in Steffan and that the decision applies only to the old policy. The court's view of the impermissibility of using statements of homosexuality as a ground for discharge under the old policy, however, may well have implications for the new policy. One difference, of course, is that the new policy contains the explicit rebuttable presumption. (DOJ has argued that there was an opportunity to rebut under the old policy). But it is far from clear whether the rebuttable presumption would be sufficient to overcome the decision and reasoning in Steffan.

Next steps

In consultation with DOD and DOJ, Bruce, George, and the Counsel's office will be reviewing various options. Among the possible choices are: (1) an appeal to the Supreme Court in the Steffan case; (2) a request for en banc review by the entire D.C. Circuit in the Steffan case; (3) an announcement that we will not appeal the Steffan decision because we want to focus on the new policy; and (4) possible actions to expedite judicial review of the new policy (so that the issue can be put to rest).

Talking points

Comments on the Steffan decision should be as limited as possible. It would be appropriate simply to say that we are reviewing the Steffan decision and that we have no further comment on it at this time. You may also wish to say that, in our system of government, courts are always the ultimate judges of constitutional challenges to government policies.

File: Gage in the M. L. H. BRL

MEMORANDUM

To: Bruce Lindsey
From: Cliff Sloan
Date: February 2, 1994
Re: Perry Nomination

Joel wanted Cliff to get this to you urgently. A new issue has come up with Perry. Republicans are objecting to the current language on sexual orientation and are talking about possibly putting a hold on Perry's nomination until it is resolved. Attached are four options that DOD has given to us. Jamie favors Option 1 or Option 2. Option 1 and Option 2 would pose the very big problem of changing language that was in the July 19 announcement. Jamie would like guidance on our position as soon as possible.

Joel inclines toward Option 3.

Please call Cliff at x66788 as soon as possible.

Current language: "Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to continued service unless manifested by homosexual conduct."

Option 1: Delete entire sentence from accession and separation Directives.

Option 2: Delete second half of the sentence ("and homosexual orientation . . .").

Option 3: Redefine "sexual orientation." The Directives currently define "sexual orientation" as "A sexual attraction to individuals of a particular sex." The revised definition would be: "An abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts." This revised definition is essentially the flip-side of our current definition of "propensity"; the Directives state that "propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts."

Option 4: Add the word "individual's" before "homosexual orientation" in the current language, so that the sentence would read: "Sexual orientation is considered a personal and private matter, and an individual's homosexual orientation is not a bar to continued service unless manifested by homosexual conduct." The theory is that adding "individual's" creates less of an impression that we are creating a "protected class."

THE WHITE HOUSE
WASHINGTON

Bruce --

Here's the new material on the
rebuttable presumption.

-- Cliff

THE WHITE HOUSE
WASHINGTON

Bruce —

FBI —

a new decision
enjoining separation
and discharge of
a gay sailor.

— Cliff



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
WASHINGTON, D.C. 20301-1600

File Copy in the
Meeting

TELECOPIER MEMORANDUM

DATE: 6 Dec.
TIME: 1904
TO: Cliff Sloger
(NAME)
White House Counsel 202 456 1677
(OFFICE) (FAX NUMBER)
FROM: Michael Vatis
(NAME)
(OFFICE)

We are submitting 5 pages, including this Telecopier Memorandum.

If you do not receive all pages, please call
at (703) 697-9341. 695-1055, 1058.

REMARKS: _____

To be added to Definitions sections:

"Propensity * * * to engage in homosexual acts" means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages or will engage in homosexual acts.

To be added to sections on rebuttable presumption (in separation and accession directives):

"Propensity * * * to engage in homosexual acts" means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages or will engage in homosexual acts.

In determining whether a servicemember has successfully rebutted the presumption that he or she engages in or has a propensity or intent to engage in homosexual acts, some or all of the following may be considered:

(i) whether the servicemember has engaged in homosexual acts;

(ii) the servicemember's credibility;

(iii) testimony from others about the servicemember's past conduct, character, and credibility;

(iv) the nature and circumstances of the servicemember's statement;

(v) any other evidence relevant to whether the servicemember is likely to engage in homosexual acts.

This list of items is not exhaustive; any other relevant evidence may also be considered.

New "Basis" section for separation directives

Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service. Homosexual conduct, however, is grounds for separation from the military services. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

A statement by a member that demonstrates a propensity or intent to engage in homosexual acts -- such as a statement by the member that he or she is a homosexual -- is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages or will engage in homosexual acts.

Scenarios 12 and 13 are recommended for personnel that deal with administrative separations. These scenarios illustrate the operation of the "rebuttable presumption" that arises when a Service member states that he or she is a homosexual. The scenarios are examples of how boards might treat cases in which a Service member attempts to rebut the presumption; they do not establish any evidentiary standards or create any substantive or procedural rights.

12. Situation: A Marine Corps sergeant reveals to his commanding officer that he is a homosexual. He also tells this to several other enlisted members. An Administrative Discharge Board is convened. At the Board hearing, the sergeant does not dispute that he stated on several occasions that he is a homosexual. The sergeant promises, however, that he will not engage in any homosexual acts during the remainder of his term of enlistment. The sergeant presents no other evidence. The Board decides that the sergeant has failed to rebut the presumption that he engages in or has a propensity or intent to engage in homosexual acts, and recommends discharge.

Issue: Was the Board's recommendation correct? Did the sergeant fail to rebut the presumption?

Proposed Resolution: A statement by a Service member that he or she is a homosexual creates a rebuttable presumption that the Service member engages in or has a propensity or intent to engage in homosexual acts. This means that the statement itself is evidence that the Service member engages in or is likely to engage in homosexual acts. If the Service member fails to demonstrate that he or she in fact does not engage in homosexual acts and is not likely to do so, he or she may be discharged.

In this case, the only evidence that the member presented to rebut the presumption was his promise that he would not engage in any homosexual acts during the remainder of his term of enlistment. The Board's responsibility was to determine whether that promise was sufficient to demonstrate that the member does not engage in homosexual acts and is not likely to do so. The Board was entitled to find, in the exercise of its discretion, that the member's promise was not sufficient to demonstrate that he does not engage in homosexual acts and was not likely to do so.

13. Situation. A Navy lieutenant tells his best friend, another lieutenant, that he has recently come to terms with his sexuality and has decided that he is a homosexual. He says, however, that he has not engaged in any homosexual acts during his ten years of military service, and that he will continue to refrain from such acts. Although the lieutenant asks his friend not to tell anyone else about their conversation, the friend tells the commanding officer. The commanding officer then asks the lieutenant whether he told his friend that he is a homosexual. The lieutenant answers, "Yes."

At a Board of Inquiry hearing, the Navy presents the testimony of the lieutenant's friend and the commander about the lieutenant's statements to them. There is no evidence that the lieutenant engaged in any homosexual acts.

The lieutenant presents testimony from several fellow officers and subordinate enlisted persons, all males. Those individuals testify that the lieutenant has never stated or suggested to them that he was a homosexual and has never made any sexual advances or engaged in sexual innuendo toward them or anyone they know. They also state that the lieutenant is an outstanding officer, that he is always truthful and conscientious, and that they believe he is fully capable of abiding by all Navy regulations, including its restrictions on homosexual conduct. Finally, the lieutenant himself testifies that, although he considers himself a homosexual, he has not engaged in any homosexual acts during his ten years of service and that he intends to continue to refrain from such acts during the remainder of his term of service.

The Board finds that the lieutenant does not engage in homosexual acts and does not have an intent or propensity to do so. It bases this finding on the nature and circumstances of the lieutenant's statement to his friend, the lack of any evidence of homosexual acts, the lieutenant's testimony and his appearance of credibility, and the testimony from other officers and enlisted members about the lieutenant's conduct, character, and credibility. It therefore recommends that the lieutenant be retained on active duty.

Issue: Was the Board's recommendation correct? Did the lieutenant successfully rebut the presumption?

Proposed Resolution: The lieutenant's statement to his friend created a rebuttable presumption that the lieutenant engaged in or had the propensity or intent to engage in homosexual acts. The question for the Board was whether the lieutenant's evidence succeeded in rebutting that presumption by demonstrating that the lieutenant in fact did not engage in homosexual acts and was unlikely to do so. Based on its consideration of the relevant evidence, the Board was entitled to find, in the exercise of its discretion, that the lieutenant had rebutted the presumption and therefore should be retained.