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Gays in the Military - Abel [3]

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THE WHITE HOUSE
WASHINGTON

Cliff-
gathered materials,
but did not have time to
write memo on the able
brief. Joel asked us to do
brief memo to Gof & on
this; no comments to
Gof otherwise
— MUK

To CS
Date 8/22 Time 5:31

While You Were Out

M Roy Hawkins
of _____
Phone 514-5714
Area Number Extension
Fax (H) 703-698-7316
Area Number Extension

- | | |
|--|--|
| ☐ TELEPHONED | ☐ PLEASE CALL |
| ☐ CALLED TO SEE YOU | ☐ WILL CALL AGAIN |
| ☐ WANTS TO SEE YOU | ☐ RETURNED CALL |
| ☐ URGENT | |

Message

Abel Case
Comments by Thur.
noon

7.

Operator

To CS or?
Date 8/23 Time 1:55

While You Were Out

M Roy Hawkins
of _____
Phone 514-5714
Area Number Extension
Fax (H) 703-698-7316
Area Number Extension

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| ☐ TELEPHONED | ☐ PLEASE CALL |
| ☐ CALLED TO SEE YOU | ☐ WILL CALL AGAIN |
| ☐ WANTS TO SEE YOU | ☐ RETURNED CALL |
| ☐ URGENT | |

Message

re Abel case
please - someone
call TODAY

7.
Operator

M. Kr. Sloan
Comment

Cliff Sloan

Attached is our draft of the Able brief. Subject to further comment, it is substantially the draft that we propose to file. Please note that we are already at our 50-page limit. Any additions will have to be offset by deletions. The brief is due for filing on September 2, 1994. Please provide your comments to Roy Hawkins (514-5714) or John Hoyle (514-3469) by Noon, Thursday, August 25th.

We call your special attention to the following matters in the brief:

(1) the prejudice section (pp. 39-44) has been substantially revised and expanded;

(2) the exhaustion argument (pp. 14-20) is new and the portion on exhaustion of First Amendment claims (pp. 19-20) is particularly difficult;

(3) we especially invite your views about our suggestion that the court of appeals not just reverse the preliminary injunctions, but dismiss the entire case. (pp. 10, 50). The benefits of such a suggestion are clear, but we also have some questions about the wisdom of making the suggestion:

-- are we being too aggressive in such a controversial case?

-- will it cause us to take too much space in our reply brief to respond to their argument opposing this suggestion?

-- can we make this suggestion in light of the fact that our motion to dismiss is pending in the district court and probably will be ruled upon before the court of appeals decides this case?

S - Before we send out,
Fax copy to John Rogovin -
Write draft on copy
We fax. Ask him to
confirm dr. Pikes
MK

MK - (1) ext - on base
(2) J. Commerce - retrach
Pursuant to your
request, I made a copy
of attached & put it in
Beth's in-box.
Jeanne
8-24

DRAFT
8/22/94

BRIEF FOR THE APPELLANTS

PRELIMINARY STATEMENT

This appeal is from two preliminary injunctions (Nickerson, J.). See, App. , reported at 847 F. Supp. 1038, and App. , (unreported).

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1331 in this action for declaratory and injunctive relief. See slip op. 3. On July 8, 1994, the government filed a timely notice of appeal. This Court has jurisdiction under 28 U.S.C. 1292(a)(1).

STATEMENT OF THE ISSUES

10 U.S.C. 654(b)(2) requires separation from military service of a member who has "stated that he or she is a homosexual" and fails to "demonstrate[] that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." The district court preliminarily enjoined the statute. The questions presented are:

1. Whether a federal statute may be preliminarily enjoined on the basis that plaintiffs raise a "serious question" presenting a "fair ground for litigation" as to its constitutionality, without a showing of a likelihood of success on the merits.
2. Whether plaintiffs must exhaust their military remedies.
3. Whether the statute violates equal protection.
4. Whether the statute violates the First Amendment.

STATEMENT

A. Nature of the Case. Plaintiffs, six gay or lesbian military service members, seek declaratory and injunctive relief to bar enforcement of the federal statute and military directives (the "new policy") regarding military service by homosexuals. Under the new policy, service members will be discharged if they engage in homosexual acts, or make statements that they are homosexuals and fail to demonstrate that they do not and are not likely to engage in homosexual acts. 10 U.S.C. 654(b). This appeal involves two preliminary injunctions entered by the district court. The court first preliminarily enjoined the military from investigating or taking any adverse action against plaintiffs based on their statements of homosexuality made in connection with this litigation. (App.). That order rests on the determination that plaintiffs have raised a serious claim that such use of their litigation statements would violate the First Amendment and equal protection. The second order (App.) preliminarily enjoins any investigations or adverse action against plaintiffs based on their statements that they are homosexuals, regardless of whether such statements were made in connection with this litigation. The court held that plaintiffs raised a serious equal protection challenge to such use of these statements.

B. The Statute. The statute governing military service by homosexuals is the result of extensive review of this highly controversial issue by the Political Branches of government. Formal review began on January 29, 1993, when President Clinton directed the Secretary of Defense to review the then-current policy (the

"old policy") of the Department of Defense ("DoD"). 29 Weekly Comp. Pres. Doc. 112 (1993). Simultaneously, Congress undertook its own review of the issue. Both the Senate and House held lengthy hearings, receiving testimony from military commanders, gay rights activists, experts in military personnel policy, and many interested civilians and service members.¹

On July 19, 1993, the President announced a new "Policy on Homosexual Conduct in the Armed Forces." 29 Weekly Comp. Pres. Doc. 1369 (1993). The principal points of that policy were enacted in the National Defense Authorization Act for Fiscal Year 1994, P. L. 103-160, § 571, 107 Stat. 1670-73, codified at 10 U.S.C. 654, which was signed by the President on November 30, 1993. The military issued directives pursuant to the statute.

Section 571 of the new Act sets forth the "Policy concerning homosexuality in the armed forces" and 15 findings upon which that policy is based. In these findings, Congress recognized that "military life is fundamentally different from civilian life" because of "the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion" in military readiness. 10 U.S.C. 654(a)(8)(A). Accordingly, "military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society." § 654(a)(8)(B). These restrictions "regulate

¹ The evolution of the statute is traced in H.R. Conf. Rep. No. 357, 103d Cong., 1st Sess. 679, reprinted in 1993 U.S.C.C.A.N. 2218, 2281; see H.R. Rep. No. 200, 103d Cong., 1st Sess. 286-90, reprinted in 1993 U.S.C.C.A.N. 2013, 2073-77.

a member's life for 24 hours each day * * * whether the member is on base or off base, and whether the members is on duty or off duty." § 654(a)(9), (10).

Congress expressly found that the "longstanding * * * prohibition against homosexual conduct * * * continues to be necessary in the unique circumstances of military service." § 654(a)(13). It recognized that "[o]ne of the most critical elements of combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members." § 654(a)(7). Congress specifically concluded (§ 654(a)(15)):

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

The statute requires separation from service if a member has:

(1) "engaged in, attempted to engage in, or solicited another to engage in a homosexual act," § 654(b)(1); (2) "stated that he or she is a homosexual or bisexual * * * unless * * * [the member] demonstrates that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts," § 654(b)(2); or (3) "married or attempted to marry a person known to be of the same biological sex," § 654(b)(3).² As the language of section 654(b)(2) indi-

² "Homosexual act" is defined as "(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and
(continued...)"

cates and the legislative history confirms, a member's statement that he is a homosexual gives rise to a rebuttable presumption that the member engages, is likely to engage, in homosexual acts. S. Rep. No. 103-112, 103d Cong., 1st Sess. 290, 293-94 (1993).

C. The DoD Directives. The DoD Directives provide that "[h]omosexual conduct is grounds for separation from the Military Services." DoD Dir. 1332.14, ¶ H.1(b)(2) (enlisted personnel). Accord Dir. 1332.30, ¶ C.1(b) (officers).³ "Homosexual conduct" is defined as "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." DoD Dir. 1332.14, ¶ H.1(a). By contrast, "[s]exual orientation is considered a personal and private matter, and is not a bar to continued service unless manifested by homosexual conduct." Id. A service member's statement that he 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 in or will engage in homosexual acts." Id.

A statement by a service member that he is a homosexual "creates a rebuttable presumption that [he] engages in, attempts

²(...continued)

(B) any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A)." 10 U.S.C. 654(f)(3).

³ The two Directives are substantially similar. A third Directive (DoD Dir. 1304.26) governing enlistment, appointment, and induction standards, also contains similar provisions regarding homosexual conduct. Id. at ¶ 8. The Coast Guard regulation (App.) is similar to DoD Dir. 1332.14. For convenience, we will hereafter cite only to DoD Dir. 1332.14.

to engage in, has a propensity to engage in, or intends to engage in homosexual acts." DoD Dir. 1332.14, ¶ H.1(b)(2). The member is then "given the opportunity to rebut the presumption" by presenting evidence to an administrative board "demonstrating that he or she does not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts." Id. A "propensity to engage in homosexual acts" is defined as "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." Id. (emphasis added).⁴

D. District Court Proceedings. Plaintiffs filed this suit on March 7, 1994, alleging that the new statute and directives violate their rights to (1) equal protection under the Fifth Amendment, (2) free speech and free expression under the First Amendment, (3) expressive and intimate association under the First and Fifth Amendments, and (4) "adequate notice of what speech, conduct or behavior is proscribed and/or form the basis for investigation and discharge" as guaranteed by the First and Fifth Amendments. Complaint, ¶¶ 1-35. They sought declaratory and

⁴ Although not relevant to this appeal, we note that the new policy differs from the old policy principally in that it: (1) expressly states that a person's sexual orientation is a personal and private matter, and that only homosexual acts, homosexual marriages, and statements that reveal a propensity to engage in homosexual acts are grounds for separation; (2) eliminates questions regarding sexual orientation during the accession process; (3) clarifies the definition of "homosexual" and the nature of the rebuttable presumption by eliminating the term "desires"; (4) specifies the circumstances in which investigations into homosexual conduct will be commenced; and (5) spells out the procedures by which a member who states that he is a homosexual may rebut the presumption that he engages in or is likely to engage in homosexual acts.

injunctive relief against the new policy on its face and as applied to them. Complaint, p. 11.

On April 4, 1994, the district court entered a preliminary injunction. As to plaintiffs' First Amendment claim, the court held that "there is a serious question as to whether a regulation goes beyond what is reasonably necessary to protect any possible government interest when it inhibits six service members from continuing to speak in court to make a constitutional challenge." Slip op. 12-13. As to plaintiffs' equal protection claim, the district court "assume[d] for the purposes of the motion that the Act and Regulations are subject to only minimal equal protection scrutiny." Id. at 13-14. The court cited several decisions reaching different results on the constitutionality of the old policy and, without "undertak[ing] to assess the relative merits of these divergent holdings," concluded that "[t]he conflict of authority signifies the seriousness of the questions going to the merits of plaintiffs' equal protection claim." Id. at 15. Finally, the court rejected the government's exhaustion defense, holding that "[e]xhaustion is not required when, as here, plaintiffs raise constitutional questions and irreparable injury will occur without preliminary judicial relief." Id. at 17. Based on these rulings, the court preliminarily enjoined defendants "pending resolution of the case from investigating or discharging or taking other adverse or punitive action against plaintiffs based on their self-identification as gay or lesbian in connection with legal proceedings challenging the constitutionality of the Act and the Regulations." Id. at 25 (emphasis added).

In view of this limitation, the Government informed plaintiffs' counsel that it would proceed with investigations or administrative proceedings involving two plaintiffs (Zehr and Spencer) who had made statements outside of the litigation that they are homosexuals. Plaintiffs then moved for a further preliminary injunction to bar these actions.

On June 3, 1994, the district court granted plaintiffs' motion and issued an additional order "preliminarily enjoining defendants pending the resolution of the case from investigating, discharging or taking other adverse or punitive action, pursuant to the Act and/or Regulations, against plaintiffs based on their self-identification as lesbian or gay." Slip op. 5. The court held that "[t]he serious questions [as held in its April 4 order] as to a violation of plaintiffs' right to equal protection are not affected by whether their self-identification is related to court proceedings." Id. at 4.⁵

SUMMARY OF ARGUMENT

1. The district court erred in preliminarily enjoining the new statute based merely upon a determination that plaintiffs raised a "serious question" as to its constitutionality. That ruling directly conflicts with the controlling precedents of this Court holding that an Act of Congress cannot be preliminarily enjoined absent a determination that plaintiffs are likely to succeed on the merits. The district court did not -- and could not -- make such a determination here.

⁵ The Government's motion to dismiss for failure to state a claim, filed March 17, 1994, is still pending.

2. Plaintiffs failed to exhaust their administrative remedies. The exhaustion doctrine is strictly applied in military cases. Because the new policy has not been applied to plaintiffs, and because the military should be given the initial opportunity to construe and apply the policy, plaintiffs' suit is premature.

3. The legislative classification in 10 U.S.C. 654(b)(2) -- barring service by members who state that they are homosexuals and who fail to demonstrate that they do not and are not likely to engage in homosexual acts -- does not violate equal protection. This classification is reviewable under the rational basis test, with great deference to Congress's constitutional authority over military affairs and to the considered professional judgment of military officials.

The statute must be sustained under this standard. As recognized by this Court and every other court to consider the issue, the military has a legitimate interest in proscribing service members from engaging in homosexual acts. The challenged statute advances that interest. It reasonably presumes, subject to rebuttal by the service member, that a member who states that he is homosexual is likely to engage in proscribed homosexual acts. Discharging a member who is likely to commit such acts rationally advances the goal of military readiness by preventing the occurrence of those acts, promoting unit cohesion, and accommodating members' privacy interests.

4. Plaintiffs' claim that the statute violates the First Amendment is also without merit. Similar challenges to the old policy regarding homosexuals were rejected by every court of

appeals to consider the issue. The new policy treats a service member's statement of homosexuality as a basis from which to presume, in the absence of rebuttal by the member, that he does or will engage in homosexual acts. It is firmly established that the First Amendment does not prohibit such evidentiary use of a person's statements.

Nor, contrary to the district court's ruling, are statements of homosexuality entitled to any greater constitutional protection if they are made in connection with litigation. Statements involved in petitioning the courts for redress of grievances are subject to the same analysis as other Petition Clause and free speech claims, and they are not entitled to blanket immunity simply because they are made in litigation.

5. Because further proceedings in the district court are not needed to resolve the legal issues presented in this case, the Court not only should vacate the preliminary injunctions, but should order the case dismissed in its entirety.

ARGUMENT

I. A FEDERAL STATUTE MAY NOT BE PRELIMINARILY ENJOINED WHERE PLAINTIFFS MERELY RAISE CONSTITUTIONAL QUESTIONS "SUFFICIENTLY SERIOUS" TO BE A "FAIR GROUND FOR LITIGATION," BUT FAIL TO ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS.

The district court preliminarily enjoined the challenged federal statute on the ground that plaintiffs raised "serious questions going to the merits." Slip op. 16. A "serious question" means only that plaintiffs present a "fair ground for litigation." Plaza Health Laboratories v. Perales, 878 F.2d 577, 580 (2d Cir. 1989); Sperry International Trade v. Government of

Israel, 670 F.2d 8, 11 (2d Cir. 1982). The district court's injunctions barring enforcement of a federal statute without finding that plaintiffs have established a likelihood of success on the merits conflict with the controlling precedents of this Court and fail to give proper consideration to the actions of co-equal branches of government.

"[A] temporary injunction against enforcement is in reality a suspension of an act, delaying the date selected by Congress to put its chosen policies into effect. Thus judicial power to stay an act of Congress, like judicial power to hold that act unconstitutional, is an awesome responsibility calling for the utmost circumspection in its exercise." Heart of Atlanta Motel v. United States, 85 S. Ct. 1, 2 (1964) (Black, Circuit Justice). An Act of Congress is "presumptively constitutional" and should thus "remain in effect pending a final decision on the merits by this Court." Turner Broadcasting System v. FCC, 113 S. Ct. 1806, 1807 (1993) (Rehnquist, Circuit Justice); accord Bowen v. Kendrick, 483 U.S. 1304 (1987) (Rehnquist, Circuit Justice).⁶

The standard used by the district court below in granting preliminary injunctive relief directly conflicts with Union Carbide Agricultural Products v. Costle, 632 F.2d 1014 (2d Cir. 1980), cert. denied, 450 U.S. 996 (1981). In that case, this

⁶ The Supreme Court has repeatedly stated that no preliminary injunction -- let alone one that bars the implementation of a federal statute -- can be granted without a showing of a likelihood of success. E.g., Amoco Production v. Village of Gambell, 480 U.S. 531, 546 n.12 (1987); Doran v. Salem Inn, 422 U.S. 922, 931 (1975); Southeastern Promotions v. Conrad, 420 U.S. 546, 562 (1975).

Court, recognizing that the presumption of constitutionality is not rebutted when a plaintiff shows only that the validity of a statute is a "fair ground for litigation," held that a district court erred in using that standard rather than the "likelihood of success" standard in preliminarily enjoining enforcement of a federal statute. 632 F.2d at 1018-19. The Court explained: "When Congress authorizes or mandates governmental action that is in the public interest, more than a 'fair ground for litigation' must be shown before the action will be stopped in its tracks by court order." 632 F.2d at 1018.⁷ Thus, "where the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the district court should not apply the less rigorous fair-ground-for-litigation standard and should not grant the injunction unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim." Plaza Health, supra, 878 F.2d at 580.⁸ See also Sweeney v. Bane, 996 F.2d

⁷ The district court incorrectly attempted (slip op. 23) to distinguish Union Carbide on the ground that this Court found no substantial constitutional claims at issue there. On the contrary, the Union Carbide Court stated that the plaintiffs "raise knotty questions that are difficult to answer on the present record," 632 F.2d at 1018, and that "what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty." Id. (quotation omitted). Moreover, if Union Carbide had not involved substantial constitutional claims, this Court would have had no occasion to choose between the two standards and to reverse the district court for applying the lesser standard.

⁸ The district court erred in seeking to distinguish Plaza Health on the ground that the due process claim there was "speculative at best." Slip op. 23. Rather, this Court held that the movant "had not shown a likelihood of success on this claim." 878 F.2d at 581.

1384, 1388 (2d Cir. 1993) (requiring likelihood of success to preliminarily enjoin state statute).

In adopting the "serious question" standard, the district court improperly relied on Haitian Centers Council v. McNary, 969 F.2d 1326 (2d Cir. 1991). Although that case involved a federal agency, it did not involve an attack on a presumptively valid federal statute and hence is not applicable here.⁹ In any event, Haitian Centers lacks precedential authority because it was vacated as moot, 113 S. Ct. 3028 (1993). See County of Los Angeles v. Davis, 440 U.S. 625, 634 n.6 (1979).

Thus, the district court erred in entering a preliminary injunction absent a showing by plaintiffs of a likelihood of success on the merits. Because the district court did not -- and, as we show below, could not -- make this necessary determination, its preliminary injunctions should be reversed.¹⁰

⁹ The district court read (slip op. 16) Mitchell v. Cuomo, 748 F.2d 804 (2d Cir. 1984), to allow a preliminary injunction to be entered under the "fair ground for litigation" standard based on constitutional claims. Like Haitian Centers, however, Mitchell did not involve a challenge to a federal statute.

¹⁰ Because the district court erred in assessing the merits of plaintiffs' claims, this Court need not review the other factors necessary for a preliminary injunction. See Disabled American Veterans v. U.S. Dep't of Veterans Affairs, 962 F.2d 136, 144 (2d Cir. 1992). Plaintiffs, however, also failed to meet the irreparable-injury and public-interest requirements. The district court's holding that plaintiffs' assertion of a constitutional violation sufficed without more to establish irreparable injury relied on precedents that are inapplicable in the military context. See infra note 11. Its public-interest ruling completely disregards the congressional policy judgment embodied in the statute and simply substitutes the court's own view. See, e.g., Walters v. National Ass'n of Radiation Survivors, 468 U.S. 1323, 1324 (1984) (Rehnquist, Circuit Justice) ("[t]he presumption of constitutionality which attaches to every Act of Congress (continued...)

overbreadth?
chilly

II. THE DISTRICT COURT ERRED IN NOT REQUIRING PLAINTIFFS TO EXHAUST THEIR MILITARY REMEDIES.

Plaintiffs are attempting to bypass completely the administrative procedures afforded to them by the military. Pursuant to those procedures, a service member who states that he is a homosexual will not be discharged without notice and the opportunity to appear with counsel before an administrative board, where he may present witnesses and relevant evidence to demonstrate that he should be retained. DoD Dir. 1332.14 ¶H.1. If the board recommends separation, the member may submit a written challenge to the board's conclusion that would be considered by the commanding officer and the Secretary prior to a final decision. [cite] To date, the new policy has not been applied to plaintiffs; none has appeared before an administrative board, and some have not even been investigated. Until they exhaust their administrative remedies -- that is, until they have at least been processed under the challenged policy -- their suit is premature. Moreover, contrary to the district court's understanding, exhaustion is not excused simply because plaintiffs assert a violation of their constitutional right.

¹⁰(...continued)

is * * * an equity to be considered in favor of [the Government] in balancing hardships"). Nor is the congressional policy overcome, as the district court indicated (slip op. 23-24), because the injunction displaces the statute only as to the six plaintiffs; Congress's determination that the new policy serves important military interests is equally applicable to every service member, and there is no basis to distinguish between the first six plaintiffs (and thus to give them preferential treatment) and the next six, or 60, or a nationwide class. Cf. Heffron v. International Soc. for Krishna Consciousness, 452 U.S. 640, 652-53 (1981); Mathews v. Eldridge, 424 U.S. 319, 344 (1976).

The exhaustion requirement "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." McCarthy v. Madigan, 112 S. Ct. 1081, 1086 (1992). Exhaustion recognizes that the agency, not the court, has the primary responsibility for administering the program and should be given the initial opportunity to exercise its discretion and bring its expertise to bear in interpreting and applying the administrative scheme. Moreover, exhaustion protects against unnecessary judicial involvement by affording the agency the opportunity to provide redress and thus may obviate a constitutional claim, thereby "vindicat[ing] 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).

These principles apply with special force in the military context. As courts have repeatedly recognized, "imperatives concerning military discipline require the strict application of the exhaustion doctrine in discharge cases," Guitard v. Secretary of Navy, 967 F.2d 737, 740 (2d Cir. 1992), to "protect the military from undue interference by the federal courts." Middendorf v. Henry, 425 U.S. 25, 29 n.6 (1976).

A. Exhaustion Is Required As To Plaintiffs' Equal Protection Claims.

The purposes underlying the exhaustion doctrine require plaintiffs to exhaust their military remedies before bringing an equal protection challenge to the new policy. Exhaustion will promote judicial economy by affording the service member the opportunity to demonstrate that he should be retained in the

military notwithstanding his alleged statement that he is a homosexual. For example, the member may be able to show that he did not make the statement, or that he made it in jest, or that it was misunderstood or taken out of context. Alternatively, he may be able to rebut the presumption arising from his statement of homosexuality by establishing that he does not and is not likely to engage in homosexual acts. In such cases, the member would be retained, thereby avoiding litigation altogether and obviating the need for a constitutional ruling. In short, judicial review of a member's constitutional claims prior to discharge is premature because "[t]he Secretary [of the Army] has not stated that he will so exercise his discretion as to remove the [plaintiff]. If the Secretary does not remove [him] it will be unnecessary to pass on the constitutional objections which have been urged." Beard v. Stahr, 370 U.S. 42, 41-42 (1962) (per curiam).¹¹

Similarly, the purposes of exhaustion would be furthered even if the military concluded that the member should be separated. The administrative proceedings would clarify the basis for the military's decision and provide a factual record for judicial review. They would also enable the military to construe or clarify the new policy and give it meaning through application in con-

¹¹ See also Guerra v. Scruggs, 942 F.2d 270, 276 (4th Cir. 1991) (military remedies may eliminate the necessity to decide constitutional issues); Von Hoffburg v. Alexander, 615 F.2d 633, 639 (5th Cir. 1980) (where there is a "viable possibility" that military remedies may eliminate need to decide constitutional issue, exhaustion is required); Bard v. Seamans, 507 F.2d 765, 770 (10th Cir. 1974) (exhaustion required before service member can present a constitutional claim because military may provide an "adequate remedy").

crete factual circumstances. Such proceedings might also produce evidence that a service member who stated that he is a homosexual actually engaged in homosexual acts, thus converting the case -- and hence the nature of the statutory challenge -- from a "statements" case to an "acts" case. Cf. Falk v. Secretary of the Army, 870 F.2d 941 (2d Cir. 1989) (upholding military discharge for homosexual acts).

Moreover, exhaustion would provide the military with an opportunity to address any purported ambiguities in the policy. For example, plaintiffs' asserted below (Plaintiffs' Reply Memorandum in Support of Preliminary Injunction, 16) that the rebuttable presumption is a "sham." While the language and history of the new policy refute that broad assertion (see infra pp. __-__), any argument that the rebuttable presumption -- or any other aspect of the policy -- will be interpreted or applied in a manner that violates equal protection should first be addressed by the military and is not, therefore, ripe for judicial consideration.

The district court plainly erred in excusing plaintiffs from exhausting their administrative remedies on the ground that "to subject [plaintiffs] to the Act and Regulations will deny them equal protection every day." Slip op. 17. As the Supreme Court has held, allegation of constitutional harm does not preclude application of the exhaustion doctrine. Beard v. Stahr, 370 U.S. at 41; see also cases cited supra note 11. At least absent patently unconstitutional action, any predischage harm from being subjected to military proceedings does not constitute a cognizable injury that would justify "equitable interference" by federal

courts. McLucas v. DeChamplain, 421 U.S. 21, 33 (1975); accord Schlesinger v. Councilman, 420 U.S. 738, 758 (1975).

Finally, the district court's exhaustion ruling is especially objectionable in preliminarily enjoining not only separations, but also investigations of plaintiffs under the new policy. It is well-established that commencement of an investigation does not constitute irreparable injury justifying equitable relief. See Ohio Civil Rights Comm'n v. Dayton Christian Schools, 477 U.S. 619, 628-29 (1986); FTC v. Standard Oil, 449 U.S. 232, 243-44 (1980). Thus, the district court plainly erred in enjoining the military from commencing investigations into the circumstances of plaintiffs' statements of homosexuality.

B. Exhaustion Is Required As To Plaintiffs' First Amendment Claims.

The foregoing principles apply generally to plaintiffs' First Amendment claims and require exhaustion as to those claims as well. The Supreme Court has held that, prior to judicial resolution of a First Amendment claim challenging a statute, plaintiff must first be processed under the statute; absent exhaustion, "important and difficult constitutional issues would be decided devoid of factual context" and without a "clear [determination] that the Act would be applied to the objecting parties." W.E.B. DuBois Clubs of America v. Clark, 389 U.S. 309, 312 (1967) (per curiam).

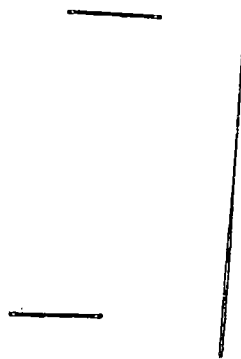
Indeed, the requirement of exhaustion in First Amendment cases applies with special force in the military. It is well settled that the First Amendment has a more limited application to

the Armed Forces because of "the different character of the military community and of the military mission." Parker v. Levy, 417 U.S. 733, 758 (1974); see id. at 757-61 (holding that First Amendment "overbreadth" doctrine does not apply in military context in the same manner as in civilian context, and upholding court martial for statements criticizing the Viet Nam war and urging soldiers not to serve); Brown v. Glines, 444 U.S. 348 (1980) (upholding restrictions on on-base circulation of petitions to Congress and the Secretary of Defense); Greer v. Spock, 424 U.S. 828 (1976) (upholding prior restraint on on-base political speeches and distribution of publications). Both Glines and Spock recognize that the overriding needs of the military warrant a delay in the exercise of free speech to allow appropriate processing and evaluation by military officials. Analogous reasoning supports the requirement here that plaintiffs exhaust their military remedies with respect to their First Amendment claims.

Plaintiffs' argument below (see Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, 48) that the new policy is unconstitutionally vague in various respects does not excuse their failure to exhaust. While any imprecision in the policy does not render it unconstitutional, this issue should be raised in administrative proceedings to permit the military to provide any necessary interpretation or clarification.

Insofar as plaintiffs claim that separation under the new policy in "statements" cases would unconstitutionally prohibit or burden free speech, their claim is not yet ripe for judicial review, and exhaustion plainly is required. Until the administra-

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tive process has been completed and separation ordered, no prohibition or burden has occurred; a service member who makes a statement of homosexuality but rebuts the presumption and thus remains in the military has not suffered any unconstitutional prohibition of free speech. Nor, for the reasons previously discussed (see supra pp. __-__), does the commencement of an administrative proceeding or investigation constitute cognizable injury that would excuse exhaustion.

Finally, exhaustion also is not excused with respect to plaintiffs' "chilling effect" claim. As discussed above, strict exhaustion principles apply in the military, and the justifications for exhaustion are equally applicable to this "chilling effect" claim. What is more, and as also discussed above, the First Amendment has a more limited scope in the Armed Services. For these reasons, and because it would be undesirable to split plaintiffs' challenge into exhaustible and non-exhaustible parts, plaintiffs' "chilling effect" claim is subject to exhaustion.¹²

III. EXCLUSION OF SERVICE MEMBERS WHO ENGAGE IN OR ARE LIKELY TO ENGAGE IN HOMOSEXUAL ACTS DOES NOT VIOLATE EQUAL PROTECTION.

As discussed above, plaintiffs have not been administratively processed under the new policy. Thus, they cannot bring an "as applied" challenge. Rather, if contrary to our argument plain-

¹² The district court erred in relying on Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion), and Paulsen v. County of Nassau, 925 F.2d 65, 68 (2d Cir. 1991), to hold that an alleged First Amendment violation suffices to excuse exhaustion. Neither of those cases arose in the special context of the military, and in neither case was there, as here, an available administrative process that would provide a factual record, bring agency expertise to bear, and sharpen -- or perhaps even moot -- plaintiffs' claims.

tiffs can sue now at all, they can only challenge the statute "on its face." But a statute is not facially invalid "simply because it may be applied in an arbitrary or unfair way in some hypothetical case not before the Court." FDIC v. Mallen, 486 U.S. 230, 247 (1988). To prevail on a facial attack, plaintiffs must show that the new statute "could never be applied in a valid manner." City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 798 (1984). Plaintiffs cannot sustain this heavy burden.

As we now show, the legislative classification in 10 U.S.C. 654(b)(2) -- barring service by members who state that they are homosexuals and who fail to demonstrate that they do not and are not likely to engage in homosexual acts -- does not violate equal protection. This classification is subject to review under the rational basis test, with great deference due to Congress's authority over military affairs and to the considered professional judgment of military officials. The statute rationally presumes, subject to rebuttal by the service member, that a member who states that he is a homosexual is likely to act in accordance with his sexuality and engage in proscribed homosexual acts. The statute advances the Nation's interest in military readiness by preventing the commission of prohibited homosexual acts, promoting unit cohesion, and accommodating service members' privacy interests. Because the statute rationally serves these legitimate objectives, plaintiffs' claim that it is unconstitutionally grounded in prejudice is without merit.

A. The Statute Should Be Reviewed Under The Rational Basis Test, With Great Deference Accorded Congress And The Military.

Even before enactment of the statute, courts recognized that the military's policy regarding service by homosexuals is subject to rational basis review. Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990) (discussing Bowers v. Hardwick, 478 U.S. 186 (1986)); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); Dronenburg v. Zech, 741 F.2d 1388, 1398 (D.C. Cir. 1984); Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984); see also High Tech Gays v. DISCO, 895 F.2d 563, 570-74 (9th Cir. 1990); Padula v. Webster, 822 F.2d 97, 102-03 (D.C. Cir. 1987).¹³

Legislative classifications subject to rational basis review are accorded "a strong presumption of validity" and must be sustained if there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." Heller v. Doe, 113 S. Ct. 2637, 2642 (1993). The government "has no obligation to produce evidence to sustain the rationality" of the statute; "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." Id. at 2643 (quotation omitted).

¹³ Pruitt v. Cheney, 963 F.2d 1160, 1165 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992), adopted an "active" rational basis test and held that the government must justify the military's old homosexual policy by record evidence introduced in each case. That test was grounded in the court's erroneous view that the old policy was directed against homosexual status rather than homosexual acts. See 963 F.2d at 1165 n.4. Here, because the statute makes clear that the new policy is conduct-directed, the Pruitt rationale is inapposite. Moreover, Pruitt does not survive Heller v. Doe, 113 S. Ct. 2637 (1993), which held that the government is not required to support its classification with record evidence under rational basis review.

Instead, "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. at 2643. Rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." Id. at 2642. So long as the asserted rationale is "plausible," "debatable," or "find[s] some footing in the realities of the subject addressed," the classification must be sustained. Id. at 2643, 2645, 2646.

Moreover, the Supreme Court has recognized that when adjudicating the "constitutionality of an Act of Congress -- 'the gravest and most delicate duty that this Court is called upon to perform' * * * -- the Court accords 'great weight to the decisions of Congress.'" Rostker v. Goldberg, 453 U.S. 57, 64 (1981) (citations omitted). Special deference is due congressional enactments in military matters -- "perhaps in no other area has the Court accorded Congress greater deference." Rostker, 453 U.S. 57, 64-65 (1981). "Judicial deference thus is at its apogee when reviewing congressional decisionmaking in [the military context]. * * * Congress has primary responsibility for the delicate task of balancing the [constitutional] rights of servicemen against the needs of the military." Weiss v. United States, 114 S. Ct. 752, 760-61 (1994).

Likewise, great deference is to be accorded the "considered professional judgment" of military officials, Goldman v. Weinberger, 475 U.S. 503, 509 (1986), concerning "complex * * * decisions as to the composition * * * of a military force." Rostker, 453

U.S. at 65. The military's "special constitutional function * * * to fight or be ready to fight wars should the occasion arise," Greer v. Spock, 424 U.S. 828, 837-38 (1976), renders the military a "specialized society separate from civilian society [that has,] by necessity, developed laws and traditions of its own during its long history." Parker v. Levy, 417 U.S. at 743. "[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life" to "foster instinctive obedience, unity, commitment, and esprit de corps." Goldman, 475 U.S. at 507. See also 10 U.S.C. 654(a)(8). The implementation of policies promoting "the subordination of personal preference and identities in favor of the overall group mission" are entrusted to the military's "considered professional judgment," Goldman, 475 U.S. at 508, and "courts have traditionally shown the utmost deference" to the "[p]redictive judgment" of the Executive Branch in such matters. Department of Navy v. Egan, 484 U.S. 518, 529-30 (1988).

These settled rules reflect the recognition that "it is difficult to conceive of an area of governmental activity in which the courts have less competence." Rostker, 453 U.S. at 65. Because courts are "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have," Goldman, 475 U.S. at 507, they must be "particularly careful not to substitute [their] judgment" (Rostker, 453 U.S. at 68) for that of the Political Branches in military matters. This is not to say that a court has no role in deciding constitutional questions in the military context; but in deciding such questions, "the Constitution itself requires [great] deference to congres-

sional choice." Rostker, 453 U.S. at 67. Accord Falk v. Secretary of the Army, 870 F.2d 941, 945 (2d Cir. 1989).

B. The Statute Rationally Presumes, Subject To Rebuttal, That A Member Who States That He Is A Homosexual Engages In Or Likely Will Engage In Prohibited Homosexual Acts.

1. The starting point in analyzing the statutory classification is the well-settled principle that homosexual acts may validly be proscribed in the special context of the military. See cases cited p. , infra. Relying on this principle, see S. Rep. No. 103-112, supra, at 285, Congress enacted a statute that, on its face, is conduct-directed. Congress specifically determined that the "longstanding * * * prohibition against homosexual conduct * * * continues to be necessary in the unique circumstances of military service." 10 U.S.C. 654(a)(13). The statute thus provides for the separation of any member who "has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts." § 654(b)(1).

Congress also concluded that service by members "who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to [the military mission]." § 654(a)(15). Congress recognized that members who state that they are homosexuals are, unless they show to the contrary, likely to engage in homosexual acts. See S. Rep. No. 103-112, supra, at 281-84. Accordingly, the statute provides that a service member who "has stated that he or she is a homosexual" shall be separated "unless there is a further finding * * * that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends

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to engage in homosexual acts." § 654(b)(2). In short, the statute is directed to persons who commit or are likely to commit homosexual acts. S. Rep. 103-112, supra, 282-83, 285, 294.

The DoD Directives equally make clear that the new policy is conduct-directed. They define "sexual orientation" as "[a]n abstract sexual preference for persons of a particular sex" (DoD Dir. 1332.14, Definitions ¶ 0), and they admonish that "[a] member's sexual orientation is considered a personal and private matter and is not a bar to continued service * * * unless manifested by homosexual conduct." DoD Dir. 1332.14, ¶ H.1(a). A statement by a service member that he 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 in or will engage in homosexual acts." Id. As the directives elaborate, such a statement "creates a rebuttable presumption that the Service member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." Id. at ¶ H.1(b)(2). "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." Id. (emphasis added). See also id., Definitions ¶ 0 (distinguishing sexual orientation from propensity to engage in sexual acts).¹⁴

¹⁴ The district court erred in disregarding the regulatory definition and holding instead that "propensity" means an "innate [or inborn] tendency" or "orientation." Slip op. at 8. The regulatory definition is reasonable and consistent with the statute and legislative history, and thus it is entitled to
(continued...)

2. The rebuttable presumption in the new policy -- that members who state that they are homosexuals engage in or are likely to engage in homosexual acts -- plainly is rational. The Senate Committee explained that, among both heterosexuals and homosexuals, "[s]exual behavior is one of the most intimate and powerful forces in society," and "experience demonstrates that few [service members] remain celibate." S. Rep. No. 103-112, supra, at 281, 284. Congress recognized that military policies properly take into account the sexual attractions that can exist between men and women, and "[s]imilar considerations apply to the development of policies with respect to homosexuality." Id. at 284.

In particular, the Committee viewed homosexuality as "intimately connected with [homosexual] conduct" (S. Rep. No. 103-112, supra, at 282) and recognized that statements of homosexuality, unless rebutted, "demonstrate a propensity or intent to engage in sexual conduct with persons of the same sex." Id. at 281. It would be "irrational," the Committee stated, "to develop military personnel policies on the basis that all gays and lesbians will remain celibate or that they will not be sexually attracted to others." Id. As the Committee emphasized (id. at 294), "it is reasonable for the armed forces to presume that when a person uses the term 'I am homosexual,' the individual engages in, attempts to

¹⁴ (...continued)

deference. See Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984); Falk v. Secretary of the Army, 870 F.2d 941, 946 (2d Cir. 1989). The fact that the military will retain a member who states that he is a homosexual but who demonstrates that he does not and will not engage in homosexual acts establishes that the policy is not aimed at "orientation."

engage in, has a propensity to engage in, or intends to engage in impermissible conduct."

Thus, Congress reasonably assumed that any person, whether heterosexual or homosexual, is likely to act in a manner that is consistent with his stated sexuality, unless he demonstrates otherwise. The difference between the treatment of declared homosexuals and heterosexuals in the military is that homosexual acts are forbidden to service members (10 U.S.C. 654(b), 925) -- a prohibition that repeatedly has been upheld as constitutional. See infra p. __. Congress's policy in "statement" cases therefore reflects the constitutionally permissible difference between heterosexual and homosexual acts in the unique military context.

Congress had ample basis to conclude that there is a rational correlation (subject to rebuttal in individual cases) between a person's statement that he is a homosexual and the inference that he engages in, or likely will engage in, homosexual acts. Indeed, "advocates of gay rights have expressly linked sexual orientation to conduct." S. Rep. No. 103-112, supra, at 283. Accord National Defense Research Inst., Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment 51, 64 (Rand 1993) (a "strong correlation" exists between persons who identify themselves as homosexuals and homosexual acts).

Courts, too, have recognized the rationality of presuming homosexual acts from statements of homosexuality. For example, the Seventh Circuit, in upholding DoD's old policy in a "statements" case, recognized that a person's statement that he is a homosexual:

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 status], but upon reasonable inferences about * * * probable [homosexual] conduct in the past and in the future.

Ben-Shalom, 881 F.2d at 464; see also Woodward, 871 F.2d at 1076; Watkins v. United States Army, 847 F.2d 1329, 1361 n.19 (9th Cir. 1988) (Reinhardt, J., dissenting) ("[t]o pretend that homosexuality or heterosexuality is unrelated to sexual conduct borders on the absurd"), vacated, 875 F.2d 699 (1989) (en banc), cert. denied, 498 U.S. 957 (1990).

Congress's enactment of this statutory presumption based on the lessons of human experience comports with settled law. A presumption in a civil proceeding is valid if it rests on "a sound factual connection between the proved and inferred facts." NLRB v. Baptist Hosp., 442 U.S. 773, 787 (1979). It is "only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." Usery v. Turner Elkhorn Mining, 428 U.S. 1, 28 (1976). See also United States v. Gainey, 380 U.S. 63, 66-67 (1965) (upholding presumption that defendant's unexplained presence at an illegal still indicates his involvement in unlawful liquor operation). Moreover, because the "process of making the determination of rationality is, by its nature, highly empirical, * * * significant weight should be accorded to the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." Usery, 428 U.S. at 28.

3. The statutory presumption at issue here is a general supposition, not an invariable rule, and as discussed supra Part III.B.1, it may be rebutted in individual cases. The statute and directives afford a service member an opportunity to show that, despite his statement of homosexuality, he should be retained in the service because he does not, and will not likely, engage in homosexual acts. In rebutting the presumption, the member is entitled, with assistance of counsel, to present relevant evidence and witnesses to the administrative board (DoD Dir. 1332.14, ¶ H.1(b)(2)), and the board may consider: (1) whether the member has engaged in past acts; (2) the member's credibility; (3) testimony from others about the member's past conduct, character, and credibility; (4) the nature and circumstances of the member's statement; and (5) any other relevant evidence. Id.¹⁵

When a member rebuts the presumption he shows that he will conform his behavior to the military standard of conduct barring homosexual acts that is designed to promote military readiness and effectiveness. By rebutting the presumption, he acknowledges that "[t]he essence of military service 'is the subordination of the desires and interests of the individual to the needs of the

¹⁵ The district court erroneously stated that neither the statute nor the regulations provide directions as to how a member who identifies himself as a homosexual "can prove that he * * * does not have such a [homosexual] propensity." Slip op. 7. In fact, the DoD Directives provide a detailed explanation, complete with examples, regarding how a member can rebut the presumption. See DoD Dir. ____; see also S. Rep. 103-112, supra, at 290, 294 (discussing procedures for rebutting the presumption). Thus, contrary to the court's understanding, a member who states that he is a homosexual is not required to disprove his sexual orientation; rather, he must show that he does not engage in, and will not likely engage in, homosexual acts. See 10 U.S.C. 654(b)(2).

service'" in order to "foster [the] instinctive obedience, unity, and esprit de corps [necessary] to accomplish * * * [the military] mission." Goldman, 475 U.S. at 507.

Congress's use of a rebuttable presumption here is "sensible and timesaving." NLRB v. Curtin Matheson Scientific, 494 U.S. 775, 788-89 (1990). Not only is the presumption reasonable, but an individual who has stated that he is a homosexual has the "peculiar means of knowledge" to prove whether or not the general presumption applies in his particular case. 9 Wigmore on Evidence § 2486, at p. 290 (Chadbourn rev. 1981). The permissibility of this approach is confirmed by Lavine v. Milne, 424 U.S. 577 (1976), which upheld a statutory presumption that a person who voluntarily leaves his job within 75 days of applying for public assistance does so to qualify for assistance. Emphasizing that "[o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment," the Court sustained the presumption because a person's state of mind "should be best known by the [person] himself." Id. at 585. So, too, the individual member is in the best position to demonstrate that, notwithstanding his statement, he is will conform his conduct to military standards by showing he does not and will not engage in homosexual acts.

C. The Statutory Exclusion Of Service Members Who By Their Statements Demonstrate That They Are Likely To Engage In Homosexual Acts Is Rationally Related To Advancing Legitimate Military Interests.

1. Preventing The Commission Of Proscribed Homosexual Acts.

The challenged statute represents a rational legislative choice

designed to prevent the commission of proscribed homosexual acts that Congress found impair military readiness. It is well settled that homosexual acts may be proscribed in the special military context. Even prior to this statute, every court of appeals to decide the issue had rejected constitutional challenges to the prohibition in the military's old policy against homosexual acts. Schowengerdt v. United States, 944 F.2d 483 (9th Cir. 1991), cert. denied, 112 S. Ct. 1514 (1992); Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984); Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981); see Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir.), cert. denied, 454 U.S. 864 (1981). Two other courts of appeals upheld the old policy as applied to members who, by stating that they were homosexuals, demonstrated a propensity to engage in homosexual acts. 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).¹⁶ And in Falk, 870 F.2d at 947, this Court recognized the military's interest "in preventing and halting [homosexual] conduct that undermines discipline and morale." The Senate Armed Services Committee endorsed

¹⁶ Indeed, even the now-vacated decision of a panel of the D.C. Circuit (which had invalidated the old policy in a case involving a statement of homosexuality) recognized that "'homosexual acts' are forbidden to military servicemembers, and there is no dispute that laws forbidding such conduct are constitutional." Steffan v. Aspin, 8 F.3d 57, 64, vacated and rehearing en banc ordered, 8 F.3d 70 (D.C. Cir. argued May 11, 1994).

such precedents in enacting the new policy. S. Rep. 103-112, supra, at 284-86.

Of course, the Constitution does not require that the military wait until homosexual acts have occurred and been detected before taking personnel action necessary to protect military readiness. "[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). Thus, the military need not "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. See also Falk, 870 F.2d at 947 (military may "prevent[]" homosexual conduct). The Senate Committee similarly recognized that the military has a duty "to separate the individual from military service without waiting until the individual's propensity or intent to violate [military standards of conduct] ripens into specific conduct prejudicial to good order and discipline." S. Rep. 103-112, supra, at 294; see id. at 282 ("the Armed Forces should not be required to take th[e] risk" that an admitted homosexual will not engage in homosexual acts). See also Gainey, 380 U.S. at 66-67 (Congress may presume that defendant's unexplained presence at an illegal still indicates his participation in unlawful liquor operation).¹⁷

¹⁷ The statute does not involve use of plaintiffs' statements to penalize their "inclinations" contrary to Jacobson v. United States, 112 S. Ct. 1535, 1542 (1992). Under the statute, (continued...)

The constitutionality of the statutory scheme prohibiting service by persons who are likely to engage in prohibited acts is directly supported by New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979). Beazer involved the Transit Authority's rule that barred employment to persons using narcotic drugs. The policy was alleged to violate equal protection because it denied employment to methadone users who were enrolled in a rehabilitation program and therefore able to perform the jobs. Id. at 589-90. Rejecting that challenge, the Supreme Court held that the policy was rationally "supported by the legitimate inference that * * * a degree of uncertainty [regarding future drug use while still in the program] persists" (id. at 591), and that it "represent[ed] a policy choice * * * [regarding employment] made by that branch of Government vested with the power to make such choices." Id. at 592. Accord Vance v. Bradley, 440 U.S. 93, 106 (1979) (in establishing mandatory retirement age, Congress validly drew a line to "avoid the risks" that otherwise might result).

Similarly, Weinberger v. Salfi, 422 U.S. 749 (1975), upheld a statutory presumption that marriages occurring less than nine months before a wage earner's death were shams entered into for the purpose of obtaining survivor benefits under the Social Secur-

¹⁷(...continued)

a person will be excluded from the military not because of his homosexual orientation, but because of the unrebutted likelihood that he will engage in homosexual acts. Moreover, Jacobson was a criminal prosecution, which involves restrictions not applicable to military personnel decisions. For example, the government may not criminally prosecute a person for being a drug addict, Robinson v. California, 370 U.S. 660 (1962); but Congress may formulate non-criminal rules to preclude military service by people who are likely to use illegal drugs.

ity Act. Emphasizing that rationality review does not require that the statute "precisely filter[] out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute" (id. at 777), the Court sustained the "prophylactic" presumption on the ground that "Congress, its concern having been reasonably aroused by the possibility of a [risk] which it legitimately desired to avoid, could rationally have concluded * * * that a particular policy would protect against [the risk's] occurrence." Id.

Under the principle of these cases, the statutory presumption in "statements" cases is a rational means to avoid the commission of proscribed homosexual acts that pose an "unacceptable risk" to military effectiveness. 10 U.S.C. 654(a)(15). Nor is the statute rendered irrational by a claim that it is "broader than necessary." Beazer, 440 U.S. at 592. In fact, in contrast to the irrebuttable "general rule[s]" (id.) upheld in Beazer, Vance, and Salfi, the legislative classification here accords service members "individualized consideration" (id.) by affording them an opportunity to rebut the presumption.

2. Promoting Unit Cohesion. The statute also rationally furthers the vital military goal of maintaining unit cohesion. Congress made two key findings in this regard. First, it found that unit cohesion -- "the bonds of trust * * * that make combat effectiveness of a military unit greater than the sum of the individual unit members" -- is "[o]ne of the most critical elements in combat capability." 10 U.S.C. 654(a)(7). Second, Congress found that "[t]he presence in the armed forces of persons

who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." § 654(a)(15).

These legislative findings "are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 331 n.12 (1985). Especially under the rational basis test, courts are not "to resolve conflicts in the evidence against the legislature's conclusion * * *." Brotherhood of Locomotive Firemen v. Chicago, R.I. & Pac. R.R., 393 U.S. 129, 136, 138-39 (1968). Accord Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 464 (1981); Katzenbach v. Morgan, 384 U.S. 641, 653 (1966).

Abundant congressional testimony supports these legislative findings. General Schwarzkopf testified that unit cohesion "is the single most important factor in a unit's ability to succeed on the battlefield." S. Rep. 103-112, supra, at 274. Likewise, then-Chairman of the Joint Chiefs of Staff, General Powell, emphasized the military's concern that "[w]e cannot allow anything to happen which would disrupt * * * cohesion within the force." S. Rep. 103-112, supra, at 275. As he explained, although service members "must get along together despite their individual preferences[,] [b]ehavior too far away from the norm undercuts the cohesion of the group." Id. at 278 (emphasis added).

In General Powell's experience, service by persons who engage in homosexual acts, or who by their statements demonstrate a

propensity to engage in homosexual acts, "would have an unacceptable detrimental and disruptive impact on the cohesion, morale, and esprit of the armed forces." Id. See also id. at 281. General Schwarzkopf similarly testified that the presence of active homosexuals in military units has a debilitating effect on combat effectiveness (id. at 280):

[I]n my years of military service, I have experienced the fact that the introduction of an open homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war.

[I]n every case I am familiar with, and there are many, whenever it became known in a unit that someone was openly homosexual, polarization occurred, violence sometimes followed, morale broke down, and unit effectiveness suffered.

Congress thus had ample basis for reaffirming the military's longstanding judgment that service by members who engage in homosexual acts, or demonstrate by their statements that they are likely to engage in such acts, severely impairs unit cohesion.

3. Accommodating Privacy Interests. The statute also rationally accommodates legitimate privacy interests of service members who "routinely" and "involuntarily" must "accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy." 10 U.S.C. 654(a)(12). As General Powell testified:

[T]he majority of our young men and women are required to live in communal settings that force intimacy and provide little privacy. It may be hard to contemplate spending 60 continuous days in the close confines of a submarine; sleeping in a foxhole with half a dozen other people; 125 people all living and sleeping in the same 40 by 50 foot, open berthing area, but this is exactly what we ask our young people to do.

S. Rep. 103-112, supra, at 277. General Powell explained that "it would be prejudicial to good order and discipline" if the military required heterosexuals and persons who demonstrated a propensity to engage in homosexual acts "to share the most private facilities together, the bedroom, the barracks, latrines, and showers." Id. at 283; see id. at 280-82.

Significantly, these same concerns underlie military personnel policies that seek, where possible, to provide men and women with separate living arrangements in order to "accommodate sexual privacy" and avoid "increased sexual tension" that would "disrupt unit cohesion." S. Rep. 103-112, supra, at 277-78. The Senate Committee recognized that, just as "[i]t is reasonable for the armed forces to take these factors into consideration in establishing gender-based assignment policies," it also "is reasonable for the armed forces to take [them] into consideration when addressing issues concerning persons who engage in or have the propensity or intent to engage in sexual activity with persons of the same sex." Id. at 278.

This privacy concern thus provides a rational basis for sustaining the legislative classification.¹⁸ Moreover, the privacy rationale is not undermined by permitting the continued service of a member who states that he is a homosexual but successfully rebuts the presumption of homosexual acts. By

¹⁸ For similar reasons, Congress could rationally conclude that allowing service by those who demonstrate a likelihood to engage in homosexual acts would adversely affect the ability of the military to recruit and retain members in our all-volunteer force. See Dronenburg, 741 F.2d at 1398; Woodward, 871 F.2d at 1076-77; Rich, 735 F.2d at 1227-28 n.7; Beller, 632 F.2d at 811.

definition, that member has demonstrated that he does not and will not engage in homosexual acts. The retention of such persons reflects a balance struck by Congress between two competing interests: the privacy interest of heterosexuals and the interest of persons who state that they are homosexuals in serving in the military if they demonstrate that they will conform their conduct to military standards. See S. Rep. 103-112, supra, at 274 (the committee "carefully considered the needs of the armed forces and the rights of all persons, including those who are gay or lesbian"). A policy need not be carried to its logical limits, without regard to other competing interests, to be rational. Under rational basis review, "the latitude of discretion is notably wide in * * * the granting of * * * exemptions upon grounds of policy." Nordlinger, 112 S. Ct. at 2335.

4. The Statute Is Not Grounded In Prejudice. As shown above, the "statements" provision in the new policy is conduct-directed and rests on concerns identical to those underlying the longstanding military prohibition of homosexual acts. Thus, the unbroken line of appellate decisions sustaining that prohibition (see supra p. __), applies with equal force here and demonstrates that the statute is not grounded on impermissible prejudice.

Moreover, the new policy was adopted after Congress and the Executive Branch fully considered both sides of the debate over the controversial issue of service by homosexuals, including in particular the criticism that the military's policies were based on "prejudice." The Senate Committee "emphasize[d] * * * that its position on the service of gays and lesbians is not based upon

stereotypes." S. Rep. 103-112, supra, at 282.¹⁹ Rather, the statute rests on the considered professional judgment of military authorities after a "careful, thorough, and open-minded review" as to "what is best for military effectiveness" (id. at 279) and on Congress's judgment about "the impact in the military setting of the conduct that is an integral element of homosexuality." Id. at 282. As General Powell explained:

[O]pen homosexuality in units is not just the acceptance of benign characteristics such as color or gender or background. It involves matters of privacy and human sexuality that, in our judgment, if allowed to exist openly in the military, would affect the cohesion and well-being of the force. It asks us to deal with fundamental issues that the society at large has not yet been able to deal with.

Id. at 281. Accordingly, Congress specifically concluded that the statute does not embody "an irrational prejudice against gays and lesbians" (id. at 283); it is "based on prudence, not prejudice" (id.) and is "carefully drafted to maintain the delicate balance between the individual concerns and the needs of the armed forces." Id. at 274. This judgment of Congress, as "a coequal branch of government whose Members take the same oath [judges] do to uphold the Constitution of the United States," is entitled to the utmost deference. Rostker, 453 U.S. at 64.

To argue, notwithstanding the congressional determination, that the statute is impermissibly grounded in prejudice and hence unconstitutional reflects a misunderstanding of rational basis review. Where, as here, no suspect classification or fundamental

¹⁹ For example, Congress rejected the "stereotypical" notion that homosexuals are sexual "predators" who "find every person of the same sex to be sexually attractive." Id. at 284.

right is at issue, equal protection is satisfied if there is "a rational relationship between the disparity of treatment and some legitimate governmental purpose." Heller, 113 S. Ct. at 2692. Only a statute that lacks any such rational basis can be said, for purposes of rationality review, to be the kind of "invidious discrimination" or "wholly arbitrary act" that equal protection condemns. New Orleans v. Dukes, 427 U.S. 397, 304 (1976) (per curiam). Thus, [a court] will not overturn * * * a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." Vance v. Bradley, 440 U.S. 93, 97 (1979). Under this test, it is only "the rare case when the facts preclude[] any plausible inference that the reason for the" challenged classification is unrelated to a legitimate government purpose. Nordlinger v. Hahn, 112 S. Ct. 2326, 2335 (1992).

In cases that have invalidated a government action under the rational basis test, the Supreme Court has concluded that the challenged action was arbitrary or based on prejudice only after it had ruled out every possible legitimate basis for the classification, thereby leaving either impermissible reasons or no reasons at all to support it. For example, Department of Agriculture v. Moreno, 413 U.S. 528 (1973), struck down a related-person requirement for household eligibility under the Food Stamp Act because "[t]he challenged classification * * * is clearly irrelevant to the stated purposes of the Act" and was supported

only by "a bare desire to harm a politically unpopular group [hippies]." Id. at 534.

Similarly, City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), overturned municipal zoning requirements that were imposed on group homes for the mentally retarded but not on any other group home or multiple-dwelling building. The Court explained that, under rational basis review, plaintiffs were protected from "invidious discrimination" by the requirement that the classification "must be rationally related to a legitimate governmental purpose," and it stressed that "'a bare * * * desire to harm a politically unpopular group' [is] not [a] legitimate state interest[]." Id. at 456-57. The Court thus made clear 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 [other group homes.]" Id. at 448 (emphasis added). Reviewing each of the proffered rationales for the special requirements and finding none that would justify the difference in treatment, the Court held that "the record does not reveal any rational basis for believing that the [mentally-retarded group] home would pose any special threat to the city's legitimate interests." Id. at 478. Absent a rational basis, "requiring the permit in this case appear[ed] to rest on an irrational prejudice against the mentally retarded." Id. at 450. See also New York Transit Authority v. Beazer, 440 U.S. 568, 592 (1979) (because ban on employment of drug users was rational, it was "neither unprincipled nor invidious").

Cleburne does not invalidate the new policy. First, Cleburne did not arise in the special context of the military. Second, unlike Cleburne, where the challenged classification did not serve any legitimate governmental interest and therefore could only rest on "irrational prejudice," 473 U.S. at 450, the new policy serves goals -- the prevention of prohibited homosexual acts, the promotion of unit cohesion, and the accommodation of personal privacy -- that are not only legitimate, but that Congress has concluded are of the highest order in the military context.²⁰

Plaintiffs argued below, however, that these rational bases do not sustain the statute because they are predicated on the "prejudice" against homosexuals held by some service members. This argument lacks merit. For the reasons just discussed, as a matter of law a classification is not based on prejudice under the rational basis test where -- as here -- it serves legitimate government objectives. As the Supreme Court recently reaffirmed, "[i]t is a familiar principle of constitutional law that [courts] will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." Turner Broadcasting System v. FCC, ___ S. Ct. ___, ___ (1994).

Moreover, plaintiffs' argument overlooks the fact that service members' views about homosexual conduct in the unique living

²⁰ The present case also differs significantly from Palmore v. Sidoti, 466 U.S. 429 (1984). In Palmore, the challenged policy occurred in the civilian context and involved a racial classification. Unlike race, which occupies a unique position in our legal system and in our history, classifications based on the likelihood of a person engaging in homosexual conduct are not illegitimate per se; on the contrary, courts have consistently upheld the military's prohibition of homosexual acts.

and working conditions found in the Armed Forces reflect a number of considerations -- including religious doctrines, moral precepts, ethical values, and privacy concerns -- about an extraordinarily complex question. See S. Rep. 103-112, supra, at 268. Rationality review does not require that Congress and the military attempt to determine the deep-seated bases for attitudes regarding this complex and controversial issue. Rather, if rational basis review and deference to Congress and the military mean anything, the Government must have sufficient latitude to address the serious practical problems affecting military readiness that the military has long found arise from homosexual conduct.²¹ Thus, plaintiffs' claim of "prejudice" does not undermine the rationality of the policy adopted by Congress and the military for dealing with this issue.

IV. SEPARATION BASED ON A SERVICE MEMBER'S STATEMENT THAT HE IS A HOMOSEXUAL DOES NOT VIOLATE THE FIRST AMENDMENT.

The district court held that the First Amendment prevents the military from separating (or even investigating) service members based on their statements, made in connection with litigation challenging the validity of the new policy, that they are homosexuals. That was error as a matter of law. All statements by service members that they are homosexuals, whether made in connection with litigation or otherwise, implicate the concerns

²¹ The Senate Committee "carefully considered" the suggestion that problems of unit cohesion "could be overcome through training and education." S. Rep. 103-112, supra, at 280. It rejected that approach, however, concluding that the new policy was most likely to promote the "effectiveness of our armed forces to carry out their mission to defend our nation." Id. at 269.

underlying the new policy and are subject to the statute and directives. The First Amendment neither forbids the use of such statements to demonstrate that a service member engages in or is likely to engage in prohibited homosexual acts, nor provides special protection to statements made in litigation.

A. The First Amendment Does Not Bar The Military's Use Of A Service Member's Statement Of Homosexuality To Establish That The Member Engages In, Or Is Likely To Engage In, Prohibited Homosexual Acts.

Prior to enactment of the statute, every appellate court to consider the issue held that the First Amendment is not violated by the discharge of a service member based on the member's statement that he is a homosexual. Ben-Shalom v. Marsh, 881 F.2d at 458-62; Schowengerdt v. United States, 944 F.2d 483, 489 (9th Cir. 1991), cert. denied, 112 S.Ct. 1514 (1992); Pruitt v. Cheney, 963 F.2d 1160, 1163-64 (9th Cir. 1991), cert. denied, 113 S.Ct. 655 (1992); Rich v. Secretary of the Army, 735 F.2d 1220, 1228-29 (10th Cir. 1984); see also High Tech Gays v. DISCO, 895 F.2d 563, 578-80 (9th Cir. 1990). The reasoning of these precedents also applies to the new statute.

Significantly, the new policy does not prohibit speech about issues concerning homosexuality; nor does it forbid criticism of the policy or advocacy for its change; nor does it ban attending demonstrations on homosexual rights, or reading homosexual newspapers, or patronizing homosexual clubs. See DoD Dir. 1332.14 (Encl. 3, Att. 4) ¶ C.3(d); S. Rep. 103-112, supra, at 292. Rather, it merely uses a service member's statement of homosexuality in an evidentiary way to establish a likelihood of homosexual

acts -- acts that the military may validly proscribe and treat as a ground for separation. Thus, the basis for the separation is acts, not "speech." Indeed, the retention in the service of a member who makes a statement that he is a homosexual, but rebuts the presumption of homosexual acts, is compelling evidence that the policy does not target speech but rather is directed to acts. See Wayte v. United States, 470 U.S. 598 (1985).

Even in the criminal context, Wisconsin v. Mitchell, 113 S. Ct. 2194, 2201 (1993), recently held that "[t]he First Amendment * * * does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." See also Dawson v. Delaware, 112 S. Ct. 1093, 1097 (1992) ("the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations * * * simply because those beliefs and associations are protected by the First Amendment"). Nothing in the First Amendment bars the use of a statement constituting an admission. See Pruitt, 963 F.2d at 1164 ("Pruitt's admission [of homosexuality], like most admissions, was made in speech, but that does not mean that the First Amendment precludes the use of the admission as evidence of the facts admitted").

This case is closely analogous to Wayte. Wayte had written to government officials, stating that he had not registered for the draft and did not intend to do so. The Supreme Court rejected his claim that his prosecution based on his self-identification violated the First Amendment, holding that free speech did not bar use of Wayte's letters as "strong, perhaps conclusive evidence of

the non-registrant's intent not to comply -- one of the elements of the offense." 470 U.S. at 612-13. Wayte is equally applicable here to uphold the new policy against plaintiffs' First Amendment challenge.²²

B. Statements Of Homosexuality Made In Connection With Litigation Are Not Entitled To Special First Amendment Protection.

Contrary to the district court's reasoning (slip op. 9-13), statements of homosexuality made in connection with litigation are not entitled to greater constitutional protection than non-litigation statements.

Claims under the Petition Clause are subject to the same analysis as free speech claims. McDonald v. Smith, 472 U.S. 479, 485 (1985), held there is "no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions." See also Wayte, 470 U.S. at 610 n.11; Brown v. Glines, 444 U.S. at 353.

²² In addition, the Supreme Court has repeatedly held that the First Amendment has a more narrow application in the military than in other areas. See supra p. . The Court also has recognized special restrictions on the free speech rights of government employees in general. See, e.g., Waters v. Churchill, No. 92-1450 (May 31, 1994), slip op. at 12 (plurality opinion) (First Amendment does not prevent discharge of employee who "begins to do or say things that detract from the agency's efficient operation"); Connick v. Myers, 461 U.S. 138, 146 (1983) (First Amendment inapplicable to government employee's speech that "cannot be fairly characterized as constituting speech on a matter of public concern"). Finally, an incidental effect on speech through government regulation of activity that combines both speech and nonspeech elements does not violate the First Amendment. See, e.g., Wayte, 470 U.S. at 611-13; United States v. O'Brien, 391 U.S. 367 (1968). These precedents confirm the constitutionality of the new policy even if it is assumed that the regulation of homosexual acts by service members might have an incidental effect on their claimed right to speak.

Relying on McDonald and Wayte, this Court held in White Plains Towing v. Patterson, 991 F.2d 1049, 1059 (2d Cir.), cert. denied, 114 S. Ct. 185 (1993), that plaintiffs' "right-to-petition claims are also governed by the interest-balancing principles" applicable to public employees' freedom of speech claims.²³

The fact that plaintiffs are petitioning the courts, rather than the Congress or the Executive, does not alter the constitutional analysis. Surely the right to petition the judiciary cannot be said to be more important to our democratic government than the right to petition the branches elected by the people.

Moreover, it has never been suggested -- until the district court's ruling here -- that the requirements imposed by Article III to establish a plaintiff's standing to sue would violate the First Amendment. On the contrary, the law is settled that statements made in connection with litigation, including statements in pleadings, may be used in subsequent proceedings against the party making the statement. See generally 4 Wigmore on Evidence (Chadbourn rev. 1972) § 1066, p. 76, and 1994 Supp., p. 374; Lehigh Valley R. v. Allied Machinery Co. of America, 271 F. 900, 902 (2d Cir.), cert. denied, 256 U.S. 704 (1921); Fed. R. Evid. 801 (testi-

²³ In White Plains Towing, this Court cited with approval decisions to the same effect from three other circuits: Schalk v. Gallemore, 906 F.2d 491, 498 (10th Cir. 1990); Gray v. Lacke, 885 F.2d 399, 412 (7th Cir. 1989); Day v. South Park Independent School District, 768 F.2d 696, 701 (5th Cir. 1985), cert. denied, 474 U.S. 1101 (1986). See also Thorne v. Bailey, 846 F.2d 241, 244-45 (4th Cir.), cert. denied, 488 U.S. 984 (1988). But cf. San Filippo v. Bongiovanni, No. 93-5658 slip op. at 29 n.19 (3rd Cir. July 21, 1994) (recognizing that its ruling conflicts with seven other circuits, court holds that public employee is protected under Petition Clause against retaliation for having filed a law suit addressing a matter of purely private concern).

mony given at a different trial or proceeding, and admissions made by a party-opponent, are not hearsay). The district court's ruling that the First Amendment precludes the evidentiary use of such statements is unprecedented and improperly reads the Constitution to be at war with itself.

We emphasize that plaintiffs are not being penalized or retaliated against for filing this litigation. Rather, they are treated no differently from any other service members who state in any context that they are homosexuals. Plaintiffs are not using the First Amendment as a shield against reprisal, but are attempting impermissibly to use it as a sword to obtain an exception for themselves from a generally applicable policy. Cf. Cohen v. Cowles Media, 111 S. Ct. 2513, 2518 (1991).

Finally, as this case itself illustrates, the novel constitutional rule created by the district court is not necessary to allow judicial review of the new policy. First, there is no shortage of litigation challenging both the old and new policies, and additional cases can be expected as the new policy is applied to more service members. Indeed, two of the plaintiffs in this very case (Zehr and Spencer) made statements of their homosexuality prior to instituting suit and thus would have standing to challenge the new policy in an appropriate action. Second, as plaintiff "Jane Able" in fact has done, plaintiffs could have sought to bring this suit under fictitious names. Cf. Webster v. Doe, 486 U.S. 592 (1988) (homosexuality); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd, 425 U.S. 901 (1976) (same). Alternatively, an appropriate gay-rights organiza-

tion may be able to sue to contest the policy on behalf of its members. See Automobile Workers v. Brock, 477 U.S. 274 (1986); NAACP v. Alabama, 357 U.S. 449 (1958). In these ways, plaintiffs could obtain an adjudication of the constitutionality of the new policy without the invention of a First Amendment rule of immunity for self-identifying statements made in litigation.²⁴

* * * * *

In sum, plaintiffs' claims are without merit, and they cannot show the likelihood of success necessary to preliminarily enjoin a federal statute. Moreover, because further proceedings in the district court are not needed to resolve the legal issues presented, this Court should not only vacate the injunctions, but order that the case be dismissed in its entirety. See New York v. Lyng, 829 F.2d 346, 349 (2d Cir. 1987); Hurwitz v. Directors Guild, 364 F.2d 67, 70 (2d Cir.), cert. denied, 385 U.S. 971 (1966); 16 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3921, p. 4 (1994 Supp.).

CONCLUSION

For the foregoing reasons, the preliminary injunctions issued by the district court should be reversed, and the case should be remanded with instructions dismiss the complaint and enter judgment for the defendants.

²⁴ These approaches would not be available if, as we argue above, exhaustion of military remedies is required before bringing suit. If that argument prevails, the Court would not reach the First Amendment issue. Thus, our discussion here assumes arguendo that exhaustion is not required.

Respectfully submitted,

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September 1994

Days - in - the -
military!

Able

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LIEUTENANT COLONEL JANE ABLE,
PETTY OFFICER ROBERT HEIGL,
FIRST LIEUTENANT KENNETH OSBORN,
SERGEANT STEVEN SPENCKER,
LIEUTENANT RICHARD von WOHL, and
SEAMAN WERNER ZEHR,

Plaintiffs,

-against-

UNITED STATES OF AMERICA, and
WILLIAM J. PERRY, SECRETARY OF
DEFENSE, in his official capacity,

Defendants.

CV 94 0974

MEMORANDUM
AND
ORDER

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for defendants.

ZACHARY W. CARTER, United States Attorney
(Charles S. Kleinberg, of counsel)
Brooklyn, New York
for defendants.

NICKERSON, District Judge:

By memorandum and order dated April 4, 1994,
familiarity with which is assumed, this court granted
plaintiffs' motion for a preliminary injunction
preventing defendants from enforcing against plaintiffs
Section 571 of the National Defense Authorization Act
for the Fiscal Year 1994 (the Act), 10 U.S.C. § 654,
concerning a new policy as to homosexuals in the
military, and Regulations issued under the Act.

Adopting the language plaintiffs used, the court
preliminarily enjoined

the defendants pending resolution of the case from
investigating or discharging or taking other
adverse or punitive action against plaintiffs
based on their self-identification as gay or
lesbian in connection with legal proceedings
challenging the constitutionality of the Act and
the Regulations.

Defendants thereafter moved for an order vacating,
altering, or amending the preliminary injunction. The
court denied that motion by memorandum and order dated
May 9, 1994.

Defendants have now decided to commence discharge proceedings against two of the plaintiffs allegedly based on statements made not in connection with litigation. Plaintiffs contended such actions would violate the spirit of the April 4, 1994 preliminary injunction.

But rather than seek an amendment or clarification of that order, plaintiffs now make a motion for a further order enjoining defendants from taking adverse action during the pendency of this litigation against any of the plaintiffs based on their self-identification as gay or lesbian.

I

In its April 4, 1994 memorandum and order this court held that plaintiffs face the irreparable harm of possible constitutional deprivations absent an injunction, that plaintiffs raise serious questions as to whether the Act and Regulations violate plaintiffs' rights under the First and Fifth Amendments to the United States Constitution, and that the balance of hardships tips decidedly in plaintiffs' favor.

A

Plaintiffs' motion for another injunctive order presents a different analysis from the prior motion

only in regard to the issue of irreparable harm under their free speech claim. See April 4, 1994 Memorandum and Order, 18-20.

But the plaintiffs face the irreparable harm of a possible violation of their right to equal protection should the government proceed to take adverse action against them based on their self-identification as homosexual, whether or not made in connection with court proceedings.

B

The serious questions as to a violation of plaintiffs' right to equal protection are not affected by whether their self-identification is related to court proceedings. See id. at 13-15. Whether defendants discover plaintiffs' homosexuality by means of self-identification in litigation or out of litigation in no way impacts the seriousness of these questions.

C

The balance of hardships analysis is not affected by plaintiffs' present motion for injunctive relief. In its prior order the court considered the impact of permitting all six plaintiffs to remain in the armed services pending resolution of this litigation and found that the balance of hardships tipped decidedly in

the plaintiffs' favor. *Id.* at 23-25. The court adopts that reasoning here.

II

Plaintiffs' motion for a new order is granted preliminarily enjoining defendants pending the resolution of the case from investigating, discharging or taking other adverse or punitive action, pursuant to the Act and/or Regulations, against plaintiffs based on their self-identification as lesbian or gay.

So Ordered.

Dated: Brooklyn, New York
June 3, 1994

Eugene H. Nickerson
Eugene H. Nickerson, U.S.D.J.

Cliff Sloan

FILE:
Gay-in-
the -
military

August 4, 1994

To Those Commenting on the Able Draft

Attached is a draft of our brief in Able v. United States. We would like to receive your comments back by cob Thursday, August 11. Under the Second Circuit's briefing order, our brief is due September 2. As you will see, this draft is substantially over the 50-page limit, so we will need to find places to cut.

Please send your comments to me in Room 3321, Main Justice. My phone number is 202-514-3388.

Thanks,

Tony Steinmeyer

DRAFT: AUG 4, 99

No. 94-6181

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LIEUTENANT COLONEL JANE ABLE, PETTY OFFICER ROBERT HEIGL,
FIRST LIEUTENANT KENNETH OSBORN, SERGEANT STEVEN SPENCER,
LIEUTENANT RICHARD von WOHL, and SEAMAN WERNER ZEHR,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA
and WILLIAM J. PERRY, SECRETARY OF DEFENSE,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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IN THE UNITED STATES COURT OF APPEALS
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SEAMAN WERNER ZEHR,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA
and WILLIAM J. PERRY, SECRETARY OF DEFENSE,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANTS

PRELIMINARY STATEMENT

This appeal is from two preliminary injunctions (Nickerson, J.). The first is reported at 847 F. Supp. 1038. The second is unreported.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1331 in this action for declaratory and injunctive relief against the military's new policy regarding service by homosexuals. App.

____.¹ On July __, 1994, the government filed a timely notice of appeal. This Court has jurisdiction under 28 U.S.C. 1292(a)(1).

STATEMENT OF THE ISSUES

Section 571 of the National Defense Authorization Act for Fiscal Year 1994, P. L. 103-160, 107 Stat. 1670-1673, codified at 10 U.S.C. 654, requires separation from military service of a member who has "stated that he or she is a homosexual or bisexual" and fails to "demonstrate[] that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." 10 U.S.C. 654(b)(2). The district court preliminarily enjoined the statute on the ground that plaintiffs' challenge to its constitutionality raised "sufficiently serious questions" without a finding that plaintiffs are likely to succeed on the merits. The questions presented are:

1. Whether a federal statute may be preliminarily enjoined on the basis that plaintiffs' challenge to its constitutionality raises a "serious question" or "fair ground for litigation," without a finding that plaintiffs are likely to succeed on the merits.

2. Whether plaintiffs must exhaust their military administrative remedies.

¹ The complaint (App.) and the district court's April 4 order (App.) also cite 28 U.S.C. 1346 as an alternative ground for jurisdiction. The only conceivably relevant provisions of that statute (§ 1346(a)(2) and § 1346(b)), however, apply only in suits for money damages. Richardson v. Morris, 409 U.S. 464 (1973). Since plaintiffs do not seek money damages (App.), § 1331 is the sole basis for jurisdiction.

3. Whether the statute violates equal protection.
4. Whether the statute violates the First Amendment.

STATEMENT

A. Nature of the Case.

This case involves a challenge by six gay or lesbian military service members. They seek declaratory and injunctive relief to bar enforcement of a federal statute and military regulations (the "new policy") regarding military service by homosexuals. Under the statute and regulations, service members will be discharged if they (a) engage in homosexual acts, or (b) make statements that they are homosexual and fail to demonstrate that they do not and are not likely to engage in homosexual acts. 10 U.S.C. 654.

This appeal is from two orders issued by the district court. The first, issued April 4, 1994, preliminarily enjoins the defendants from investigating or taking any adverse action against plaintiffs based on their statements made in connection with this litigation that they are homosexuals. The order rests on the district court's determination that plaintiffs have raised a serious claim that the use of such litigation statements as a basis for investigation or separation would violate the First Amendment and equal protection. The second order, issued on June 3, 1994, preliminarily enjoins any investigations or adverse action against plaintiffs based on their statements that they are homosexuals, regardless of whether such statements were made in connection with this litigation. In issuing this order, the

court determined that plaintiffs have raised a serious equal protection challenge to the use of any such statement as a basis for investigation or separation.

B. The Statute and DoD Directives.

1. **Background.** The statute governing military service by homosexuals was the result of extensive review of this highly controversial issue by the Political Branches of Government. Formal review began on January 29, 1993, when President Clinton directed the Secretary of Defense to review the then-current policy (the "old policy") of the Department of Defense ("DoD"). A Military Working Group established by the Secretary studied the issue for more than three months, meeting with individuals and groups holding a wide spectrum of views.

Simultaneously, Congress undertook its own review of the issue. Both the Senate and House held lengthy hearings, receiving testimony from military commanders, gay rights activists, experts in military personnel policy, and many interested civilians and members of the Armed Forces.²

On July 19, 1993, the President and Secretary of Defense announced a new DoD "Policy on Homosexual Conduct in the Armed Forces." The principal points of that policy were codified in the statute, which was enacted by Congress and signed by the

² The evolution of the statute is traced in H.R. Conf. Rep. No. 357, 103d Cong., 1st Sess. 679, reprinted in 1993 U.S.C.C.A.N. 2218, 2281; see H.R. Rep. 200, 103d Cong., 1st Sess. 286-290, reprinted in 1993 U.S.C.C.A.N. 2013, 2073-2077.

President on November 30, 1993.³ The military then issued Directives pursuant to the statute.

2. The Statute. Section 571 of the National Defense Authorization Act for Fiscal Year 1994 sets forth the congressional "Policy concerning homosexuality in the armed forces" and 15 findings upon which that policy is based.

In these findings, Congress recognized that "military life is fundamentally different from civilian life" due to "the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion" in military readiness. 10 U.S.C. 654(a)(8)(A). Accordingly, "military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society." § 654(a)(8)(B). Moreover, because "members of the armed forces must be ready at all times for worldwide deployment to a combat environment" (§ 654(a)(11)), these restrictions "regulate a member's life for 24 hours each day * * * whether the member is on base or off base, and whether the members is on duty or off duty." § 654(a)(9), (10).

With particular regard to service by homosexuals, Congress found that the "longstanding * * * prohibition against homosexual conduct * * * continues to be necessary in the unique circum-

³ S. Rep. No. 103-112, 103d Cong., 1st Sess. 265 (1993); 139 Cong. Rec. S11174 (Sept. 9, 1993) (Statement of Sen. Nunn); 139 Cong. Rec. S11177 (Sept. 9, 1993) (Statement of Sen. Thurmond); 139 Cong. Rec. S11180 (Sept. 9, 1993) (Statement of Sen. Exon).

stances of military service." § 654(a)(13). Congress found that "[o]ne of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members." § 654(a)(7). Congress specifically concluded (§ 654(a)(15)):

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

The statute requires separation from service if a member (1) "has engaged in, attempted to engage in, or solicited another to engage in a homosexual act," § 654(b)(1); (2) "has married or attempted to marry a person known to be of the same biological sex," § 654(b)(3); or (3) "has stated that he or she is a homosexual or bisexual" and fails to "demonstrate[] that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." § 654(b)(2). As the language of section 654(b)(2) indicates, and as the legislative history confirms, a member's statement that he or she is a homosexual gives rise to a rebuttable presumption that the member has engaged in homosexual acts or is likely to do so. S. Rep. 103-112, 103d Cong., 1st Sess. 293 (1993).

3. The DoD Directives. The DoD Directives implement this rebuttable presumption and provide that a member has the

opportunity to rebut the presumption in proceedings before the administrative discharge board. DoD Dir. 1332.14, ¶ H.1(b)(2) (enlisted personnel). Accord Dir. 1332.30, ¶ C.1(b) (officers).⁴

Specifically, the DoD Directives provide that "[s]exual orientation is considered a personal and private matter, and is not a bar to continued service unless manifested by homosexual conduct." DoD Dir. 1332.14, ¶ H.1(a). However, "[h]omosexual conduct is grounds for separation from the Military Services." Ibid. "Homosexual conduct" is defined as "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." Ibid.⁵ Thus, a statement by a service 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 in or will engage in homosexual acts." Ibid.

A statement by a service member that he or she is a homosexual "creates a rebuttable presumption that [he or she] engages in, attempts to engage in, has a propensity to engage in, or

⁴ The provisions of the two Directives are substantially similar. A third Directive, DoD Dir. 1304.26, governs enlistment, appointment, and induction standards. It also contains similar provisions regarding homosexual conduct. Id. at ¶ 8. For convenience we will hereafter cite only to DoD Dir. 1332.14.

⁵ "Homosexual acts" is defined as "(1) Any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires, and (2) Any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph [1], above." DoD Dir. 1332.14, Definitions ¶ F.

intends to engage in homosexual acts." DoD Dir. 1332.14, ¶ H.1(b)(2). The service member is then "given the opportunity to rebut the presumption" raised by the statement by presenting evidence to the administrative discharge board "demonstrating that he or she does not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts." Ibid. The Directive defines "propensity to engage in homosexual acts" as "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." Ibid. (emphasis added). See also DoD Dir. 1332.14, Definitions ¶ O ("[s]exual orientation" is defined as "[a]n abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts").

In determining whether the presumption has been rebutted, the discharge board may consider, among other things, "(a) Whether the member has engaged in homosexual acts; (b) The member's credibility; (c) Testimony from others about the member's past conduct, character, and credibility; (d) The nature and circumstances of the member's statement; and (e) Any other evidence relevant to whether the member is likely to engage in homosexual acts." DoD Dir. 1332.14, ¶ H.1(b)(2). In addition, DoD has issued a training manual providing illustrative examples of situations in which a board may find that the presumption has been rebutted.

C. District Court Proceedings.

1. Plaintiffs, gay and lesbian members of the military, filed this suit on March 7, 1994, alleging that the new statute and implementing Directives violate their rights to (1) equal protection under the Fifth Amendment, (2) free speech and free expression under the First Amendment, (3) expressive and intimate association under the First and Fifth Amendments, and (4) "adequate notice of what speech, conduct or behavior is proscribed and/or form the basis for investigation and discharge" as guaranteed by the First and Fifth Amendments. They seek declaratory and injunctive relief against the application of the new policy to them.

2. On April 4, 1994, the district court entered a preliminary injunction. Applying a First Amendment standard that a military regulation may "restrict speech no more than is reasonably necessary to protect [a] substantial governmental interest" (App. __ (quotation omitted)), the court concluded that "there is a serious question as to whether a regulation goes beyond what is reasonably necessary to protect any possible government interest when it inhibits six service members from continuing to speak in court to make a constitutional challenge." Slip op. 12-13.

With respect to plaintiffs' equal protection claim, the district court "assume[d] for the purposes of the motion that the Act and Regulations are subject to only minimal equal protection scrutiny." Slip op. 13-14. The court cited several decisions

reaching different results on the constitutionality of the old policy and, without "undertak[ing] to assess the relative merits of these divergent holdings," concluded that "[t]he conflict of authority signifies the seriousness of the questions going to the merits of plaintiffs' equal protection claim." Slip op. 15.

The district court also found "the balance of hardships tips decidedly in favor of the six plaintiffs." Slip op. 25. Since the current regulations "will remain in force against all other service members," the court concluded that "[t]he potentially adverse effect on 'good order' and 'unit cohesion' of allowing these six plaintiffs to remain on duty and not subject to investigation while the case is pending can be minimal at most." Slip op. 23-24.

Finally, the district court rejected the government's claim that, because none of the plaintiffs had undergone separation proceedings, they had failed to exhaust their administrative remedies. The court held that "[e]xhaustion is not required when, as here, plaintiffs raise constitutional questions and irreparable injury will occur without preliminary judicial relief." Slip op. 17. It reasoned that plaintiffs' "substantial claim that to subject them to the Act and Regulations will deny them equal protection every day * * * constitutes irreparable harm." Slip op. 17. In addition, the court concluded that plaintiffs would suffer irreparable injury because the Act and regulations would impose "a continuing inhibition on speech throughout the litigation." Slip op. 19.

Based on these determinations, the district court preliminarily enjoined defendants "pending resolution of the case from investigating or discharging or taking other adverse or punitive action against plaintiffs based on their self-identification as gay or lesbian in connection with legal proceedings challenging the constitutionality of the Act and the Regulations." Slip op. 25 (emphasis added).

3. Because the April 4 preliminary injunction was limited to statements made in connection with litigation, the Government informed plaintiffs' counsel that it would go forward with investigations or administrative proceedings involving two plaintiffs (Zehr and Spencer) who had made statements outside of the litigation that they are homosexuals. Plaintiffs then moved for a further preliminary injunction to bar investigations and proceedings based on plaintiffs' self-identification as homosexuals, whether or not made in connection with this litigation.

On June 3, 1994, the district court granted plaintiffs' motion and issued an order "preliminarily enjoining defendants pending the resolution of the case from investigating, discharging or taking other adverse or punitive action, pursuant to the Act and/or Regulations, against plaintiffs based on their self-identification as lesbian or gay." The district court found that "[t]he serious questions [that it had earlier found in its April 4 order] as to a violation of plaintiffs' right to equal protection are not affected by whether their self-identification is related to court proceedings." Slip op. 4. Following the re-

mainder of its preliminary injunction analysis in its April 4 decision, the court preliminarily enjoined defendants from investigating or discharging against plaintiffs based on any of their statements of homosexuality.⁶

SUMMARY OF ARGUMENT

[to be added]

ARGUMENT

- I. **A FEDERAL STATUTE MAY NOT BE ENJOINED WHERE PLAINTIFFS RAISE QUESTIONS ABOUT ITS CONSTITUTIONALITY THAT ARE "SUFFICIENTLY SERIOUS" TO BE A "FAIR GROUND FOR LITIGATION" BUT DO NOT ESTABLISH A PROBABILITY OF SUCCESS ON THE MERITS.**

The district court held that a preliminary injunction may be issued against a federal statute where, inter alia, plaintiffs have raised "sufficiently serious questions going to the merits." Slip op. 16. Under the law of this Circuit, a "serious question" exists if plaintiffs present a "fair ground for litigation." Plaza Health Laboratories, Inc. v. Perales, 878 F.2d 577, 580 (2d Cir. 1989); Sperry International Trade, Inc. v. Government of Israel, 670 F.2d 8, 11 (2d Cir. 1982); Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979). The district court's ruling was error as a matter of law. Although the cited standard applies in cases not involving the validity of a federal statute, its application to preliminarily enjoin an Act of Congress, without a showing that plaintiffs are likely to succeed on the merits of their constitutional challenge (which the

⁶ The Government's motion to dismiss for failure to state a claim, filed March --, 1994, is still pending.

district court did not determine had been made here), directly conflicts with decisions of this Court and fails to give proper consideration to the actions of co-equal branches of government.

"[A] temporary injunction against enforcement is in reality a suspension of an act, delaying the date selected by Congress to put its chosen policies into effect. Thus judicial power to stay an act of Congress, like judicial power to hold that act unconstitutional, is an awesome responsibility calling for the utmost circumspection in its exercise." Heart of Atlanta Motel, Inc. v. United States, 85 S.Ct. 1, 2 (1964) (Black, Circuit Justice). An Act of Congress is "presumptively constitutional," and "as such, it 'should remain in effect pending a final decision on the merits by this Court.'" Turner Broadcasting System, Inc. v. FCC, 113 S. Ct. 1806, 1807 (1993) (Rehnquist, Circuit Justice). As Chief Justice Rehnquist has summarized: "It has been the unvarying practice of [the Supreme] Court so long as I have been a Member of it to note probable jurisdiction and decide on the merits all cases in which a single district judge declares an Act of Congress unconstitutional. In virtually all of these cases the Court has also granted a stay if requested to do so by the Government." Bowen v. Kendrick, 483 U.S. 1304 (1987) (Rehnquist, Circuit Justice).

Recognizing that the presumption of constitutionality is not rebutted when a plaintiff shows only that the validity of a statute is a "fair ground for litigation," this Court has held that a district court abused its discretion in using that stan-

dard rather than the "likelihood of success" standard in preliminarily enjoining enforcement of a federal statute. Union Carbide Agricultural Products Co. v. Costle, 632 F.2d 1014, 1018-19 (2d Cir. 1980), cert. denied, 450 U.S. 996 (1981). The Court explained that "[w]hen Congress authorizes or mandates governmental action that is in the public interest, more than a 'fair ground for litigation' must be shown before the action will be stopped in its tracks by court order." 632 F.2d at 1018.⁷ Thus, under Union Carbide, "where the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the district court should not apply the less rigorous fair-ground-for-litigation standard and should not grant the injunction unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim." Plaza Health, 878 F.2d at 580.⁸

In adopting the "serious question" standard, the district court improperly relied on Haitian Centers Council, Inc. v.

⁷ The district court incorrectly attempted (slip op. 23) to distinguish Union Carbide on the ground that this Court found no substantial constitutional claims at issue there. The Union Carbide Court stated that the plaintiffs "raise knotty questions that are difficult to answer on the present record," 632 F.2d at 1018, and that "'what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty." Ibid. Moreover, if Union Carbide had not involved substantial constitutional claims, this Court would have had no occasion to choose between the two standards for a preliminary injunction.

⁸ The district court erred in seeking to distinguish Plaza Health on the ground that the due process claim there was "speculative at best." Slip op. 23. Plaza Health upheld the denial of a preliminary injunction because "[movant] had not shown a likelihood of success on this claim." 878 F.2d at 581.

McNary, 969 F.2d 1326 (2d Cir. 1991). Although that case involved action by a federal agency, it did not involve an attack on a presumptively valid federal statute and hence is not contrary to the rule established in Union Carbide and Plaza Health.⁹ In any event, Haitian Centers lacks precedential authority because it was vacated as moot, 113 S. Ct. 3028 (1993). See County of Los Angeles v. Davis, 440 U.S. 625, 634 n.6 (1979).

Under the law of this Circuit, therefore, it was legal error for the district court to enter a preliminary injunction absent a showing by plaintiffs of a likelihood of success on their constitutional claims. Moreover, as demonstrated below, plaintiffs' constitutional arguments are without merit. Accordingly, the district court's preliminary injunction should be reversed and the case dismissed. See State of New York v. L yng, 829 F.2d 346, 349 (2d Cir. 1987) (plenary review of merits legal issue on appeal from denial of preliminary injunction); Hurwitz v. Directors Guild of America, 364 F.2d 67, 70 (2d Cir.), cert. denied, 385 U.S. 971 (1966) (directing entry of final judgment on appeal from denial of preliminary injunction); 16 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3921, p. 4 (1994 Supp.) (jurisdiction under 28 U.S.C. 1292(a)(1) extends to "all

⁹ The district court read (slip op. 16) Mitchell v. Cuomo, 748 F.2d 804 (2d Cir. 1984), to allow a preliminary injunction to be entered under the "fair ground for litigation" standard based on constitutional claims. However, that case, like Haitian Centers, did not involve a challenge to a federal statute.

aspects of the case that have been sufficiently illuminated to enable decision").¹⁰

II. THE DISTRICT COURT ERRED IN FAILING TO REQUIRE THE PLAINTIFFS TO EXHAUST THEIR MILITARY REMEDIES.

By filing suit before the new policy had been applied to them, plaintiffs completely bypassed the administrative procedures established by the military. This violated the well-settled rule that judicial review is not available until administrative remedies have been exhausted. Contrary to the district court's reasoning (slip op. 17), exhaustion is not

¹⁰ Because the district court erred in assessing the merits of plaintiffs' claims, this Court need not review the other factors necessary for a preliminary injunction. See Disabled American Veterans v. U.S. Dep't of Veterans Affairs, 962 F.2d 136, 144 (2d Cir. 1992). We note, however, that the district court also erred in its determinations that plaintiffs' assertion of a constitutional violation sufficed without more to establish irreparable injury and that the public interest favored issuance of the preliminary injunction. The irreparable injury ruling relied on precedents that are inapplicable in the military contest. See p. __, n. __, infra. [Cite to discussion of Elrod and Paulsen in exhaustion section.]

Similarly, the district court's public-interest ruling completely disregards the congressional policy judgment embodied in the statute and simply substitutes the court's own view. See e.g., Walters v. National Ass'n of Radiation Survivors, 468 U.S. 1323, 1324 (1984) (Rehnquist, Circuit Justice) ("[t]he presumption of constitutionality which attaches to every Act of Congress is * * * an equity to be considered in favor of [the Government] in balancing hardships"). Nor is the congressional policy overcome, as the district court believed (slip op. 23-24), by the fact that the preliminary injunction displaces the statute only as to the six plaintiffs; Congress's determination that the new policy serves important military interests is equally applicable to each and every service member, and there is no basis for a court to distinguish between the first six plaintiffs (and thus to give them preferential treatment) and the next six, or 60, or a nationwide class. Cf. Heffron v. International Soc. for Krishna Consciousness, 452 U.S. 640, 652-53 (1981); Mathews v. Eldridge, 424 U.S. 319, 344 (1976).

excused -- especially in the military context -- simply because plaintiffs assert a violation of their constitutional rights.

Preliminarily, we note an important limitation on the nature of the claims plaintiffs can raise at this stage. Absent exhaustion, plaintiffs cannot challenge the new policy on an "as applied" basis -- since it has not yet been applied to them -- and are confined to contesting the policy "on its face." In the context of a facial challenge, the Court must assume that the statute and Directives will be properly administered. See FDIC v. Mallen, 486 U.S. 230, 247 (1988) (in a facial challenge, a statute "is not to be held unconstitutional simply because it may be applied in an arbitrary or unfair way in some hypothetical case not before the Court"); United States v. Salerno, 481 U.S. 739, 745 (1987). Moreover, to prevail on their facial attack, plaintiffs must meet a heavy burden to show that the new policy -- including the rebuttable presumption -- "could never be applied in a valid manner." City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 798 (1984). On this record, therefore, plaintiffs cannot now be heard to complain about the new policy as applied and, as we show below, must pursue their administrative remedies as to their facial claims.

A. Strict Exhaustion Principles Apply In The Military.

The exhaustion requirement "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." McCarthy v. Madigan, 112 S. Ct. 1081, 1086 (1992). First, exhaustion recognizes that the agency, not the court, has

the primary responsibility for administering the statutory program, and therefore should have the initial opportunity to interpret and apply the administrative scheme based on its expertise and discretion. Second, exhaustion will avoid judicial controversies where the individual is successful before the agency and will provide a legal and factual record where judicial review proves necessary. Id. at 1086-87. See also, e.g., United States v. McKart, 395 U.S. 185, 193-95 (1969).

This Court has recognized that the "imperatives concerning military discipline require the strict application of the exhaustion doctrine in discharge cases." Guitard v. Secretary of Navy, 967 F.2d 737, 740 (2d Cir. 1992). See also Michaelson v. Herren, 242 F.2d 693, 696 (2d Cir. 1957) (jurisdiction to review an Army discharge does not attach "until plaintiff has exhausted the [military] review process").¹¹ Requiring exhaustion in discharge cases is essential to "protect the military from undue interference by the federal courts." Middendorf v. Henry, 425 U.S. 25, 29 n.6 (1976).

¹¹ This same rule obtains in other courts of appeals. See, e.g., Guerra v. Scruggs, 942 F.2d 270, 276 (4th Cir. 1991); Cargill v. Marsh, 902 F.2d 1006, 1007-08 (D.C. Cir. 1990); Williams v. Secretary of the Navy, 787 F.2d 552, 558-59 (Fed. Cir. 1986) ("encouraging premature rushes to the federal courthouse renders futile Congress's statutory provision of remedies within the military"); Navas v. Vales, 752 F.2d 765, 771 (1st Cir. 1985); Von Hoffburg v. Alexander, 615 F.2d 633, 637 (5th Cir. 1980) (constitutional claims of alleged homosexual seeking to prevent his discharge dismissed for failure to exhaust administrative remedies); Hodges v. Callaway, 499 F.2d 417, 420 (5th Cir. 1974).

B. Exhaustion Was Required As To Plaintiffs' Equal Protection Claim.

Under these principles, plaintiffs were required to exhaust military remedies with respect to their equal protection claim. As explained above (see pp. ___, supra), an administrative discharge board is convened to consider separation for a service member who states that he or she is a homosexual. Although such a statement gives rise to a rebuttable presumption that the service member engages in or is likely to engage in proscribed homosexual acts, the member is afforded an opportunity to rebut the presumption by demonstrating that, notwithstanding his or her statement, "he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." 10 U.S.C. 654(b)(2). In determining whether the presumption has been rebutted, the board may consider, among other things: "(a) Whether the member has engaged in homosexual acts; (b) The member's credibility; (c) Testimony from others about the member's past conduct, character, and credibility; (d) The nature and circumstances of the member's statement; and (e) Any other evidence relevant to whether the member is likely to engage in homosexual acts." Directive 1332.14, ¶ H.1(b)(2).¹²

¹² The member also has administrative appeal rights from any adverse decision. See 10 U.S.C. 1183 (board of review to consider determination that officer should not be retained on active duty); 10 U.S.C. 1184 (removal by Secretary if recommended by board of review). In addition, the Board for the Correction of Military Records (the members of which are civilians) can "correct any military record" in order to "correct an error or remove an injustice." 10 U.S.C. 1552(a)(1).

The exhaustion doctrine required plaintiffs to pursue these procedures. On the one hand, such proceedings afford a service member the opportunity to demonstrate that he or she is entitled to remain in the military notwithstanding the alleged statement.

For example, the member may be able to show that he or she did not make the statement, or that it was made in jest, or was ambiguous or misunderstood or taken out of context, and thus did not indicate that the member is a homosexual. In addition, the member may be able to rebut the presumption arising from a statement of homosexuality by demonstrating that he or she does not and is not likely to engage in homosexual acts. In either event, the member would be retained in the service, thereby avoiding litigation altogether and obviating in particular the need for a constitutional ruling.

On the other hand, an adverse decision separating the service member would no less further the purposes of exhaustion. For example, administrative proceedings might produce evidence that a service member who stated that he or she is a homosexual actually engaged in homosexual acts, which would convert the case -- and hence the nature of the challenge to the separation -- from a "statements" case to an "acts" case.¹³ Moreover, even in "statements" cases, exhaustion would enable the military to construe or clarify the new policy and give it meaning through application in concrete factual circumstances. Allowing the

¹³ Such evidence also would support the connection underlying the presumption between a statement of homosexuality and the occurrence or likelihood of homosexual acts.

military to proceed in the first instance to address such issues both reflects the deference and autonomy due the administrative agency and promotes informed and efficient judicial decision-making. Finally, exhaustion would produce a factual record for any ensuing judicial review.

The practical importance of exhaustion in this case is well illustrated by the issue of the rebuttable presumption and the meaning of the term "propensity." A service member who states that he or she is a homosexual rebuts the presumption of homosexual acts by showing, inter alia, that he or she does not have a propensity to engage in such acts, which is expressly defined in the Directives as "more than an abstract preference or desire to engage in homosexual acts" and instead "a likelihood that a person engages in or will engage in homosexual acts." DoD Dir. 1332.14, ¶ H.1(b)(2) (emphasis added); see also DoD Dir. 1332.14, Definitions ¶ O ("sexual orientation" defined as "[a]n abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts"). However, despite the rebuttable presumption in the statute and the explicit provisions in the Directives, the district court interpreted "propensity" to mean "a 'natural inclination' or an 'innate or inherent tendency'" (slip op. 6) and on that basis concluded that the presumption is "virtually irrebuttable" and the opportunity to rebut a "hollow offer." Id. at 19, 6.

To the extent that the statute and Directives left the court uncertain about the meaning and application of the rebuttable

presumption, the proper course would have been to remit plaintiffs to their administrative remedies to permit the military to resolve those issues. In that way, the military could have clarified the operation of the rebuttable presumption, further explicated the concept of "propensity," elaborated the five-factor guidance outlined in the Directives on rebuttal of the presumption, and generally fleshed out the rebuttable presumption through a process of common-law adjudication in adversarial settings involving concrete factual circumstances. The district court's blithe dismissal of the rebuttable presumption in the absence of any administrative record is completely unsupported and is irreconcilable with the sound judicial decisionmaking that the exhaustion doctrine is designed to promote.

In the face of these compelling reasons for exhaustion, the district court's decision cannot be saved by the court's theory that "to subject [plaintiffs] to the Act and Regulations will deny them equal protection every day." Slip op. 17. First of all, the court misunderstood the nature of the constitutional harm at issue here. The gravamen of the equal-protection issue is that homosexuals but not heterosexuals are separated from the service based on statements of their sexuality. Thus, unless and until a service member is discharged -- which can occur only at the conclusion of the administrative process -- there is no cognizable constitutional violation; the self-identified homosexual who is allowed to continue in the service has no ground for a claim of unconstitutional discrimination. In these circum-

stances, the court below was simply wrong in saying that plaintiffs were, prior to the completion of administrative proceedings and an order of separation, being denied "equal protection every day."¹⁴

What is more, the district court also erred in holding that an allegation of constitutional violation necessarily constitutes irreparable injury that excuses exhaustion. Both the Supreme Court and lower courts have recognized that administrative proceedings generally are not to be enjoined simply because a constitutional claim is asserted. As the Court explained in an analysis equally applicable here, "[t]he Secretary [of the Army] has not stated that he will so exercise his discretion as to remove the [plaintiff]. If the Secretary does not remove [him] it will be unnecessary to pass on the constitutional objections which have been urged." Beard v. Stahr, 370 U.S. 41, 41-42 (1962) (per curiam). See also Ohio Civil Rights Comm'n v. Dayton Christians Schools, Inc., 477 U.S. 619, 628-29 (1986); Public Utilities Comm'n v. United States, 355 U.S. 534, 539-40 (1958) (if "administrative proceeding might leave no remnant of the constitutional question, the administrative remedy plainly should be pursued"); Guerra v. Scruggs, 942 F.2d at 276 (exhaustion required before service member seeking to challenge his discharge

¹⁴ Even in an equal-protection challenge to a separation, the harm involved is the plaintiff's loss of his or her position in the military. Under settled principles, a loss of government employment is not irreparable injury justifying a preliminary injunction where the employee can be reinstated with back pay if ultimately successful in the litigation. See Sampson v. Murray, 415 U.S. 61, 90-91 (1974); Guitard, 967 F.2d at 742.

could pursue equal protection and due process claims); Von Hoffburg v. Alexander, 615 F.2d at 639 (plaintiff's constitutional challenge to her discharge dismissed because "there is a viable possibility that the [Board for the Correction of Military Records] may determine that [plaintiff] is not a 'homosexual' within the meaning of the DoD's policy directive"); Bard v. Seamans, 507 F.2d 765, 770 (10th Cir. 1974) (service member's constitutional claim does not eliminate exhaustion requirement). Only in the special context of free-speech claims under the First Amendment has the Supreme Court suggested that a constitutional violation amounts to irreparable injury. Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion); see also Paulsen v. County of Nassau, 925 F.2d 65, 68 (2d Cir. 1991). Whatever else it may mean (see pp. ___, infra), that limited exception has no application to the equal-protection issues here and does not overturn the well-established law requiring exhaustion in cases of other constitutional rights.¹⁵

Finally, the district court's exhaustion ruling is particularly objectionable in preliminarily enjoining not only separations but even investigations of the plaintiffs under the new policy. In general, there is no irreparable injury -- even in cases involving constitutional claims -- in being subject to an

¹⁵ The two non-First Amendment cases cited by the district court both involved continuing physical harm. Covino v. Patrissi, 967 F.2d 73, 77 (2d Cir. 1992) (body cavity searches); Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984) (severe prison overcrowding). Such harm is "irreparable" on traditional grounds, regardless of whether a constitutional violation is involved.

administrative investigation. See Ohio Civil Rights Comm'n, 477 U.S. at 628-29; FTC v. Standard Oil Co., 449 U.S. 232, 243 (1980); Ticor Title Ins. Co. v. FTC, 814 F.2d 731, 740-41 (D.C. Cir. 1987) (opinion of Edwards, J.). This rule applies with full force in the military context. See McLucas v. DeChamplain, 421 U.S. 21, 33 (1975); Schlesinger v. Councilman, 420 U.S. 738, 758 (1975). Accordingly, the district court plainly erred in enjoining investigations of plaintiffs pursuant to the new policy.

C. Exhaustion Was Required As To Plaintiffs' First Amendment Claims.

The foregoing principles apply generally to plaintiffs' First Amendment claims as well, and therefore the district court erred in excusing plaintiffs from exhausting their military remedies. The Supreme Court has required exhaustion in a First Amendment case to enable the agency to process the plaintiff under the challenged statute; absent exhaustion, "important and difficult constitutional issues would be decided devoid of factual context" and without a "clear [determination] that the Act would be applied to the objecting parties." W.E.B. DuBois Clubs of America v. Clark, 389 U.S. 309, 312 (1967) (per curiam). Insofar as "adequate procedures exist for the vindication of the [First Amendment] claims," the "exercise [of] jurisdiction at this stage would thus be premature." American-Arab Anti-Discrimination Comm'n v. Thornburgh, 970 F.2d 501, 512 (9th Cir. 1991).

With respect to plaintiffs' claim that separation under the new policy in "statements" cases would violate the First Amend-

ment because it effectively prohibits or burdens their asserted right of free speech, exhaustion is required essentially for the same reasons that it is required for their equal protection claims. Until the administrative process has been completed and separation ordered, no prohibition or burden has occurred. Thus, a service member who states that he or she is a homosexual, but rebuts the presumption of homosexual acts and is allowed to remain in the military, has not suffered any unconstitutional "burden" on free speech.

Furthermore, requiring plaintiffs to pursue their military remedies as to those First Amendment claims would serve the purposes of the exhaustion doctrine. In the court below, a centerpiece of plaintiffs' First Amendment argument was the assertion that the rebuttable nature of the presumption is a "sham." [Cite.] However, absent exhaustion, there is no basis whatsoever for plaintiffs to raise, or a court to adjudicate, this assertion. See p. __, supra. [Citing same point made in the discussion of exhaustion to equal protection.]

Likewise, plaintiffs asserted below that the new policy would prohibit a long list of activities that are constitutionally protected. See Plaintiffs' Memorandum in Opposition of Defendants' Motion to Dismiss, at 36-37. As to many of these, however, it is very unlikely that the new policy prohibits them. [Discuss exceptions for statements to clergy members and medical personnel.] In any event, to the extent the new policy does not clearly resolve these issues, exhaustion is required.

Plaintiffs similarly complained below that the new policy is unconstitutionally vague because they "cannot know, on a day-to-day basis, if what they might do will run afoul of the proscription, for example, on 'language or behavior that a reasonable person would believe intends to convey the statement that [he or she is] a homosexual.'" Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss, at 48. See also id. at 49 (new policy "render[s] it impossible for plaintiffs to know what speech or behavior will subject them to discharge," and "leaves gay and lesbian servicemembers at a complete loss as to what they could possibly say in an administrative hearing to 'rebut the presumption' of 'propensity or intent,'" because of vagueness in the terms "rebuttable presumption," "propensity," "opportunity to rebut," and "evidence [to rebut] propensity or intent"). While the new policy is not unconstitutionally vague, the ambiguities plaintiffs profess to find reinforce the need for exhaustion to permit the military to apply the policy in plaintiffs' cases and thus provide any necessary clarification.

Finally, plaintiffs' arguments below also were cast in the customary language of "chilling effect." However, that theory does not dispel the need for exhaustion to allow the military to apply and clarify the new policy. Indeed, given the separate and specialized nature of the military (see pp. ____, infra) and the more limited scope of the First Amendment in the armed services (see pp. ____, infra), the exhaustion doctrine applies with particular force in the military context. See pp. ____, supra.

For these reasons, and because it would be undesirable to split plaintiffs' challenge into exhaustible and non-exhaustible parts, plaintiffs' "chilling effect" claims should be equally subject to exhaustion as their other claims.¹⁶

III. THE STATUTORY POLICY EXCLUDING SERVICE MEMBERS WHO ENGAGE IN OR DEMONSTRATE A PROPENSITY TO ENGAGE IN HOMOSEXUAL ACTS DOES NOT VIOLATE EQUAL PROTECTION.

As we now show, the legislative classification in 10 U.S.C. 654(b)(2) -- barring service by members who state that they are homosexuals and who do not demonstrate that they do not and are not likely to engage in homosexual acts -- does not violate equal protection. This classification is subject to review under the rational basis test, with great deference due to Congress's constitutional authority over military affairs and to the considered professional judgment of military officials. Applying that standard, the statute rationally presumes, subject to rebuttal by the service member, that a member who states that he or she is homosexual is likely to act in accordance with that sexuality and engage in proscribed homosexual acts. Finally, the statute

¹⁶ In the present circumstances, the district court erred in relying on Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion), and Paulsen v. County of Nassau, 925 F.2d 65, 68 (2d Cir. 1991), to hold that an alleged First Amendment violation suffices to excuse exhaustion. Neither of those cases arose in the special context of the military, where strict exhaustion requirements apply and First Amendment rights are limited. Nor in either case was there, as here, an administrative process whose exhaustion would significantly bear on the need for and substance of judicial review of constitutional issues. Finally, in contrast to this case, both of those cases involved a determination of a likelihood of success on plaintiffs' First Amendment claims, and accordingly there was a likelihood that failure to enter an interim injunction would have immediately affected First Amendment rights.

rationally advances the legitimate military goals of preventing the commission of prohibited homosexual acts, promoting unit cohesion, and accommodating service members' privacy interests.

A. The Statute Should Be Reviewed Under The Rational Basis Test, With Great Deference Accorded Congress And The Military.

Even before enactment of the statute, courts recognized that the military's policy regarding service by homosexuals is subject to rational basis review. See Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990) (discussing Bowers v. Hardwick, 478 U.S. 186 (1986)); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); Dronenburg v. Zech, 741 F.2d 1388, 1398 (D.C. Cir. 1984); Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984); see also High Tech Gays v. DISCO, 895 F.2d 563, 570-74 (9th Cir. 1990); Padula v. Webster, 822 F.2d 97, 102-03 (D.C. Cir. 1987).¹⁷

Legislative classifications subject to rational basis review are accorded "a strong presumption of validity" and must be

¹⁷ In Pruitt v. Cheney, 963 F.2d 1160, 1165 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992), the Ninth Circuit adopted what it called an "active" rational basis test and held that the government must justify the military's old homosexual policy by record evidence introduced in each case. That test was grounded in the Court's erroneous view that the old policy was directed against homosexual status rather than homosexual acts. See 963 F.2d at 1165 n.4. Here, because the statute makes clear that the new policy is conduct-directed, the Pruitt rationale is inapposite. Moreover, as we show infra, Pruitt does not survive the Supreme Court's subsequent decision in Heller v. Doe, 113 S. Ct. 2637 (1993), that, under rational basis review, the government is not required to support its classification with record evidence. Indeed, the Ninth Circuit's creation of an "active" rational basis test was especially inappropriate in the military context.

sustained if there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." Heller v. Doe, 113 S. Ct. 2637, 2642 (1993). Pursuant to this "relaxed" standard, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976), the Government "has no obligation to produce evidence to sustain the rationality" of the statute; "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." Heller, 113 S. Ct. at 2643 (quotation omitted). Instead, "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. at 2643. And, of course, rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." Id. at 2642. So long as the asserted rationale is "plausible," "debatable," or "find[s] some footing in the realities of the subject addressed," the classification must be sustained. Id. at 2643, 2645, 2646.

Moreover, special deference is due congressional enactments in military matters. This case "arises in the context of Congress's authority over national defense and military affairs, and perhaps in no other area has the [Supreme] Court accorded Congress greater deference." Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981). As the Supreme Court recently explained in Weiss v. United States, 114 S. Ct. 752, 760-61 (1994), "[j]udicial deference thus is at its apogee when reviewing congressional

decisionmaking in [the military context]. * * * Congress has primary responsibility for the delicate task of balancing the [constitutional] rights of servicemen against the needs of the military." Thus, "the scope of Congress's constitutional power in this area [is] broad." Rostker, 453 U.S. at 65.

Likewise, in applying the rational basis test, great deference is to be accorded the "considered professional judgment" of military officials, Goldman v. Weinberger, 475 U.S. 503, 509 (1986), concerning "complex * * * decisions as to the composition * * * of a military force." Rostker, 453 U.S. at 65. The military's "special constitutional function * * * to fight or be ready to fight wars should the occasion arise," Greer v. Spock, 424 U.S. 828, 837-38 (1976), renders the military a "specialized society separate from civilian society [that has,] by necessity, developed laws and traditions of its own during its long history." Parker v. Levy, 417 U.S. 733, 743 (1974). "[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life" in order to "foster instinctive obedience, unity, commitment, and esprit de corps." Goldman, 475 U.S. at 507. See also 10 U.S.C. 654(a)(8). Thus, the need for "the subordination of personal preference and identities in favor of the overall group mission" is a matter entrusted to the military's "considered professional judgment." Goldman, 475 U.S. at 508. In such circumstances, "courts have traditionally shown the utmost deference" to the "[p]redictive

judgment" of the Executive Branch in military affairs. Department of Navy v. Egan, 484 U.S. 518, 529-30 (1988).

These settled rules of deference to Congress and the military reflect the recognition that "the lack of competence on the part of the courts in military matters is marked. * * * [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence." Rostker, 453 U.S. at 65. Because courts are "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have," Goldman, 475 U.S. at 507, they must be "particularly careful [in military matters] not to substitute [their] judgment of what is desirable for that of [the Political Branches], or [their] own evaluation of evidence for a reasonable evaluation by the [Political Branches]." Rostker, 453 U.S. at 68. This is not to say that a court has no role in deciding constitutional questions in the military context; but in deciding such questions, "the Constitution itself requires [great] deference to congressional choice." Rostker, 453 U.S. at 67. Accord Falk v. Secretary of the Army, 870 F.2d 941, 945 (2d Cir. 1989).

In sum, under these principles, it is not for "[a] civilian court to second-guess [the] military decision[]," United States v. Shearer, 473 U.S. 52, 57 (1985), reached by Congress and the Armed Forces that service by those who engage or are likely to engage in homosexual acts is inconsistent with the military mission.

B. The Statute's Rebuttable Presumption Based On Statements Of Homosexuality Rationally Targets Persons Who Engage In Or Likely Will Engage In Prohibited Homosexual Acts.

1. In analyzing the constitutionality of the new policy, the starting point is the well-settled principle that the prohibition on homosexual acts in the special context of the military is valid. Even prior to the statute, every court of appeals to decide the issue had rejected constitutional challenges to the prohibition in the old policy¹⁸ against homosexual acts by service members. Schowengerdt v. United States, 944 F.2d 483 (9th Cir. 1991), cert. denied, 112 S. Ct. 1514 (1992); Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984); Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981); see Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir.), cert. denied, 454 U.S. 864 (1981). In addition, two other courts of appeals upheld the old policy as applied to service members who, by stating that they were homosexuals, demonstrated a propensity to engage in homosexual acts that the courts specifical-

¹⁸ The new policy differs from the old policy in that it: (1) expressly states that a person's sexual orientation is a personal and private matter, and that only homosexual acts, homosexual marriages, and statements that reveal a propensity to engage in homosexual acts are grounds for separation; (2) eliminates questions regarding sexual orientation during the accession process; (3) clarifies the definition of "homosexual"; (4) specifies the circumstances in which investigations into homosexual conduct will be commenced; and (5) spells out the procedures by which a members who states that he is a homosexual may rebut the presumption that he engages in or is likely to engage in homosexual acts.

ly recognized could validly be prohibited. 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).¹⁹ The Senate Armed Services Committee expressly endorsed and relied upon these precedents in enacting the new policy. S. Rep. 103-112, supra, at 284-286.

Because the new policy is directed to homosexual acts, it is constitutional under this principle. In enacting the statute, Congress specifically determined that the "longstanding * * * prohibition against homosexual conduct * * * continues to be necessary in the unique circumstances of military service." 10 U.S.C. 654(a)(13). Accordingly, the statute provides for the separation of any member who "has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts." § 654(b)(1).

Congress similarly concluded that service by members "who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to [the military mission]." § 654(a)(15). The statute provides that a service member who "has stated that he or she is a homosexual" shall be separated "unless there is a further finding * * * that the member has demonstrated that he or she is not a person who engages in, attempts to engage

¹⁹ Indeed, even the now-vacated decision of a panel of the D.C. Circuit (which had invalidated the old policy in a case involving a statement of homosexuality) recognized that "'homosexual acts' are forbidden to military servicemembers, and there is no dispute that laws forbidding such conduct are constitutional." Steffan v. Aspin, 8 F.3d 57, 64, vacated and rehearing en banc ordered, 8 F.3d 70 (D.C. Cir. argued May 11, 1993).

in, has a propensity to engage in, or intends to engage in homosexual acts." § 654(b)(2).

In adopting the statute, Congress repeatedly emphasized that it was directed to homosexual acts that had been or were likely to be committed. S. Rep. 103-112, supra, 282-283, 285, 294. Congress recognized that service members who state that they are homosexuals are, unless they show to the contrary, likely to engage in homosexual acts. Id. at 285, 290, 293-294.

Consistent with the statute and legislative history, the DoD Directives make clear that the new policy is conduct-directed. The Directives define "sexual orientation" as "[a]n abstract sexual preference for persons of a particular sex" and distinguish it from "a propensity or intent to engage in sexual acts." DoD Dir. 1332.14, Definitions ¶ 0, ¶ H.1(a). The Directives then expressly admonish that "[a] member's sexual orientation is considered a personal and private matter and is not a bar to continued service * * * unless manifested by homosexual conduct." Id. at ¶ H.1(a). By contrast, "[h]omosexual conduct" -- which 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" -- "is grounds for separation from the Military Services." Ibid.

With particular respect to "statements" cases, the Directives explain that a statement by a service member that he or she is a homosexual is a ground for separation "not because it reflects the member's sexual orientation, but because the statement

indicates a likelihood that the member engages in or will engage in homosexual acts." DoD Dir. 1332.14, ¶ H.1(a). As the Directives elaborate, such a statement "creates a rebuttable presumption that the Service member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts" and thus is basis for separation "unless * * * the member * * * demonstrate[s] that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." *Id.* at ¶ H.1(b)(2). Finally, the Directives define "propensity" to reiterate the distinction with "sexual orientation": "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." *Ibid.* (emphasis added).²⁰

²⁰ Although the district court correctly noted that the term "propensity * * * is not defined" in the statute (slip op. 6), it erred in disregarding the definition in the Directives and concluding, based on dictionary excerpts, that "propensity" means an "innate [or inborn] tendency" or "orientation." *Id.* at 8. As explained above, the statute on its face is directed at homosexual acts, and the legislative history confirms focus. Consistent with the statutory text and history, the DoD Directives define "propensity to engage in homosexual acts" as "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." DoD Dir. 1332.14, ¶ H.1(b)(2) (emphasis added). This regulatory interpretation is reasonable and thus is entitled to deference. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984). Finally, the fact that the military will retain a member who states that he is a homosexual but who demonstrates that he does not and will not engage in homosexual acts shows conclusively that the policy is not aimed at "orientation." See *infra* Part III.B.2.

The member is entitled to present relevant evidence and witnesses (DoD Dir. 1332.14, ¶ H.1(b)(2)) and the board, in determining whether the member has rebutted the presumption, may consider: (1) whether the member has engaged in past acts; (2) the member's credibility; (3) testimony from others about the member's past conduct, character, and credibility; (4) the nature and circumstances of the member's statement; and (5) any other relevant evidence. See ibid.²¹

2. The rebuttable presumption in the new policy -- that service members who state that they are homosexuals engage in or are likely to engage in homosexual acts -- plainly is rational. The Senate Committee on Armed Services explained that, among both heterosexuals and homosexuals, "[s]exual behavior is one of the most intimate and powerful forces in society," and "experience demonstrates that few [service members] remain celibate." S. Rep. No. 103-112, supra, at 281, 284. Congress recognized that military personnel policies properly take into account the sexual attractions that can exist between men and women, and "[s]imilar

²¹ The district court erroneously stated that neither the statute nor the regulations provide directions as to how a member who identifies himself as a homosexual "can prove that he * * * does not have such a [homosexual] propensity." Slip op. 7. In fact, the DoD Directives provide a detailed explanation, complete with examples, regarding how a member can rebut the presumption. See supra pp. __-__; see also S. Rep. 103-112, supra, at 290, 294 (discussing procedures for rebutting the presumption). Thus, contrary to the court's understanding, a member who states that he is a homosexual is not required to disprove his sexual orientation; rather, he must show that he does not engage in, and will not likely engage in, homosexual acts. See 10 U.S.C. 654(b)(2).

considerations apply to the development of policies with respect to homosexuality." Id. at 284.

In particular, the Committee viewed homosexuality as "intimately connected with [homosexual] conduct" (S. Rep. No. 103-112, supra, at 282) and recognized that statements of homosexuality, unless rebutted, "demonstrate a propensity or intent to engage in sexual conduct with persons of the same sex." Id. at 281. It would be "irrational," the Committee stated, "to develop military personnel policies on the basis that all gays and lesbians will remain celibate or that they will not be sexually attracted to others." Ibid. Thus, Congress explicitly adopted a homosexual policy based on the presumption that people -- heterosexuals and homosexuals alike -- ordinarily will act in accordance with their stated sexuality. As the Committee emphasized (id. at 294), "it is reasonable for the armed forces to presume that when a person uses the term 'I am homosexual,' the individual engages in, attempts to engage in, has a propensity to engage in, or intends to engage in impermissible conduct." See also id. at 284 (when a service member indicates that he will likely engage in a homosexual act, the military is neither "required to wait until the person engages in that act before taking personnel action" nor "required to prove in each individual case that a service member will not remain celibate"); id. at 290-94.

Thus, Congress reasonably assumed that any person, whether homosexual or heterosexual, is likely to act in a manner that is consistent with his stated sexuality, unless he demonstrates

otherwise. The difference between the treatment of declared homosexuals and heterosexuals in the military is that homosexual acts are forbidden to service members (10 U.S.C. 654(b), 925) -- a prohibition that repeatedly has been upheld as constitutional. See supra p. __ (citing cases). Congress's policy in "statement" cases thus reflects the constitutionally permissible difference between heterosexual acts and homosexual acts in the unique military context.

Rules governing eligibility for military service need not, as criminal sanctions must, be made applicable only to past actions. The military may fashion its rules governing the composition of its forces in light of the overriding concerns of military readiness. "[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). Thus, the Constitution does not require the military "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. In enacting the new policy, Congress expressly agreed that the military should not be required to take this risk. S. Rep. 103-112, supra, at 282, 284, 285, 294.²²

²² The statute does not involve use of plaintiffs' statements to penalize their "inclinations," contrary to Jacobson v. United States, 112 S. Ct. 1535, 1542 (1992). Under the statute, a person will be excluded from the military if his or her state-
(continued...)

Congress had ample basis to conclude that there is a rational correlation (subject to rebuttal in individual cases) between a person's statement that he is a homosexual and the inference that he engages in, or likely will engage in, homosexual acts. Indeed, "advocates of gay rights have expressly linked sexual orientation to conduct." S. Rep. No. 103-112, supra, at 283. Accord National Defense Research Inst., Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment 51, 64 (Rand 1993) (a "strong correlation" exists between persons who identify themselves as homosexuals and homosexual acts).

Courts similarly have recognized the rationality of a presumption of homosexual acts based on statements of homosexuality. For example, the Seventh Circuit, in upholding the validity of

²²(...continued)
ments demonstrate a "propensity to engage in homosexual acts," defined by regulation to mean "more than an abstract preference or desire to engage in homosexual acts; [propensity] indicates a likelihood that a person engages in or will engage in homosexuals acts." DoD Dir. 1332.14, ¶ H.1(b)(2) (emphasis added). Moreover, Jacobson involved a criminal prosecution, which involves restrictions not applicable to military personnel decisions. For example, the Government may not criminally prosecute a person for being a drug addict, Robinson v. California, 370 U.S. 660 (1962); but Congress may formulate non-criminal rules regarding the composition of military forces to preclude service by people who DoD reasonably concludes are likely to use illegal drugs or commit any other dischargeable offense.

Moreover, even in the criminal context, the Supreme Court has sustained the use of reasonable presumptions. United States v. Gainey, 380 U.S. 63 (1965), upheld the permissive presumption in 26 U.S.C. 5601(b)(2) that a defendant's unexplained presence at an illegal still is sufficient to satisfy the substantive offense of carrying on illegal distillery operations. The Court explained, "it is precisely when courts have been unable to agree as to the exact relevance of a frequently occurring fact in an atmosphere pregnant with illegality that Congress's resolution is appropriate." Id. at 67.

DoD's old homosexual policy in a "statements" case, recognized that a "compelling" connection exists between a person's statement that he is a homosexual and the likelihood that the person commits or will commit homosexual acts:

[A person's statement that he is a homosexual] 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 status], but upon reasonable inferences about * * * probable [homosexual] conduct in the past and in the future.

Ben-Shalom, 881 F.2d at 464; see also Woodward, 871 F.2d at 1076; Watkins v. United States Army, 847 F.2d 1329, 1361 n.19 (9th Cir. 1988) (Reinhardt, J., dissenting) (it is an "unremarkable" fact that homosexuals and heterosexuals "engage in or seek to engage in" homosexual and heterosexual conduct respectively; "[t]o pretend that homosexuality or heterosexuality is unrelated to sexual conduct borders on the absurd"), vacated, 875 F.2d 699 (1989) (en banc), cert. denied, 498 U.S. 957 (1990).

Congress's enactment of this statutory presumption based on the lessons of human experience comports with settled law. A presumption in a civil proceeding is valid if it rests on "a sound factual connection between the proved and inferred facts." NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 787 (1979). Thus, it is "only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 28 (1976). And in re-

viewing the rationality of the statutory presumption, substantial deference is due Congress's determinations because of the legislature's superior ability to gather and evaluate empirical information and its constitutional responsibility for and extensive experience with the operation of the military. See Usery, 428 U.S. at 28 (the "process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded to the capacity of Congress to amass the stuff of actual experience and cull conclusions from it").

3. The statutory presumption is a general supposition, not an invariable rule, and, as discussed supra at pp. _____, the presumption is rebuttable in individual cases. Accordingly, the statute and regulations afford a service member an opportunity to rebut the presumption by showing that, despite his statement of homosexuality, he should be allowed to remain in the service because he does not engage in, and will not likely engage in, homosexual acts.

A member who rebuts the presumption establishes that he will conform his behavior to the military code of conduct barring homosexual acts that is designed to promote military readiness and effectiveness. By rebutting the presumption, the member acknowledges that "[t]he essence of military service 'is the subordination of the desires and interests of the individual to

the needs of the service' " in order to "foster [the] instinctive obedience, unity, and esprit de corps [necessary] to accomplish * * * [the military] mission." Goldman, 475 U.S. at 507.

Congress's use of a rebuttable presumption here is "sensible and timesaving," NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 788-89 (1990), because an individual who has stated that he is a homosexual has the "peculiar means of knowledge" to prove whether or not the general presumption applies in his particular case. 9 Wigmore on Evidence § 2486, at p. 290 (Chadbourn rev. 1981). The reasonableness of this approach is confirmed by Lavine v. Milne, 424 U.S. 577 (1976), in which the Supreme Court upheld a statutory presumption that a person who left his job voluntarily within 75 days of applying for public assistance did so to qualify for assistance. Emphasizing that "[o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment," the Court sustained the rationality of the presumption because a person's state of mind "should be best known by the [person] himself." Id. at 585. So, too, in this case, the individual service member is in the best position to demonstrate that, notwithstanding his statement, he is willing and able to conform his conduct to military standards by showing he does not and will not engage in homosexual acts.

C. The Statutory Exclusion Of Service Members Who By Their Statements Demonstrate That They Are Likely To Engage In Homosexual Acts Is Rationally Related To Advancing Legitimate Military Interests.

1. The Classification Is Rationally Related To Preventing The Commission Of Proscribed Homosexual Acts. The statute represents a rational legislative choice designed to prevent the commission of proscribed homosexual acts that Congress found interfere with the effective accomplishment of the military mission. See Dronenburg, 741 F.2d at 1398 (homosexual acts "are almost certain to be harmful to morale and discipline" within a military unit); Hatheway, 641 F.2d at 1384 (there is a substantial "governmental interest in deterring homosexual conduct by members of the armed forces"). In particular, Congress rationally concluded that a service member's statement that he or she is a homosexual provides a substantial basis for presuming, unless the member demonstrates otherwise, that he or she engages in or is likely to engage in homosexual acts. Further, as discussed supra at p. __, Congress also rationally and lawfully determined that the military need not take the risk a service member who states that he or she is homosexual will refrain from engaging in prohibited homosexual acts.

The rationality of this statutory scheme is directly supported by New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979). Beazer involved the Transit Authority's rule that barred employment to persons using narcotic drugs. The policy was alleged to violate equal protection because it denied employment to methadone users who were enrolled in a rehabilitation program and

therefore able to perform the jobs. Id. at 589-90. Rejecting that challenge, the Supreme Court held that the policy was rationally "supported by the legitimate inference that * * * a degree of uncertainty [regarding future drug use while still in the program] persists" (id. at 591), and that it "represent[ed] a policy choice * * * [regarding employment] made by that branch of Government vested with the power to make such choices." Id. at 592. Accord Vance v. Bradley, 440 U.S. 93, 106 (1979) (in establishing mandatory retirement age, Congress permissibly drew a line that sought to "avoid the risks" that otherwise might result).

Similarly, in Weinberger v. Salfi, 422 U.S. 749 (1975), the Supreme Court upheld Congress's authority to enact presumptions that are rationally related to preventing the occurrence of conduct that may be proscribed. In Salfi, plaintiffs challenged a statutory presumption that marriages occurring less than nine months before the wage earner's death were shams entered into for the purpose of obtaining survivor benefits under the Social Security Act. The Court rejected the challenge and endorsed Congress's use of presumptions for "prophylactic" purposes (id. at 777):

[T]he question raised is not whether a statutory provision precisely filters out those and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would [unnecessarily] ban all prophylactic provisions. * * * The question is whether Congress, its concern having been reasonably aroused by the possibility of a [risk] which it legitimately desired to avoid, could rationally have concluded * * * that a

particular [policy] would protect against [the risk's] occurrence * * *.

Under the principle of these cases, the statutory presumption in "statements" cases represents a rational means to avoid the commission of proscribed homosexual acts that pose an "unacceptable risk" to military effectiveness. 10 U.S.C. 654(a)(15). Nor is the statute rendered irrational by a claim that it is "broader than necessary." Beazer, 440 U.S. at 592. In fact, in contrast to the irrebuttable "general rule[s]" (*ibid.*) upheld in Beazer, Vance, and Salfi, the legislative classification here accords service members "individualized consideration" (*ibid.*) by affording them an opportunity to rebut the presumption.

In sum, the statute is rational as a reasonable method of preventing the commission of homosexual acts that are validly forbidden to service members.

2. The Classification Is Rationally Related To Promoting Unit Cohesion. The statute also rationally furthers the vital military goal of maintaining unit cohesion. Congress made two key findings in this regard. First, Congress found that unit cohesion -- which it described as "the bonds of trust * * * that make combat effectiveness of a military unit greater than the sum of the individual unit members" -- is "[o]ne of the most critical elements in combat capability." 10 U.S.C. 654(a)(7). Second, Congress found that "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards

of morale, good order and discipline, and unit cohesion that are the essence of military capability." § 654(a)(15).

These legislative findings "are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 331 n.12 (1985). A court's "responsibility for making 'findings of fact' certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion * * *." Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & Pac. R.R., 393 U.S. 129, 136, 138-39 (1968). Accord Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981); Katzenbach v. Morgan, 384 U.S. 641, 653 (1966).

Abundant congressional testimony supports these legislative findings. General H. Norman Schwarzkopf testified that unit cohesion "is the single most important factor in a unit's ability to succeed on the battlefield." S. Rep. 103-112, supra, at 274. Likewise, then-Chairman of the Joint Chiefs of Staff, General Colin L. Powell, explained that the military strives to "create cohesive teams of warriors who will bond so tightly that they [will] go into battle and give their lives if necessary for the accomplishment of the mission and for the cohesion of the group and for their individual buddies." Id. at 275.

General Powell emphasized the military's concern that "[w]e cannot allow anything to happen which would disrupt * * * cohe-

sion within the force." S. Rep. 103-112, supra, at 275. Thus, as he explained, although service members "must get along together despite their individual preferences[,] [b]ehavior too far away from the norm undercuts the cohesion of the group." Id. at 278 (emphasis added). In General Powell's experience, service by persons who engage in homosexual acts, or who by their statements demonstrate a propensity to engage in homosexual acts, "would have an unacceptable detrimental and disruptive impact on the cohesion, morale, and esprit of the armed forces." Ibid. See also id. at 281 (General Powell) (service by persons with a stated propensity to engage in homosexual acts "would [adversely] affect the cohesion and well-being of the force"). General Schwarzkopf likewise testified that the presence of active homosexuals in military units has a debilitating effect on combat effectiveness (id. at 280):

[I]n my years of military service, I have experienced the fact that the introduction of an open homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war.

[I]n every case I am familiar with, and there are many, whenever it became known in a unit that someone was openly homosexual, polarization occurred, violence sometimes followed, morale broke down, and unit effectiveness suffered.

Congress therefore reaffirmed the military's longstanding judgment that service by members who engage in homosexual acts, or demonstrate by their statements that they are likely to engage in such acts, severely impairs unit cohesion. This joint conclusion of Congress and the military is entitled to the utmost

deference. "It is not for [the courts] to dismiss [concerns regarding unit cohesion] as insignificant in the context of military preparedness and the exigencies of a future mobilization." Rostker, 453 U.S. at 81.

3. The Classification Is Rationally Related To Accommodating Privacy Interests. In addition, the statute rationally accommodates legitimate privacy interests of service members who "routinely" and "involuntarily" must "accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy." 10 U.S.C. 654(a)(12). As General Powell testified (S. Rep. 103-112, supra, at 277):

[T]he majority of our young men and women are required to live in communal settings that force intimacy and provide little privacy. It may be hard to contemplate spending 60 continuous days in the close confines of a submarine; sleeping in a foxhole with half a dozen other people; 125 people all living and sleeping in the same 40 by 50 foot, open berthing area, but this is exactly what we ask our young people to do.

General Powell stated that "it would be prejudicial to good order and discipline" if the military required heterosexuals and persons who demonstrated a propensity to engage in homosexual acts "to share the most private facilities together, the bedroom, the barracks, latrines, and showers." Id. at 283; see id. at 280-82.

Significantly, these same concerns underlie military personnel policies that seek, where possible, to provide men and women with separate living arrangements to avoid "increased sexual tension" that would "disrupt unit cohesion." See S. Rep. 103-112, supra, at 277-78. Indeed, "[o]ne of the factors in dictating the

pace of increasing the opportunities for women in the armed forces has been the need to accommodate sexual privacy with respect to living, rest room, and bathing facilities for deployed troops." Id. at 277. The Senate Committee on Armed Services recognized that, just as "[i]t is reasonable for the armed forces to take these factors into consideration in establishing gender-based assignment policies," it also "is reasonable for the armed forces to take [them] into consideration when addressing issues concerning persons who engage in or have the propensity or intent to engage in sexual activity with persons of the same sex." Id. at 278. Accord id. at 281 ("In civilian life people are not compelled to live with individuals who are sexually attracted to persons of the same sex, and the committee finds no military necessity to compel persons to do so in the military"). This privacy concern thus provides a rational basis for sustaining the legislative classification.²³

The privacy rationale is not undermined by the fact that the statute permits continued service by a member who states that he is a homosexual but successfully rebuts the presumption of homosexual acts. Retaining a member who rebuts the presumption is perfectly consistent with the policy's purpose of excluding only persons who engage in or likely will engage in homosexual acts;

²³ For similar reasons, Congress could rationally conclude that allowing service by those who demonstrate a likelihood to engage in homosexual acts would adversely affect the ability of the military to recruit and retain members in our all-volunteer force. [cites to Senate testimony]; see also Dronenburg, 741 F.2d at 1398; Woodward, 871 F.2d at 1076-77; Rich, 735 F.2d at 1227-28 n.7; Beller, 632 F.2d at 811.

by definition, a member who succeeds in rebutting the presumption has demonstrated that he does not engage in and will not engage in homosexual acts. More fundamentally, the retention of such persons reveals a balance struck by Congress between two competing interests: the privacy interest of heterosexuals, on the one hand, and, on the other hand, the interest of persons who state that they are homosexuals in serving in the military if they demonstrate that they have no propensity to engage in homosexual acts and thus will conform their conduct to military standards. See S. Rep. 103-112, supra, at 274 (in adopting the statute, the committee "carefully considered the needs of the armed forces and the rights of all persons, including those who are gay or lesbian"). A policy need not be carried to its logical limits, without regard to other competing interests, to be rational. Rather, in the context of rational basis review, "the latitude of discretion is notably wide in * * * the granting of * * * exemptions upon grounds of policy." Nordlinger v. Hahn, 112 S. Ct. 2326, 2335 (1992).

4. The Classification Is Not Grounded In Prejudice. Finally, the statute is not based on constitutionally impermissible prejudice. To begin with, the "statements" provision in the new policy is, as shown above, conduct-directed and rests on concerns identical to those underlying the longstanding military prohibition on homosexual acts. Thus, the unbroken line of appellate decisions holding that the prohibition of homosexual acts in the Armed Forces rests on a constitutionally permissible basis ap-

plies with equal force here. See Dronenburg, 741 F.2d at 1398; Ben-Shalom, 881 F.2d at 460-461; Woodward, 871 F.2d at 1076; Rich, 735 F.2d at 1229. Beller, 632 F.2d at 811.

Moreover, the new policy was adopted after Congress and the Executive Branch fully considered both sides of the debate over the controversial issue of service by homosexuals, including in particular the criticism that the military's old policy was based on "prejudice." In enacting the new policy, Congress "carefully considered the needs of the armed forces and the rights of all persons, including those who are gay or lesbian." S. Rep. 103-112, supra, at 274. The Senate Armed Services Committee "emphasize[d] * * * that its position on the service of gays and lesbians is not based upon stereotypes." Id. at 282.²⁴ Rather, the statute rests on the considered professional judgment of military authorities after a "careful, thorough, and open-minded review" as to "what is best for military effectiveness" (id. at 279) and on Congress's judgment about "the impact in the military setting of the conduct that is an integral element of homosexuality." Id. at 282.

As General Powell explained:

[O]pen homosexuality in units is not just the acceptance of benign characteristics such as color or gender or background. It involves matters of privacy and human sexuality that, in our judgment, if allowed to exist openly in the military, would affect the cohesion

²⁴ For example, Congress expressly rejected the "stereotypical" notion that homosexuals are sexual "predators" who "find every person of the same sex to be sexually attractive." Id. at 284.

and well-being of the force. It asks us to deal with fundamental issues that the society at large has not yet been able to deal with.

Id. at 281. Based on its extensive consideration, Congress specifically concluded that the statute does not embody "an irrational prejudice against gays and lesbians " (id. at 283); it is "based on prudence, not prejudice" (ibid.) and is "carefully drafted to maintain the delicate balance between the individual concerns and the needs of the armed forces." Id. at 274. This judgment of Congress, as "a coequal branch of government whose Members take the same oath [judges] do to uphold the Constitution of the United States," is entitled to the utmost deference. Rostker, 453 U.S. at 64.

To argue, notwithstanding the congressional determination, that the statute is grounded in constitutionally impermissible prejudice and hence violates equal protection reflects a misunderstanding of rational basis review. Where, as here, no suspect classification or fundamental right is at issue, equal protection is satisfied if there is "a rational relationship between the disparity of treatment and some legitimate governmental purpose." Heller, 113 S. Ct. at 2692.

Under this rationality standard, a challenged classification violates equal protection "only when it 'rests on grounds wholly irrelevant to the achievement of the State's objective.'" Heller, 113 S. Ct. at 2695. Only a statute that lacks such a rational basis can be said, for purposes of rationality review, to be the kind of "invidious discrimination" or "wholly arbitrary

act" that equal protection condemns. New Orleans v. Dukes, 427 U.S. 397, 304 (1976) (per curiam). "Thus, [a court] will not overturn * * * a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." Vance v. Bradley, 440 U.S. 93, 97 (1979). See also Gregory v. Ashcroft, 111 S. Ct. 2395, 2406 (1991); Pennell v. City of San Jose, 485 U.S. 1, 14 (1988). In applying this test, it is only "the rare case when the facts preclude[] any plausible inference that the reason for the" challenged classification is unrelated to a legitimate government purpose. Nordlinger v. Hahn, 112 S. Ct. 2326, 2335 (1992). See also Village of Arlington Heights v. Metropolitan Housing Dev., 429 U.S. 252, 266 (1977) (analyzing state action that was "unexplainable on grounds other than race").

In cases that have invalidated a government action under the rational basis test, the Supreme Court has concluded that the action was irrational or based on prejudice only after it had eliminated all possible rational justifications for the classification; it was only through the process of ruling out every legitimate basis, thereby leaving either impermissible reasons or no reasons at all, that the Court held that the classification was invalid. For example, in U.S. Department of Agriculture v. Moreno, 413 U.S. 528 (1973), the Court struck down a related-person requirement for household eligibility under the Food Stamp Act because "[t]he challenged classification * * * is clearly

irrelevant to the stated purposes of the Act" and was supported only by "a bare desire to harm a politically unpopular group [hippies]." Id. at 534. Because the sole asserted rationale for the provision was not "a legitimate governmental interest" (ibid.), the Court concluded that the statute was "wholly without any rational basis." Id. at 538.

Similarly, in City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), the Court overturned municipal zoning requirements that were imposed on group homes for the mentally retarded but not on any other group home or multiple-dwelling building. The Court explained that, under rational basis review, plaintiffs were protected from "invidious discrimination" by the requirement that the classification "must be rationally related to a legitimate governmental purpose," and it stressed that "'a bare * * * desire to harm a politically unpopular group' * * * [is] not [a] legitimate state interest[]." Id. at 446-47. The Court thus made clear 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 [other group homes.]" Id. at 448 (emphasis added). Reviewing each of the proffered rationales for the special requirements and finding none that would justify the difference in treatment, the Court held that "the record does not reveal any rational basis for believing that the [mentally-retarded group] home would pose any special threat to the city's legitimate interests." Id. at 478. In the absence

of a rational basis, the Court concluded, "requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded." Id. at 450. See also New York Transit Authority v. Beazer, 440 U.S. 568, 592 (1979) (because ban on employment of drug users was rational, it was, under rationality review, "neither unprincipled nor invidious").

Under this standard of rationality review, the statute governing military service by homosexuals does not rest on constitutionally impermissible prejudice. For the reasons previously explained, the new policy is amply supported by a number of rational bases. It does not embody "a bare * * * desire to harm" homosexuals. See Cleburne, 473 U.S. at 447. Nor does it represent "unthinking[]" or "reflexive[]" government action or an "accidental by-product of a traditional way of thinking about [homosexuals]." Rostker, 453 U.S. at 72, 74. Rather, it reflects the considered judgment of Congress and the military regarding "what is best for military effectiveness" and "the impact in the military setting of [actual or likely homosexual] conduct." See S. Rep. 103-112, supra, at 279, 282. As the Senate Armed Services Committee observed, the new policy "is not based upon stereotypes. * * * [T]he policy is based upon prudence, not prejudice." Id. at 282, 283.

In these circumstance, the Supreme Court's decision in Cleburne does not invalidate the new policy. First, of course, Cleburne did not arise in the special context of the military. But beyond that, the Cleburne holding -- that "mere negative

attitudes, or fears, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases" for the classification (473 U.S. at 448) -- is inapposite here. The claimed justifications in Cleburne simply did not serve any legitimate governmental interest in that case; absent such a rationale, the Court concluded, the challenged classification could only rest on "irrational prejudice." Id. at 450. Plainly, governmental action based on "mere negative attitudes" unrelated to legitimate state objectives does not withstand even deferential rational-basis scrutiny. Here, however, the new policy serves goals -- the prevention of prohibited homosexual acts, the promotion of unit cohesion, and the preservation of personal privacy -- that are not only legitimate and relevant in the military but of the highest order. These critical objectives bearing on the essential mission of the Armed Forces more than suffice to sustain the rationality of the new policy in the context of the military.²⁵

Plaintiffs argued below, however, that these rational bases do not support the statute because, they assert, it is predicated on the "prejudice" against homosexuals held by some service

²⁵ The present case also differs significantly from Palmore v. Sidoti, 466 U.S. 429 (1984). In Palmore, the challenged policy occurred in the civilian context and involved a racial classification. Unlike race, which occupies a unique position in our legal system and in our history, classifications based on the likelihood of a person engaging in homosexual conduct are not illegitimate per se; on the contrary, courts have consistently upheld the military's prohibition on homosexual acts. Consequently, unlike the classification at issue in Palmore, equal protection analysis requires only that the statute be rationally related to a legitimate governmental goal.

members. This argument is legally insufficient for the reasons just discussed. As the Supreme Court recently reaffirmed, "[i]t is a familiar principle of constitutional law that [courts] will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.'" Turner Broadcasting System v. FCC, ____ S. Ct. ____ (1994).

Moreover, plaintiffs' assertion overlooks the fact that service members' views about homosexual conduct in the unique living and working conditions found in the Armed Forces reflect a number of considerations -- including religious doctrines, moral precepts, ethical values, and privacy concerns -- about an extraordinarily complex question. See S. Rep. 103-112, supra, at 268. Rationality review does not require that Congress and the military attempt to determine the deep-seated bases for attitudes regarding the complicated and controversial issue of homosexuality. If rational basis review and deference to Congress and the military mean anything, it is that these institutions of government must be allowed sufficient latitude to deal with practical problems that may arise due to the attitudes of service members that affect military preparedness, unit cohesion, discipline, and morale. See S. Rep. 103-112, supra, at 279.

The argument that the Armed Forces is barred under rationality review from considering factors rationally related to military readiness cannot be reconciled with the military's "vital role" to be prepared to defend our country. Goldman, 475 U.S. at 507. See also 10 U.S.C. 654(a)(4). Given the realities the

Armed Forces confront, it is within the province of Congress and the military to conclude that service by those who engage in or likely will engage in prohibited homosexual acts would adversely affect the military mission. Otherwise, the government would be precluded from addressing the serious problems that the military has long found arise from homosexual conduct.²⁶ Plaintiffs' claim of "prejudice" therefore does not undermine the rationality of the policy adopted by Congress and the military for dealing with this issue or overcome the deference due their joint judgment on matters concerning the effectiveness and readiness of our Armed Forces.

**IV. SEPARATION BASED ON A SERVICE MEMBER'S STATEMENT
THAT HE OR SHE IS A HOMOSEXUAL DOES NOT VIOLATE
THE FIRST AMENDMENT.**

The district court held that the First Amendment prevents the military from separating (or even investigating) service members based on their statements, made in connection with litigation challenging the validity of the new policy, that they are homosexuals. That was error as a matter of law. All statements by service members that they are homosexuals, whether made in connection with litigation or otherwise, implicate the concerns underlying the new policy and are subject to the statute and Directives. The First Amendment neither forbids the use of such

²⁶ The Senate Committee on Armed Services "carefully considered" the suggestion that problems regarding unit cohesion "could be overcome through training and education" (see S. Rep. 103-112, supra, at 280), but it rejected this approach, concluding that the policy it adopted was most likely to promote the "effectiveness of our armed forces to carry out their mission to defend our nation." Id. at 269.

statements to demonstrate that a service member engages in or is likely to engage in prohibited homosexual acts, nor provides special protection to statements made in litigation.

A. The First Amendment Does Not Bar The Military's Use Of A Service Member's Statement Of Homosexuality To Establish That The Member Engages In, Or Is Likely To Engage In, Prohibited Homosexual Acts.

Prior to enactment of the statute, every appellate court to consider the issue had held that the First Amendment is not violated by the discharge of a service member based on the member's statement that he or she is a homosexual. See Ben-Shalom v. Marsh, 881 F.2d at 458-62; Schowengerdt v. United States, 944 F.2d 483, 489 (9th Cir. 1991), cert. denied, 112 S.Ct. 1514 (1992); Pruitt v. Cheney, 963 F.2d 1160, 1163-64 (9th Cir. 1991), cert. denied, 113 S.Ct. 655 (1992); Rich v. Secretary of the Army, 735 F.2d 1220, 1228-29 (10th Cir. 1984); see also High Tech Gays v. DISCO, 895 F.2d 563, 578-80 (9th Cir. 1990). The reasoning of these cases is equally applicable to the new statute and sustains its constitutionality under the First Amendment.

In analyzing plaintiffs' First Amendment challenge, it is important at the outset to make clear the nature of the new policy. The policy does not prohibit speech about issues concerning homosexuality; nor does it forbid discussion and criticism of the policy or proposals and advocacy for its change; nor does it ban attending demonstrations on homosexual rights, or reading homosexual newspapers, or patronizing homosexual clubs. See DoD Dir. 1332.14 (Encl. 3, Att. 4) ¶ C.3(d); S. Rep. 103-112, supra, at 292.

Rather than affecting First Amendment rights, the new policy merely uses a service member's statement of homosexuality in an evidentiary way to establish a likelihood of homosexual acts -- acts that the military may validly proscribe and treat as a ground for separation. As explained above, the new policy is conduct-directed and provides for the discharge of service members who engage or likely will engage in homosexual acts. A member's statement that he or she is a homosexual is an evidentiary fact from which the military presumes, in the absence of rebuttal by the member, that the member does or will engage in homosexual acts. Thus, the basis for the discharge is acts, not "speech." Indeed, the retention in the service of a member who makes a statement that he or she is a homosexual, but rebuts the presumption of conduct by demonstrating that he or she has not engaged in homosexual acts and will not do so in the future, is a compelling indication that the policy does not target speech but rather is directed to acts. Cf. Wayte v. United States, 470 U.S. 598, 609 (1985) (enforcement policy not based on speech because people who said they had not registered for the draft, but later did so, were not prosecuted).

Under settled principles, it does not violate the First Amendment to make evidentiary use of a person's statements to demonstrate that he has engaged or likely will engage in acts that the Government may prohibit. As the Supreme Court recently held in Wisconsin v. Mitchell, 113 S. Ct. 2194, 2201 (1993), even in the criminal context "[t]he First Amendment * * * does not

prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent," and thus it was not unconstitutional to use "evidence of the defendant's prior speech or associations." See also Dawson v. Delaware, 112 S. Ct. 1093, 1097 (1992) ("the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations * * * simply because those beliefs and associations are protected by the First Amendment"); Haupt v. United States, 330 U.S. 631, 641-42 (1947) (upholding admission of evidence of defendant's political beliefs to show his motive and intent). And certainly nothing in the First Amendment bars the use of a statement constituting an admission or confession. See Pruitt, 963 F.2d at 1164 ("Pruitt's admission [of homosexuality], like most admissions, was made in speech, but that does not mean that the First Amendment precludes the use of the admission as evidence of the facts admitted").

This case is closely analogous to Wayte. There, the Selective Service System enforced the draft laws only against those non-registrants who reported themselves (the vast majority of cases) or were reported by others (who generally knew about those non-registrants because they were "vocal" protesters of the draft). Wayte had written to several government officials, including the President, stating that he had not registered and did not intend to do so. The Supreme Court rejected Wayte's claim that his prosecution based on his self-identification violated the First Amendment. 470 U.S. at 610-14. In parti-

cular, the Court recognized that the First Amendment did not prevent the government from making use of Wayte's letters as "strong, perhaps conclusive evidence of the non-registrant's intent not to comply -- one of the elements of the offense." Id. at 612-13. Wayte is equally applicable here to uphold the constitutionality of the new policy against plaintiffs' First Amendment challenge.²⁷

B. Statements Of Homosexuality Made In Connection With Litigation Are Not Entitled To Special First Amendment Protection.

Contrary to the district court's reasoning (slip op. 9-13), statements of homosexuality made in connection with litigation are not entitled to greater constitutional protection than non-

²⁷ In addition, the Supreme Court has repeatedly held that the First Amendment has a more narrow application in the military than in other areas. See, e.g., Brown v. Glines, 444 U.S. 348, 353-58 (1980) (upholding restrictions on on-base circulation of petitions to Congress and Secretary of Defense); Greer v. Spock, 424 U.S. 828 (1976) (upholding prior restraint on on-base political speeches, and distribution of publications); Parker v. Levy, 417 U.S. 733 (1974) (upholding court martial for statements criticizing the Viet Nam war and urging other soldiers to refuse to serve). The Court also has recognized special restrictions on the free speech rights of government employees in general. See, e.g., Waters v. Churchill, No. 92-1450 (May 31, 1994), slip op. at 12 (plurality opinion) (First Amendment does not prevent discharge of employee who "begins to do or say things that detract from the agency's efficient operation"); Connick v. Myers, 461 U.S. 138, 146 (1983) (First Amendment inapplicable to government employee's speech that "cannot be fairly characterized as constituting speech on a matter of public concern"). Finally, an incidental effect on speech through government regulation of activity that combines both speech and nonspeech elements does not violate the First Amendment. See, e.g., Wayte, 470 U.S. at 611-13; United States v. O'Brien, 391 U.S. 367 (1968). These precedents confirm the constitutionality of the new policy even if it is assumed that the government's regulation of homosexual acts by members of the military might have an incidental effect on plaintiffs' claimed right to speak.

litigation statements covered by the Free Speech or Petition Clause of the First Amendment.

1. Claims under the Petition Clause are subject to the same analysis as Free Speech claims. In McDonald v. Smith, 472 U.S. 479 (1985), the Supreme Court rejected a claim of absolute immunity for libelous statements made in a letter to the President concerning a candidate for federal appointment, holding that defendant was limited to the qualified immunity of New York Times v. Sullivan, 376 U.S. 254 (1964). The Court found "no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions." 472 U.S. at 485. See also Brown v. Glines, 444 U.S. at 353 (rejecting Petition Clause claim "[f]or the same reasons" that it had rejected speech claims); Wayte v. United States, 470 U.S. at 610 n.11 ("[a]lthough the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis").

This Court has similarly held that the same First Amendment analysis applies to the Petition and Free Speech Clauses. In White Plains Towing Corp. v. Patterson, 991 F.2d 1049, 1059 (2d Cir.), cert. denied, 114 S. Ct. 185 (1993), the Court, relying on McDonald and Wayte, held that plaintiffs' "right-to-petition claims are also governed by the interest-balancing principles" of

Pickering v. Board of Education, 391 U.S. 563 (1968), that are applicable to public employees' freedom of speech claims.²⁸

2. The fact that plaintiffs here are petitioning the courts for redress of grievances, rather than the Congress or the Executive, does not alter the constitutional analysis. Surely the right to petition the courts cannot be said to be more important, or more essential to our democratic form of government, than the right to petition the Political Branches elected by the people.

It is true, of course, that under Article III of the Constitution, a plaintiff must establish a proper "case or controversy," including his standing to sue, in order to invoke the jurisdiction of the federal courts. Where, as here, anticipatory relief is sought, a plaintiff has to demonstrate, inter alia, that he is subject to the provision in a real and concrete way. See, e.g., City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983). Under this constitutional requirement, plaintiffs seeking to bring a pre-enforcement attack on a criminal or regulatory statute generally must show, as the price of admission to the courthouse, that they are or will be in violation of the statute and hence at actual risk of sanctions. See, e.g., Wooley v. Maynard, 430 U.S. 705, 711 (1977); Steffel v. Thompson, 415 U.S. 452, 456, 460 (1974); Douglas v. City of Jeannette, 319 U.S. 157,

²⁸ In White Plains Towing, this Court cited with approval decisions to the same effect from three other circuits. See Day v. South Park Independent School District, 768 F.2d 696, 701 (5th Cir. 1985), cert. denied, 474 U.S. 1101 (1986); Gray v. Lacke, 885 F.2d 399, 412 (7th Cir. 1989); Schalk v. Gallemore, 906 F.2d 491, 498 (10th Cir. 1990). See also Thorne v. Bailey, 846 F.2d 241, 244-45 (4th Cir.), cert. denied, 488 U.S. 984 (1988).

159-60 (1943); O'Shea v. Littleton, 414 U.S. 488, 496-97 (1974); Golden v. Zwickler, 394 U.S. 103, 108-110 (1969).

As a practical matter, this showing can be highly prejudicial to the plaintiff if his challenge is unsuccessful and an enforcement action is later brought. Indeed, his own allegations and evidence may be sufficient to prove a violation of law. Nevertheless, it has never been suggested -- until the district court's ruling here -- that the requirements of Article III violated the First Amendment by "burdening" or "chilling" the right to petition the courts. Quite the opposite, it is settled law that statements made in connection with litigation, including statements in pleadings, may be used against the party making the statement in subsequent proceedings. See generally 4 Wigmore on Evidence (Chadbourn rev. 1972) § 1066, p. 76, and 1994 Supplement, p. 374; Williams v. Union Carbide Corp., 790 F.2d 552, 556 (5th Cir.), cert. denied, 479 U.S. 992 (1986); Lehigh Valley R. Co. v. Allied Machinery Co. of America, 271 F. 900, 902 (2d Cir.), cert. denied, 256 U.S. 704 (1921); Fed. R. Evid. 801 (testimony given at a different trial or proceeding, and admissions made by a party-opponent, are not hearsay). The district court's constitutional rule is both unprecedented and unsound, and improperly reads the Constitution to be at war with itself.

We emphasize that plaintiffs are not being penalized or retaliated against for filing this litigation. Compare McCoy v. Goldin, 598 F. Supp. 310, 214-15 (S.D.N.Y. 1984). Rather, they are treated no differently from any other service members who

state in any context that they are homosexuals. Plaintiffs are not using the First Amendment as a shield against reprisal, but instead as a sword to obtain an exception for themselves from the generally applicable policy on military service by homosexuals. This the First Amendment does not permit. Cf. Cohen v. Cowles Media Co., 111 S. Ct. 2513, 2518 (1991).

Finally, as this case itself illustrates, the novel constitutional rule created by the district court is not necessary to allow judicial resolution of the validity of the new policy. First, it is fair to observe that there is no shortage of litigation challenging both the old and new policies, and additional cases can be expected as the new policy is applied to more service members. Indeed, two of the plaintiffs in this very case (Zehr and Spencer) made statements of their homosexuality prior to instituting suit, and (absent the district court's preliminary injunctions) the military proposed to proceed against them; either before their administrative separation (if, contrary to our submission, exhaustion is excused) or after (if exhaustion is required and they are discharged), these plaintiffs would have standing to challenge the new policy. Thus, even without the district court's First Amendment ruling, there is not prospect that constitutional review would be evaded.

Second, as plaintiff "Jane Able" in fact has done, plaintiffs could have sought to bring this lawsuit under fictitious names. Courts have allowed litigants to proceed anonymously in a variety of circumstances involving, as here, sensitive personal

matters. See Webster v. Doe, 486 U.S. 592 (1988) (homosexuality); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd, 425 U.S. 901 (1976) (homosexuality); Plyler v. Doe, 457 U.S. 202 (1982) (illegal aliens); Roe v. Wade, 410 U.S. 113 (abortion). Alternatively, an appropriate gay-rights organization or association may be able to sue to contest the policy on behalf of its members. See Automobile Workers v. Brock, 477 U.S. 274 (1986); NAACP v. Alabama, 357 U.S. 449 (1958). In these ways, plaintiffs could obtain an adjudication of the constitutionality of the new policy without the invention of a First Amendment rule of immunity for self-identifying statements made in litigation.²⁹

²⁹ We recognize that these approaches would not be available if, as we argue above, exhaustion of military remedies is required before judicial litigation may be brought. If our exhaustion argument prevails, the Court would not need to reach the First Amendment issue. Accordingly, our discussion of the First Amendment assumes arguendo that exhaustion is not required.

CONCLUSION

For the foregoing reasons, the preliminary injunctions issued by the district court should be reversed.

Respectfully submitted,

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