No 06-2313

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

THOMAS COOK, *et al.*,
Plaintiffs-Appellants,

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, *et al.*,
Defendants-Appellees.

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

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of Defendants-Appellees
Supporting Affirmance

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INTEREST OF THE *AMICUS CURIAE*

The National Legal Foundation (NLF) is 501(c)(3) public interest law firm. Our donors and supporters have a vital interest in issues pertaining to America's moral heritage. The protection of traditional values of the family and of our nation is of great importance. Further, we support efforts taken by Congress to defend our nation and decisions to support the military.

This brief is filed pursuant to consent of Counsel of Record for all parties.

I. IN ADDITION TO BEING CONSTITUTIONAL FOR THE REASONS RELIED UPON BY THE COURT BELOW, THE "DON'T ASK DON'T TELL" POLICY IS ALSO CONSTITUTIONAL BECAUSE NONE OF THE REASONS RELIED UPON TO FIND THE POLICY UNCONSTITUTIONAL IN PRIOR CASES IS VALID.

This Court should affirm the district court's judgment upholding the constitutionality of the "Don't Ask, Don't Tell" policy, 10 U.S.C. § 654 (2000) and its implementing regulations, (hereinafter "DADT policy" or "the policy").

The court below rejected the Plaintiffs' Due Process, Equal Protection, and First Amendment arguments. *Cook v. Rumsfeld*, 429 F. Supp. 2d 385, 407, 409 (D. Mass. 2006). However, in earlier cases, some district courts (all reversed on appeal) found the policy unconstitutional and some dissenting judges would have found the policy unconstitutional on bases other than those rejected by the court below. In addition, the court below rejected certain of the Plaintiffs' arguments on bases that are arguably the same as or arguably different from the bases of these

other courts and judges; however, to the extent these latter bases are the same, the analysis of the court below is more superficial than that of the other courts. This Brief will show why none of the bases accepted by other courts and judges and none of the "superficial" bases can support a conclusion of unconstitutionality.

A. The DADT Policy is Constitutional Because it Does Not Discriminate On the Basis of Homosexual Status.

Some courts and judges have concluded that the DADT policy is unconstitutional because they believed it discriminates on the basis of homosexual status. *See, e.g., Philips v. Perry*, 106 F.3d 1420, 1439 (9th Cir. 1997) (Fletcher, J., dissenting) (status discrimination violates the Equal Protection Component of the Due Process Clause); *Thomasson v. Perry*, 80 F.3d 915, 953 (4th Cir. 1996) (Hall, J., dissenting) (discrimination based on status violates Due Process and renders the majorities First Amendment holding irrelevant); *Able v. United States*, 880 F. Supp. 968, 973, 980 (E.D.N.Y. 1995), *rev'd by* 155 F.3d 628 (2d Cir. 1996) (status discrimination violates First Amendment and Equal Protection Component of the Due Process Clause); *Holmes v. Cal. Army National Guard*, 920 F. Supp 1510, 1527 (N.D. Cal. 1996) *rev'd by* 124 F.3d 1126 (9th Cir. 1997) (status discrimination violates Equal Protection Component of the Due Process Clause). However, as will be shown, the policy is conduct-based rather than status-based.

Should a homosexual service member act in a manner which could lead to separation under 10 U.S.C. § 654(b), that homosexual is not automatically

separated. For example, 10 U.S.C. § 654(b)(1)(A)-(E) contains a rebuttable presumption that allows further findings in order to demonstrate that the conduct is not likely to recur; a homosexual can remain in the military under the provisions if evidence demonstrates that the homosexual act was a limited occurrence. The claim that the DADT policy discriminates on one's homosexual status is thus erroneous on its face. Because homosexuals are allowed to remain in the military if they are not likely to engage in further homosexual activity, the DADT policy bans homosexual conduct rather than status.

Overwhelmingly, other courts have determined that the policy regulates conduct, not status. For example, the Fourth Circuit has stated that "the legislature was certainly entitled to presume that a service member who declares that he is gay has a propensity to engage in homosexual acts." *Thomasson v. Perry*, 80 F.3d 915, 930 (4th Cir. 1996).

Additionally, the Eighth Circuit has made the distinction between status and conduct based on dissimilarity between racial and sexual discrimination. *Richenberg v. Perry*, 97 F.3d 256, 261 n.7 (8th Cir. 1996). That court quoted then-General Colin Powell's congressional testimony: "Skin color is a benign, non-behavioral characteristic," sexual orientation, on the other hand, manifests itself in acts and conduct. *Id.*

Because the DADT policy only regulates homosexual conduct, the policy survives the rational basis test on that distinction. As the D.C. Circuit noted, the military already separates on the basis of sex, but has limited ways of controlling the sexual attractions between those of the same sex. "The military's concerns, then, do not stem from an irrational bias . . . rather, heterosexuals and homosexuals are treated differently because the means at the military's disposal for dealing with the natural phenomenon of sexual attraction differ for the two." *Steffan*, 41 F.3d at 692. While the *Steffan* decision was made under Naval Academy regulations and prior Department of Defense Directives, this underlying principle is still applicable because sexual conduct between homosexuals cannot be limited by a segregation of homosexuals from heterosexuals and the government has a rational basis for limiting homosexual conduct within the military setting. According to the Second Circuit's holding in *Able,* a confessed homosexual is likely to engage in homosexual activity; therefore, "it is plain . . . that there is a correlation" between the admission and further homosexual conduct. 88 F.3d at 1296-97. Thus, the DADT policy does not discriminate on the basis of status and this Court should reject the analysis of those courts and judges that have concluded the opposite.

Nonetheless, some courts have taken the position that the DADT policy *must* constitute unconstitutional discrimination based on status because the supposedly rebuttable presumption is actually irrebuttable. This was the view of the district

courts in *Holmes,* 920 F. Supp. at 1528; and *Able v. United States*, 880 F. Supp. 968 (E.D.N.Y. 1995). For example, the Holmes court concluded that the rebutable presumption was actually irrebuttable because "the policy does not provide a concrete method" to rebut the presumption. 920 F. Supp. at 1528. Both courts considered testimony from the congressional record that they said supported their decision. Both district courts also discounted the government's evidence of seven cases where service members successfully rebutted the presumption, with the court in *Able* referring to those cases as aberrations. *Able*, 880 F. Supp at 976; *Holmes*, 920 F. Supp. 1528-29.

However, both of those cases were reversed on appeal because the appellate courts found unpersuasive the district courts' complete disregard of the cases presented by the government. *Holmes*, 124 F.3d at 1135; *Able*, 88 F.3d at 1298; Able 155 F.3d at 636. The Ninth Circuit in *Holmes* concluded that while some of those cases involved unusual circumstances, there were other cases that clearly showed that the presumption is truly rebuttable. 124 F.3d at 1136. One of those cases involved an officer who had admitted her homosexuality, but stated that she understood the rule against homosexual conduct and promised to obey it. *Id.* It could not be any more straight forward: Since the presumption has been successfully rebutted, the position of the *Holmes* and *Able* district courts is simply not tenable and each court was properly reversed.

B. The DADT Policy is Not Based Upon Anti-Homosexual Prejudice Because It is Based Upon Important Considerations of Military Life, Not Irrational Fears.

Some courts and judges have concluded that the DADT policy is unconstitutional because they believed it caters to private prejudice against homosexuals. *See*, *e.g.*, *Philips v. Perry*, 106 F.3d 1420, 1436 (9th Cir. 1997) (Fletcher, J., dissenting); *Thomasson v. Perry*, 80 F.3d 915, 951 (4th Cir. 1996) (Hall, J., dissenting); *Able v. United States,* 968 F. Supp. 850 (E.D.N.Y. 1997), and *Holmes v. Cal. Army National Guard*, 920 F. Supp 1510, 1532 (N.D. Cal. 1996). Each of these courts and judges made very similar points in support of this conclusion and the *Able* district court is illustrative. That court noted that the "Constitution does not grant the military special license to act on prejudices or cater to them." 968 F. Supp. at 859. The *Able* court relied primarily *Romer v. Evans*, 517 U.S. 620 (1996), *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); and *Palmore v. Sidoti*, 466 U.S. 429 (1984) in support of its assertion that the DADT policy caters to private biases. However, as will be shown, the instant case is distinguishable from those cases.

First, in *Romer*, *Cleburne*, and *Palmore*, the discrimination did not arise in the military setting, and therefore the courts did not apply the same level of scrutiny that should be applied in the case at hand. Second, those cases involve

status discrimination, and are inapposite to the DADT policy's conduct regulation found in this case.

In those cases, it is true that the Supreme Court's rationale rested on the invalidity of private prejudices as the basis for government action. For example, in *Romer*, the Court held that a Colorado constitutional amendment prohibiting laws which would grant special legal protection to homosexuals violated the Equal Protection Clause, reasoning that "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus" 517 U.S. at 632. Similarly, in *Cleburne*, 473 U.S. at 450, the Supreme Court struck down a zoning regulation prohibiting a group home because the justifications offered demonstrated an "irrational prejudice" against mentally retarded people. And in *Palmore*, 466 U.S. at 433, a White mother was granted continued custody of her child after the father brought suit claiming that the mother's new relationship with a Black man would be against the best interest of the child. The Court held that racial prejudice, though real, could not be grounds for denying custody. *Id.*

However, the government actions in those cases are not analogous to the DADT policy. Indeed, the *Able* district court's use of those cases was rejected by the Second Circuit when it reversed the district court's decision. *Able v. United States*, 155 F.3d 628, 634 (2d Cir. 1998):

> The analysis set forth in *Romer*, *Cleburne Living Ctr.*, and *Palmore* differed from traditional rational basis review because it forced the government to justify its discrimination. Moreover, the Court did not simply defer to the government; it scrutinized the justifications offered by the government to determine whether they were rational.
>
> Furthermore,
>
> [i]n this case, plaintiffs' reliance on *Romer*, *Cleburne Living Ctr.* and *Palmore* is misplaced. Those cases did not arise in the military setting. In the civilian context, the Court was willing to examine the benign reasons advanced by the government to consider whether they masked an impermissible underlying purpose. In the military setting, however, constitutionally-mandated deference to military assessments and judgments gives the judiciary far less scope to scrutinize the reasons, legitimate on their face, that the military has advanced to justify its actions.
>
> Moreover, in this case the military's justifications are based on factors which are unique to military life. The military argues that the prohibition on homosexual conduct is necessary for military effectiveness because it maintains unit cohesion, reduces sexual tension and promotes personal privacy. These concerns distinguish the military from civilian life and go directly to the military's need to foster "instinctive obedience, unity, commitment, and esprit de corps."

Id. (citation omitted).

A second distinction between the case at hand and *Romer*, *Cleburne*, and *Palmore*, is that those cases concern discrimination based on status, while the case at hand regulates homosexual conduct—as per the discussion in Part I.A., above. For example, in *Romer,* the court prevented discrimination based upon the legal protection of homosexuals *qua* homosexuals, regardless of their behavior. *Palmore* protected the class of African Americans by preventing racial

discrimination in child custody determinations. Thus, that case protected the status of race rather than the behavior of a group. The mentally handicapped were also protected based upon their status in *Cleburne*.

In addition to—and in light of—the discussion in Part I.A. above, it is also helpful to note here the reasoning of the Ninth Circuit in *Philips,* 106 F.3d at 1428. There that court was responding to Philip's argument that *Cleburne* and *Palmore* overturned *Beller v. Middendorf,* 632 F.2d 788 (9th Cir. 1980); and *Hatheway v. Secretary of the Army*, 641 F.2d 1376 (9th Cir. 1981), two homosexual separation cases. The Ninth Circuit reasoned that

> *Cleburne* and *Palmore* involved status restrictions, not conduct restrictions. Each was therefore a case where the government distinction had no purpose other than raw prejudice. While the same might well be said of the Navy's restriction in *Beller* if tension between known homosexuals and other members who "despise/detest homosexuality" had been the Navy's only justification, it wasn't, and our opinion did not rest on this ground alone but rather, as we said: "There are multiple grounds for the Navy to deem this regulation appropriate for the full and efficient accomplishment of its mission."

Philips, 106 F.3d at 1428 (citations and footnote omitted).

For all these reasons, those courts and judges that have invoked *Romer*, *Cleburne*, and *Palmore*, to support their assertions that DADT is an unconstitutional governmental rubberstamp of private prejudices are simply wrong.

C. The DADT Policy is Constitutional Because it Supports the Military Goals of Promoting Unit Cohesion, Reducing Sexual Tension, and Protecting Privacy.

Some courts and judges have concluded that the DADT policy is not rationally related to the governmental interests in "morale, good order and discipline, and unit cohesion," 10 USC § 654 (a) (15) (2000).[1] As will be discussed below, the government typically argues these interests under the rubrics of maintaining unit cohesion (or avoiding unit polarization), diminishing sexual tension, and protecting the privacy rights of heterosexual service members.[2]

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[1] Actually, only the majority of these courts and dissenting judges used the rational basis test. A few did not, however. *Thorne v. United States Dept. of Defense*, 916 F. Supp. 1358, 1370 (E.D. Va. 1996) used "a moderated version of strict scrutiny," asking whether the policy substantially furthers an important state interest. In another instance, the court in *Able*, 968 F. Supp. at 864, seemed to analyze the claim according the rational basis test, but the court noted that "[h]omosexuals meet the criteria of a group warranting heightened protection under the equal protection clause" after the analysis, hinting that another level of review would be appropriate.

The court below used the rational basis test for both its equal protection and due process analysis. Because Amicus agrees with the court below and with the vast majority of all courts that this is the correct level of scrutiny for both types of claims, *Amicus* is not addressing this issue in its Brief. Furthermore, when *Amicus* uses the *Thorne* and *Able* cases hereafter, it will not discuss the level of scrutiny since the points of disagreement Amicus emphasizes will be points of disagreement other than the level of scrutiny.

[2] In *Philips*, 106 F.3d at 1436, Judge Fletcher, in dissent, noted that "[t]he military's 'retention and recruitment,' 'morale,' and 'discipline' justifications are similarly invalid" under an analysis of *Cleburne*, *Palmore*, and *Romer*. This was the extent of the comment. *Amicus* will not address it further here. However, just as Judge Fletcher believed these "justifications" were unconstitutional for the similar reasons given for the other interests, so *Amicus* believes that they are constitutional for similar reasons to those that will be discussed below.

1. *The DADT policy is rationally related to unit cohesion because the presence of open homosexuals leads to unit polarization.*

Some courts and judges have concluded that the government's interest in unit cohesion does not save the policy from constitutional defects. *See, e.g.*, *Able,* 968 F. Supp. at 858; *Philips*, 106 F.2d at 1436 (Flecther, J., dissenting); *Thomasson*, 80 F. 3d at 951(Hall, J., dissenting); *Holmes*, 920 F. Supp. at 1531-32; *Able,* 880 F. Supp. at 978-79. On the other hand, the unit cohesion rationale has been upheld as "the cornerstone of an effective military." *Richenberg*, 97 F.3d at 262. Of the three interests, the unit cohesion interest was the one most directly and fully addressed by the court below. *Cook*, 429 F. Supp. 2d at 399-400. Furthermore, the arguments discussed above in Part I.B. about private prejudice are often leveled against the unit cohesion interest. Thus, *Amicus* will not fully rebut this argument here.[3] However, it is worth noting in passing the congressional testimony of General H. Norman Schwarzkopf on this issue:

> [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.

[3] The same use of the private prejudice argument is made to varying degrees about the other two governmental interests as well.

Cook, 429 F. Supp. 2d at 403, n.25 (quoting S. Rep. No. 103-112, at 280 (1993)).

Congress balanced testimony on both sides of the issue before deciding that it would be in the best interest of the military to enact the DADT policy. *See, e.g.*, *Thomasson*, 80 F. 3d at 919-920. Under a rational basis review, the court only has to determine that there is "'any reasonably conceivable state of facts that could provide a rational basis for the classification'" in order to uphold a law as constitutional, regardless of whether the court might agree or disagree with the legislation. *Heller v. Doe*, 509 U.S. 312, 320 (1993) (quoting *Beach Communications*, 508 U.S. at 313). Moreover, the courts are to give the highest amount of deference to Congress when deciding matters concerning the military. *Goldman*, 475 U.S. at 508 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)) ("'[Judicial] deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.'"). Under this standard, the DADT policy is clearly rationally related to the government's interest in unit cohesion.

2. *The goal of diminishing sexual tension is advanced by the DADT policy because it reduces the anxiety of heterosexual service member.*

The DADT policy is also rationally related to the government's interest in reducing sexual tension between the homosexual and heterosexual service members. The court in *Able*, 968 F. Supp. at 860-61, held and the plaintiff in

Loomis v. United States, 68 Fed. Cl. 503, 520 (2005), argued, in effect, that the policy is not rationally related to the interest in reducing sexual tension because the government offers no convincing reasons as to how the DADT reduces tension.[4] Similar conclusions were reached by *Philips*, 106 F.2d at 1436 (Fletcher, J., dissenting); *Thomasson*, 80 F. 3d at 951(Hall, J., dissenting); *Holmes*, 920 F. Supp. at 1531-32; *Able,* 880 F. Supp. at 978-79. However, other courts have concluded the opposite. Congressional findings based upon, *inter alia*, testimony such as that given by General Schwarzkopf (mentioned above) provide a rational basis for the policy. *Loomis* 68 Fed. Cl. at 522; *Richenberg*, 97 F.3d at 262. It is "legitimate . . . for Congress to conclude that sexual tensions and attractions could play havoc with a military unit's discipline and solidarity." *Thomasson*, 80 F.3d at 929.

Further, *Loomis* cited and accepted another rational connection between the policy and the interest in sexual tension which was contained the in the Senate Armed Forces Committee Report: "'[I]n civilian life people are not compelled to live with individuals who are sexually attracted to members of the same sex, and the committee finds no military necessity to compel persons to do so in the military.'" *Loomis*, 68 Fed. Cl. at 521 (citation omitted).

Another argument against the policy is that the presence of secret homosexuals in the military does not advance the goal of diminishing sexual

[4] As noted above, the private prejudice argument is also made against this interest.

tension because a secret homosexual could live in close quarters for an extended time with those to whom he is sexually attracted. *See*, *e.g.*, *Thorne v. United States Dept. of Defense*, 916 F. Supp. 1358, 1371-72 (E.D. Va. 1996). This argument fails to recognize that the policy still reduces the anxiety on behalf of the heterosexuals because they would not be exposed to the anxiety of a homosexual conduct or open discussion of one's homosexuality. Thus, because the sexual tensions are reduced for one group, the DADT policy is rationally related to the interest in reducing sexual tension. The fact that it does not completely eliminate that tension is not a constitutional infirmity.

3. *The DADT policy is rationally related to protecting the privacy of heterosexual service members because it is an accommodation to the close quarters under which they live.*

Each of the courts previously mentioned as rejecting the policy's rational relationship to the interests in unit cohesion and reducing sexual tension also rejected any such relationship with the interest in maintaining the privacy of heterosexuals.[5] *See, e.g.*, *Philips*, 106 F.2d at 1436 (Flecther, J., dissenting); *Able,* 968 F. Supp. at 858; *Thomasson*, 80 F. 3d at 951(Hall, J., dissenting); *Holmes*, 920 F. Supp. at 1531-32; *Able,* 880 F. Supp. at 978-79. The main argument is, in effect, that because homosexuals are still in the armed forces, privacy cannot be even partially protected by the policy. *See*, *e.g.*, *Able*, 880 F. Supp. at 978. This

[5] As noted above, the private prejudice argument is also made against this interest.

assertion cannot stand up to scrutiny when it is remembered that concerns about sexual tension and concerns about privacy go hand-in-hand. "Because members of the military 'must live and work under close conditions affording minimal privacy' during deployment, the military personnel policy must reflect what is required under those conditions." *Loomis*, 68 Fed. Cl. at 520-21 (quoting the Senate report). The *Loomis* court held that since it is impossible for the military to separate heterosexuals and homosexuals entirely, proscribing homosexual behavior and open discussion of one's homosexuality in the close military context reduces sexual tension *and* protects the privacy. Thus, the DADT policy is rationally related to the protection of privacy.

D. Banning Homosexuals From the Military Under the DADT Does Not Constitute Viewpoint Discrimination Because Homosexual Viewpoints Can Be Restricted In the Military and Permissibly Serve an Evidentiary Purpose.

Some courts and judges have suggested that the policy might constitute viewpoint discrimination. *See*, *e.g.*, *Holmes*, 155 F.3d at 1050 (Pregerson, J., dissenting) (concluding that the DADT policy constitutes viewpoint discrimination); *Elzie*, 897 F. Supp. at 5 (raising the question). For example, the *Holmes* dissent notes that "heterosexual military personnel may talk about their sexuality without jeopardy" although homosexual personnel are subject to dismissal if they talk about their personal sexuality in the same manner. *Id.* Because one group's statement is preferred above the other, the dissent argues that

the policy constitutes viewpoint discrimination. The *Elzie* court's assertion relied on a Supreme Court case "recogniz[ing] that the statement 'I am homosexual' expresses a viewpoint." 897 F. Supp. at 5 (referencing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338 (1995)). Since that statement, which professes a homosexual rather than heterosexual viewpoint, ultimately results in a disadvantage under the DADT, the court suggested that viewpoint discrimination exists. *Id.*

Other courts, however, have held that the DADT policy does not constitute viewpoint discrimination. The *Thomasson* court, for example, upheld the discharge of the service member in that case based upon the mere statement that the plaintiff was a homosexual. 80 F.3d at 93. Despite the plaintiff's arguments that the dismissal violated his First Amendment rights, that court held that the DADT statute does not target the speech or the professed viewpoint of homosexuality. *Id.* at 931. Rather, "it targets homosexual acts and the propensity or intent to engage in homosexual acts, and permissibly uses the speech as evidence." *Id.* The service member's viewpoint in that case is permitted as evidence to show the likelihood of acting upon that homosexual viewpoint. Since the homosexual viewpoint is not the cause of the dismissal, but rather only evidence leading to dismissal, *see also Able*, 155 F.3d at 633, *Philips*, 106 F.3d at

1430, *Richenberg*, 97 F.3d at 263, the DADT policy does not discriminate based upon a homosexual viewpoint.

In addition to the concluding that the DADT does not constitute viewpoint discrimination, courts have also recognized that First Amendment rights in the military may be more restricted than those rights in a civilian context. *See, e.g.*, *Able*, 155 F.3d at 633, *Thomasson v. Perry*, 895 F. Supp. 820, 824 (E.D. Va. 1995). Such cases have noted that the Supreme Court has recognized that the military may restrict certain freedoms granted to civilians because of the special mission of the armed forces. *Brown v. Glines*, 444 U.S. 348, 354 (1980) (citation omitted) ("To ensure that ensure that they always are capable of performing their mission promptly and reliably, the military services 'must insist upon a respect for duty and a discipline without counterpart in civilian life.'"); *Parker v. Levy*, 417 U.S. 733, 758 (1974) ("[T]he different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.").

The analysis of the court below regarding the evidentiary uses statements by homosexuals for purposes of the First Amendment arguments made by *Cook*, 429

F. Supp. at 407-409, applies in the context of viewpoint discrimination as well. No such discrimination exists under the policy.

CONCLUSION

For the foregoing reasons, and for other reasons stated in the Appellee's brief, this Court should find that the DADT policy is constitutional.

Respectfully Submitted,
this 4th day of January, 2007

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of The National Legal Foundation in the case of *Cook v. Rumsfeld*, No. 06-2313 on all required parties by depositing the required number of paper copies in the United States mail, first class postage, prepaid on January 4, 2007, addressed as listed below. The required number of paper copies were filed in the same manner on the same date.

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