No. 98-91

In the Supreme Court of the United States

OCTOBER TERM, 1997

TRACY THORNE, PETITIONER

v.

DEPARTMENT OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Act of Congress governing homosexual conduct in the military, 10 U.S.C. 654, requires separation of a member who, like petitioner, states that he is a homosexual and fails to rebut the presumption arising from that statement that he has engaged in, or has a propensity to engage in, homosexual acts. The question presented is:

Whether 10 U.S.C. 654 and petitioner's discharge under it are consistent with the First Amendment and equal protection.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 139 F.3d 893 (Table). The opinions of the district court (Pet. App. 16a-43a, 3a-15a) are reported at 916 F. Supp. 1358 and 945 F. Supp. 924.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1998. The petition for a writ of certiorari was filed on July 8, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In enacting 10 U.S.C. 654 (Pet. App. 48a-52a), which governs homosexual conduct in the military, Congress found 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). Congress also determined (10 U.S.C. 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.

Accordingly, the Act provides for separation from service if a member has: (1) "engaged in, attempted to engage in, or solicited another to engage in a homosexual act"; (2) "stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, 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 to engage in homosexual acts"; or (3) "married or attempted to marry a person known to be of the same biological sex." 10 U.S.C. 654(b)(1)-(3).[1]

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[1] The Act defines "homosexual act" as "(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and (B) any bodily contact which 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).

2. Pursuant to statutory provisions for the issuance of implementing regulations and procedures, the Department of Defense promulgated several directives to govern separations under the Act. DoD Directive 1332.30, applicable to officers, governs this case, and a substantially similar directive, DoD Directive 1332.14, applies to enlisted personnel.[2] To implement the "statements" provision of the Act (10 U.S.C. 654(b)(2)), DoD Directive 1332.30 provides that a statement by an officer that he "is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the officer engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." DoD Dir. 1332.30, Encl. 2, Reasons for Separation ¶ C.1.b. Cf. Pet. App. 61a. The officer is "given the opportunity to rebut the presumption by presenting evidence" to an administrative board "demonstrating that he * * * does not engage in, attempt to engage in, have a propensity to engage in or intend to engage in homosexual acts." *Ibid.*

A "[p]ropensity 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." DoD Dir. 1332.30, Encl. 1, Definitions ¶ 13; Pet. App. 58a (emphasis added). By contrast, 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" (DoD Dir. 1332.30, Encl. 1, Definitions ¶ 16; cf. Pet. App. 58a)—"is considered a personal and private matter, and is not a

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[2] The text of Directive 1332.30 set forth at Pet. App. 53a-83a differs in some immaterial respects from the Directive pursuant to which petitioner was discharged. Admin. R. 366-388.

bar to continued service * * * unless manifested by homosexual conduct." DoD Dir. 1332.30, Encl. 2, Reasons for Separation ¶ C; cf. Pet. App. 60a.[3] An officer'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." *Ibid.* The Directive also sets forth the types of evidence an officer may offer to rebut the presumption. DoD Dir. 1332.30, Encl. 2, Reasons for Separation ¶ C.1.b; Pet. App. 61a-62a.

3. Petitioner, then a Navy lieutenant, stated that he is a homosexual in a letter to his commanding officer and on a national television program. Pet. App. 18a. The Navy first instituted a discharge proceeding against petitioner based upon those statements under its former regulatory policy regarding military service by homosexuals. *Id.* at 18a-19a. After the enactment of 10 U.S.C. 654, petitioner was reprocessed under the current policy. Pet. App. 21a.

Following the hearing, a Naval board of inquiry recommended that petitioner be honorably discharged. Pet. App. 22a. The board found that petitioner had stated that he is a homosexual and that he had failed, "in fact made no effort, to rebut" the presumption arising from those statements that he "engages in homosexual acts or has a propensity or intent to do so." *Id.* at 44a. The board's recommendation was accepted

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[3] "Homosexual conduct" is defined by the directive as "[a] homosexual act, a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage." DoD Dir. 1332.30, Definitions ¶ 9; Pet. App. 57a.

by the Secretary of the Navy, and petitioner was honorably discharged. *Id.* at 22a, 45a-46a.

4. Petitioner then brought this suit claiming that his discharge was unconstitutional. The district court initially directed further development of the record "to enable the Court to determine the extent to which the presumption [in the policy] is rebuttable in practice without a recantation" by the service member of his original statement that he is a homosexual. Pet. App. 32a. Shortly thereafter, the Fourth Circuit sustained the statutory policy in *Thomasson* v. *Perry*, 80 F.3d 915 (en banc), cert. denied, 117 S. Ct. 358 (1996). The district court then granted summary judgment against petitioner. Pet. App. 3a-15a. The court noted that *Thomasson* held that the statutory presumption was indeed rebuttable in practice. *Id.* at 7a. The court also reviewed the administrative records of eight service members who had stated that they were homosexuals but had been retained in military service after they successfully rebutted the presumption that they engaged in prohibited homosexual acts or had a propensity to do so. *Id.* at 9a-14a. The court held that petitioner's facial First Amendment challenge could not succeed because "at least one [of the eight] service member[s] rebutted the presumption without disavowing his statement of homosexuality." *Id.* at 14a. The court also held that petitioner's as-applied challenge failed "because [petitioner] made no attempt to rebut the presumption in the administrative proceeding." *Id.* at 15a. On petitioner's appeal, the Fourth Circuit affirmed in an unpublished per curiam opinion, citing its decision in *Thomasson*. *Id.* at 1a-2a.

ARGUMENT

The decision below is correct and in accord with the decisions of all four courts of appeals that have considered the validity of the Act of Congress governing homosexual conduct in the military. See *Thomasson* v. *Perry*, 80 F.3d 915 (4th Cir.) (en banc), cert. denied, 117 S. Ct. 358 (1996); *Selland* v. *Perry*, 905 F. Supp. 260 (D. Md. 1995), aff'd, 100 F.3d 950 (4th Cir. 1996) (Table), cert. denied, 117 S. Ct. 1691 (1997); *Able* v. *United States*, 88 F.3d 1280 (2d Cir. 1996)(sustaining statute against First Amendment challenge, provided statute's prohibition of homosexual acts is upheld on remand);[4] *Richenberg* v. *Perry*, 97 F.3d 256 (8th Cir. 1996), cert. denied, 118 S. Ct. 45 (1997); *Philips* v. *Perry*, 106 F.3d 1420 (9th Cir. 1997) (sustaining statute's prohibition of homosexual acts); *Holmes* v. *California Army Nat. Guard*, 124 F.3d 1126 (9th Cir. 1997), petition for cert. pending (provisionally filed July 2, 1998). This Court recently denied certiorari in three of those cases, all of which presented First Amendment and equal protection issues similar to those presented in this case. There has been no change in circumstances that would warrant a different result here. Accordingly, the petition for a writ of certiorari should be denied.

1. The court of appeals correctly held that the Act of Congress governing homosexual conduct in the military is consistent with the First Amendment. The Act treats a service member's statement that he is a homosexual as a basis from which to presume, in the absence of

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[4] On remand from the *Able* decision, the district court held that the statute's prohibition of homosexual acts violates the First Amendment and equal protection. The government's appeal from that decision is now pending. *Able* v. *United States*, No. 97-6205 (2d Cir. argued Apr. 2, 1998).

rebuttal by him, that he is a "homosexual" as defined by the Act, *i.e.*, one "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(f)(1). The First Amendment does not prohibit such evidentiary use of a service member's statement. *Thomasson* v. *Perry*, 80 F.3d at 931-934; *Able* v. *United States*, 88 F.3d at 1292-1300; *Philips* v. *Perry*, 106 F.3d at 1429-1430; *Holmes* v. *California Army Nat. Guard*, 124 F.3d at 1136. See *Wayte* v. *United States*, 470 U.S. 598 (1985). Petitioner was afforded the opportunity to rebut the presumption in his administrative hearing, but he made no effort to do so. Pet. App. 15a, 44a. In addition, expressive conduct may be restricted in the military context if it is "likely to interfere with * * * vital prerequisites for military effectiveness." *Brown* v. *Glines*, 444 U.S. 348, 354 (1980). The express legislative findings supporting the Act of Congress at issue (see 10 U.S.C. 654(a)) show that that test is met here.[5]

2. The court below also correctly rejected petitioner's argument (Pet. 19-28) that 10 U.S.C. 654 and its implementing directive violate equal protection. The

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[5] Petitioner errs in arguing that the policy "crushe[s] the ability of gays and lesbians to urge the public to support an end to the ban." Pet. 11. The statute applies only to statements by a service member "that he or she is a homosexual or bisexual, or words to that effect" (10 U.S.C. 654(b)(2)), not to statements opposing the policy. See DoD Directive 1332.30, Encl. 8, Guidelines for Fact-Finding Inquiries into Homosexual Conduct ¶ C.3.d (Pet. App. 80a-81a) ("marching in a gay rights rally in civilian clothes" is not credible evidence of a basis for discharge). No action was taken against petitioner for any statement he may have made of his viewpoint opposing the policy. Petitioner therefore errs in attempting to distinguish *Thomasson* and the other precedents upholding this statute on the ground that they "did not involve an officer speaking out as part of a political debate." Pet. 21-22 n.6.

court of appeals relied upon its decision in *Thomasson*, which held that the statutory policy classifies on the basis of homosexual acts and the propensity to engage in such acts, not on the basis of sexual orientation or status. 80 F.3d at 928. *Thomasson* also held that this acts-based classification in a military context is not suspect and does not burden any fundamental right, so that it is therefore reviewable under the rational-basis test. *Ibid.* That holding is correct and in accord with the decisions of the other courts of appeals that have addressed this issue. *Richenberg* v. *Perry*, 97 F.3d at 260; *Philips* v. *Perry*, 106 F.3d at 1425; *Holmes* v. *California Army Nat. Guard*, 124 F.3d at 1132.

Thomasson then held that, given the special circumstances of military service, the armed forces can validly exclude those who engage in homosexual acts. 80 F.3d at 928-929.[6] Further, *Thomasson* properly sustained the judgment of the Legislative and Executive Branches, as well as military leaders, that service members with a propensity or intent to engage in homosexual acts should also be excluded as a means of fostering the legitimate aims of maintaining unit cohe-

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[6] Petitioner argues that the policy is invalid because it "proscribes conduct by homosexual servicemembers that is not similarly proscribed for heterosexual servicemembers such as hand-holding and kissing." Pet. 25. He did not, however, raise that argument in the court below, so it is not properly before this Court. See *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 39 (1989). In any event, petitioner was not discharged for hand-holding or kissing another man, and he did not attempt to show that, when he stated that he is a homosexual, he meant that he has engaged, and is likely to engage, in only homosexual acts of that kind. Petitioner thus lacks standing to argue that others might be discharged for noncriminal homosexual acts. See *Parker* v. *Levy*, 417 U.S. 733, 757-761 (1974) (declining to apply overbreadth doctrine in the military context).

sion, protecting privacy interests, and minimizing sexual tensions. *Id.* at 929-931. Given those rational and legitimate aims, *Thomasson* correctly rejected (*id.* at 927-931) the same argument that petitioner makes here—namely, that the statute is impermissibly "based on invidious or irrational prejudice." Pet. 23. The Eighth and Ninth Circuits have also rejected that argument. *Richenberg* v. *Perry*, 97 F.3d at 261; *Philips* v. *Perry*, 106 F.3d at 1429. See *Holmes* v. *California Army Nat. Guard*, 124 F.3d at 1133-1136.

Petitioner's reliance (Pet. 24) on *Romer* v. *Evans*, 517 U.S. 620 (1996), is misplaced because there are at least four important distinctions between Amendment 2 to the Colorado Constitution at issue in *Romer* and the statute challenged here. First, 10 U.S.C. 654, which concerns military service by persons who engage in homosexual conduct, is much narrower in scope than Colorado's Amendment 2, which this Court described as a "sweeping" and "unprecedented" measure that withdrew from homosexuals the "protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society," so much so as to "deem a class of persons a stranger to its laws." 517 U.S. at 627, 631, 633, 635. Second, *Romer* arose in the civilian context and does not affect precedents, such as *Parker* v. *Levy*, 417 U.S. 733, 756 (1974), holding that "Congress is permitted to legislate both with greater breadth and with greater flexibility" in the military context. See *Rostker* v. *Goldberg*, 453 U.S. 57 (1981) (sustaining men-only draft law). Third, Colorado's Amendment 2 classified on the basis of homosexual status (517 U.S. at 635), while the statute at issue here classifies on the basis of past or likely future prohibited homosexual acts. Fourth and most important, the statute chal-

lenged here serves the legitimate objectives of prohibiting homosexual acts in the military, promoting unit cohesion, protecting privacy interests, and reducing sexual tensions, while this Court found that Amendment 2 had no legitimate objective. 517 U.S. at 635.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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