UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK A. PHILIPS, Plaintiff-Appellant,	)	No. 95-35293
vs.	)	USDC No. CV-93-11154-WD
WILLIAM PERRY, Secretary of Defense; JOHN H. DALTON, Secretary of the Navy; and M.B. MARGOSIAN, Commanding Officer, Transient Personnel Unit, Puget Sound, Defendants-Appellees.	)	

On appeal from the United States District Court for the
Western District of Washington, at Seattle, Honorable Judge William Dryer

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Petty Officer Mark Philips' opening brief to this Court ("Op. Br.") showed that the "Policy concerning homosexuality in the armed services." 10 U.S.C. §§ 654 (the "Act"), was constructed to serve an impermissible purpose and is unconstitutional. In response, the government argues principally that this Court's prior decisions dispose of Philips' equal protection claim. But the issue posed by Philips is one of first impression in this Circuit and. moreover, the only decisions of this Court that are even arguably relevant have been undermined by recent decisions of the U.S. Supreme Court.

In substantive defense of the policy, the government argues that the Act passes rational basis review because heterosexuals, potentially discomforted by serving alongside open lesbians and gay men, might disrupt their units. But this is capitulation to hostility, not a legitimate basis for different treatment by the government.

Finally, the government maintains that the Act does not regulate speech at all and if it does, that it does not discriminate on the basis of content or viewpoint. The first argument. based on cases developed under a materially different military policy, ignores the very statute and congressional record here. Those establish the regulation of expression as the only purpose of the Act. The second government argument ignores the simple fact that only speech revealing an actual lesbian or gay orientation is punished, whereas speech about a heterosexual orientation or a false claimed gay orientation does not mandate discharge. The infringement upon Philips' freedom of expression demands a substantial showing of need by the government, but again the defendants respond only with illegitimate justifications.

ARGUMENT

I. THE ACT VIOLATES EQUAL PROTECTION

A. Philips' Equal Protection Claim Has Never Been Addressed By This Court

Philips challenges the military's double standard of allowing heterosexuals to engage in behavior that reflects their sexual orientation but discharging lesbians and gay men for doing the same thing. See Op. Br. at 18-19. Because the only justifications for this different treatment are based on the negative reactions of others, the Act cannot pass constitutional muster. Id. at 21-28.

The government insists that "Philips' Equal Protection Claim Is Foreclosed By Ninth Circuit Precedent." Gov't Br. at 11, relying primarily on Meinhold v. U.S. Dept. of Defense, 34 F.3d 1469 (9th Cir. 1994). The Navy discharged the plaintiff in Meinhold because he said he was gay. Meinhold, 34 F.3d at 1473. He argued that it is unconstitutional to assume from a statement of orientation that a lesbian or gay man will violate a conduct prohibition while not making a similar assumption about a heterosexual. Id. at 1478. This Court held that the Navy's then-applicable regulations could be interpreted not to apply to someone who merely stated a gay sexual orientation, thus avoiding what it termed the "close" constitutional question the plaintiff posed. Id. at 1478-79.

As this Court explicitly noted, the plaintiff in Meinhold did not challenge the military's regulation of sexual or other conduct. Id. at 1477. Far from reaching out to decide the constitutionality of the military's discriminatory conduct rules, this Court avoided even the narrow constitutional question raised by the plaintiff. Id. Moreover, a constitutional ruling on such a differential punishment of conduct claim was in no conceivable way necessary to

decide that the Navy's regulations had not been properly interpreted. Thus, Meinhold never addressed, either implicitly or explicitly, the question posed in this case.

The other cases invoked by the government are Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980). cert. denied 452 U.S. 905 (1981), and Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir.). cert. denied. 454 U.S. 864 (1981). But, as this Court pointed out in Pruitt v. Cheney, 963 F.2d 1160, 1165 (9th Cir. 1991), the reasoning of Beller and Hatheway cannot survive the subsequent Supreme Court decisions in Palmore v. Sidoti, 466 U.S. 429 (1984) and Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).[1]

Beller upheld an earlier military policy, in the face of a due process challenge, on the basis that heterosexual service members allegedly "despise/detest" lesbians and gay men. Beller, 632 F.2d at 811. In Palmore and Cleburne the Supreme Court made clear that one group's dislike for another group is not a legitimate reason for governmental discrimination against the latter, no matter what the nature of the group affected. Palmore, 466 U.S. at 433; Cleburne, 473 U.S. at 448.[2] Thus, in Pruitt this Court ruled that after Palmore and Cleburne, "unexamined effect" cannot be given to Beller and Hatheway so as to preclude an equal protection challenge to military policies that discriminate against lesbians and gay men. Pruitt, 963 F.2d at 1165. The government's request that Beller and Hatheway be given that effect here must therefore be rejected.

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[1]While conceding that Hatheway was "[g]uided by" Beller, Gov't Br. at 15. the government suggests that because it involved conduct it is not affected by Palmore and Cleburne. Gov't Br. at 16. But in Pruitt this Court held that both Beller and Hatheway are now undermined. Pruitt 963 F.2d at 1165 n.4.

[2]Indeed, this Court has already explicitly rejected the government's argument, Gov't Br. at 30, that Palmore is limited to racial classifications. Pruitt 963 F.2d at 1165.

B. The Act's Adverse Treatment Of Openly Lesbian And Gay Service Members Lacks A Legitimate Rationale

The government responds to Philips' equal protection claim by arguing that the Act doesn't discriminate against lesbians and gay men because heterosexuals who have sex with members of the same gender are treated just as harshly as lesbians and gay men who engage in such acts. First. this is factually untrue. The statute provides that if a service member can establish that her customary sexual acts are heterosexual and she is not likely to engage in "homosexual acts" in the future she will not be discharged. 10 U.S.C. § 654(b)(l). See also Op. Br. at 9-10. Thus. a heterosexual who engages in a sexual act with a member of the same gender is retained while a lesbian or gay member who engages in a sexual act with a member of the same gender is discharged.

Moreover. the government's own explanation of the Act is based on the notion that lesbians and gay men are more likely to engage in intimate contact with members of the same gender than heterosexuals are. Of course, this is true generally.[3] Given that fact. a rule that punishes any sex act between members of the same gender more harshly than it punishes the same act between men and women (if it punishes it at all) discriminates against lesbians and gay men.[4]

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[3]It does not follow that lesbians and gay men are more likely than heterosexuals to violate any particular prohibition on sexual conduct. such as a rule against sodomy. The government does not contend otherwise, and indeed it would be irrational to do so.

[4]It is significant to note that what sparked the prejudice in Palmore v. Sidoti, 466 U.S. 429 (1981). was the interracial relationship between the child's mother and stepfather. That Palmore was about something that a white person and a black person were doing together did not make it any less a case about race; similarly, if the discomfort here is induced not simply by the fact that a person is gay or lesbian but by their actual or perceived same-sex sexual behavior. that does not make the prejudice any less directed at lesbians and gay men on the

Even accepting the government's own description of the Act's classification -- as between persons who participate in sexual acts with individuals of the opposite gender and persons who participate in the same sexual acts with individuals of the same gender -- the classification must still rationally relate to a legitimate purpose. This one does not. because the only explanation for how the two classes are "not equatable." Gov't Br. at 18, is the feared negative reactions of members of the former class to the idea of serving alongside members of the latter.

In arguing that it can somehow satisfy rational basis review, the government recognizes that in all equal protection cases courts must examine the legitimacy of purported justifications for the unequal treatment, but ignores the effect on the court's overall rational basis analysis of a finding that a justification is impermissible. When the record reveals an illegitimate purpose, or when the government proffers one. the court must not only reject that justification but must review the remaining goals with skepticism. Both the legitimacy of the remaining goals as well as their connection to the challenged classification are considered with greater care. See Cleburne v. Clebume Living Center, 473 U.S 432, 448-49 (1985); see also Op. Br. at 20.

There is little dispute about the justifications for the Act. The government says it is concerned about unit cohesion because it believes that heterosexuals would be so discomforted by the presence of open lesbians and gay men that the heterosexuals would disrupt the units. Gov't Br. at 22-23; Op. Br. at 25. Likewise. the government points to "privacy" because it

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basis of their sexual orientation.

thinks that the sensibilities of heterosexuals will be so disturbed by the presence of open lesbians and gay men that they'll cause disruption. Gov't Br. at 24-25; Op. Br. at 25.[5]

As to "sexual tension," it is clear from the Senate Armed Services Committee report that what Congress meant when it referred to "sexual tension" was, again, tension between heterosexuals and lesbian and gay service members. Gov't Br. at 25: S. Rep. No. 103-112 at 202-204. The government's position that sexual tension will be created by requiring heterosexuals to share barracks and showers with people who engage in "homosexual acts" is another way of saying that people who engage in "homosexual acts" make heterosexuals nervous and that they will therefore be disruptive. Thus, the "sexual tension" argument is founded on the same illegitimate basis as the other proffered justifications.[6]

The government contends that since military officials believe disruption is possible there is a rational basis for discrimination, no matter what the cause of the disruption. But

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[5]Philips certainly does not, as the government asserts, Gov't Br. at 26, seek separate barracks for lesbian and gay service members. Rather, the fact that the Act does not physically alter the living conditions in the military shows that the concern is not about increasing actual privacy, but about catering to the sensibilities of heterosexuals who are assumed to prefer not to know which of their colleagues are lesbian or gay. See Op. Br. at 26.

In addition. while the government does not claim that the Act is justified by a concern about recruitment and retention, it argues that Congress could rationally have relied on such a concern. Gov't Br. at 25 n.16. But as with the other claimed concerns, this is just another way of saying that non-heterosexuals should be discharged because heterosexuals will not like serving alongside them.

[6]The Act would also be irrational if it was aimed at reducing tensions from sexual relationships among service members. While it requires the discharge of all openly lesbian or gay service members, heterosexuals are not just allowed to be open about their sexual orientation. they are actually permitted to have sexual relationships with other service members, even members of their unit. See Op. Br. at 24.

the cause of the disruption is critical; under both Equal Protection and the First Amendment the government may not act against one group of citizens because their existence or perceived message discomforts another group. Cleburne v. Cleburne Living Center, 473 U.S. 432, 448 (1985): Texas v. Johnson. 491 U.S. 397, 414 (1989). It matters not that a person's discomfort may be great enough to translate into some kind of action. Indeed, that typically is the government's asserted reason for acting. See Op. Br. at 27 (describing government's claims of concern about violence and harm in Cleburne and Palmore). And even if in the context of the military the disruptive behavior of one group could in some special circumstance be used as an excuse for discriminating against another, the government must at a minimum have much more than the unsubstantiated views of a few officials that disruption is a likely result, especially when those opinions are contradicted by the independent studies commissioned by the government itself, in order to justify sidestepping core constitutional principles. See 1993 Report of the RAND Corporation (Doc. No. 68, Ex. 12); 1992 Report of the General Accounting Office (Doc. No. 68, Ex. 11); 1988 Report of the Defense Personnel Security Research and Education Center (Doc. No. 68, Ex. 9).

Of course, even if any of the justifications proffered by the government were legitimate, the provisions of the Act would still be required to further these goals. Yet the Act's classification disadvantaging open lesbians and gay men does not jibe with the military's purported concerns. The government offers no explanation of how or why there will be greater unit cohesion, increased privacy and less sexual tension now that heterosexual service members know that some of their colleagues are lesbians and gay men but don't know which ones. Because there is no relationship between the classification created by the Act

and the proffered justifications, and because, in any event, those justifications are all rooted in the dislike or discomfort of one group towards another, the Act fails rational basis review.

II. THE ACT VIOLATES THE FIRST AMENDMENT

Philips made two statements at issue in this case: first. that he is gay. and second. in response to questioning following that disclosure. that he had engaged in private. off-base sexual relations with men unconnected with the military. See Op. Br. at 16. The Navy discharged him based on both of these statements. Id. The Act's requirement of discharge for these statements violates the First Amendment because it is based on the statements' communication of a gay sexual orientation. See Op. Br. at 28-29. The government argues that the Act is constitutional because under it. Philips' statements are, according to the government, used as an admission that he engaged in "homosexual acts" or as evidence of a likelihood that he will engage in them. See Gov't Br. at 3l-32. But, as the congressional record makes clear, the single purpose of the Act is not to exclude lesbians and gay men or regulate their sexual behavior, but rather to prevent them from communicating their sexual orientation to others. See Op. Br. at 4-8. Thus, cases involving speech used to prove some independent offense are irrelevant, as are cases involving prior military policies.

The government also contends that the restrictions on speech are neither content- nor viewpoint-based. Gov't Br. at 33 n.23. But the justifications relied on by the government -- "unit cohesion, privacy and sexual tension." id. -- are all concerns about heterosexual reactions to speech that communicates a lesbian or gay orientation. See Op. Br. at 28-29. According to the government, the Act does not distinguish on the basis of viewpoint because a statement

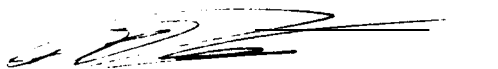
of sexual orientation is not a viewpoint. Gov't Br. at 33 n.23. But because heterosexuals identifying themselves as such, or even stating in jest or mimicry "I am gay," are not punished under the Act it is clear that the "perspective of the speaker," Rosenberger v. University of Virginia. 63 U.S.L.W. 4702, 4705 (June 29, 1995), improperly lies at the heart of the restrictions on speech.

With neither of its protests against Philips' freedom of expression claim having any merit, the government is left with the burden of showing a substantial, legitimate purpose for which the Act's limitations on expression are necessary. It has made no such showing and therefore the First Amendment, like the equal protection clause, dictates judgment in Philips' favor.

CONCLUSION

For all of the foregoing reasons, as well as those stated in Petty Officer Philips' opening brief, this Court should reverse the District Court's decision, order P.O. Philips reinstated into the Navy and declare the Act and its implementing directives unconstitutional.

Respectfully submitted,



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Dated: November 9, 1995

AFFIRMATION OF SERVICE

The undersigned attorney hereby affirms under the penalties of perjury that two copies of the accompanying Reply Brief of Appellants were served by U.S. mail, postage prepaid, this 9th day of November, 1995, on Counsel for Defendants-Appellees:

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