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12 **UNITED STATES DISTRICT COURT**  
13 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
**EASTERN DIVISION**

14 LOG CABIN REPUBLICANS,  
15 Plaintiff,  
16 v.  
17 UNITED STATES OF AMERICA AND  
ROBERT M. GATES, Secretary of  
18 Defense,  
19 Defendants.

No. CV04-8425 VAP (Ex)  
DEFENDANTS' NOTICE OF  
MOTION AND MOTION FOR  
SUMMARY JUDGMENT  
DATE: April 26, 2010  
TIME: 2:00 p.m.  
BEFORE: Judge Phillips

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22  
23 Filed herewith:

- 24 1. Notice of Motion and Motion for Summary Judgment
- 25 2. Memorandum of Points And Authorities in support of  
Motion for Summary Judgment
- 26 3. Statement of Uncontroverted Fact and Conclusions of Law
- 27 4. Appendix
- 28 5. Proposed Order

1           **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**

2           **NOTICE IS HEREBY GIVEN** that on April 26, 2010, at 2:00 p.m. in the  
3 Courtroom of the Honorable Virginia A. Phillips, United States District Judge,  
4 Defendants United States and Secretary of Defense (hereafter “Defendants”), by  
5 and through counsel, will move for summary judgment. The motion will be based  
6 upon these moving papers, the attached Memorandum of Points and Authorities in  
7 support of the Motion, a Statement of Uncontroverted Facts and Conclusions of  
8 Law, and upon such other and further arguments, documents, and grounds as may  
9 be advanced in the future.

10           The Log Cabin Republicans (“LCR”) challenge the constitutionality of the  
11 statute (10 U.S.C. § 654) and the Department of Defense’s (“DoD’s”) implement-  
12 ing regulations prohibiting homosexual conduct in the military, commonly known  
13 as the “Don’t Ask, Don’t Tell” (“DADT”) policy. LCR filed this action in 2004.  
14 On March 21, 2006, this Court held that LCR had failed to establish that it had  
15 associational standing to challenge the DADT policy. The Court dismissed  
16 without prejudice, giving LCR an opportunity through an amended complaint to  
17 identify at least one “active member” who had been harmed by the policy. LCR  
18 designated two such purported “active members,” John Alexander Nicholson and,  
19 anonymously, John Doe. Discovery has now shown that Mr. Nicholson was not a  
20 member of LCR when this action commenced and that he has never been a bona  
21 fide or active member of LCR. LCR has failed to demonstrate, moreover, that  
22 John Doe has bona fide active membership or, as importantly, that John Doe has  
23 suffered any harm whatsoever as a consequence of DADT. LCR, therefore, has  
24 failed to carry its burden of establishing standing, and this action cannot proceed.

25           On June 9, 2009, this Court dismissed LCR’s equal protection claim, but  
26 ruled that LCR’s substantive due process and an aspect of LCR’s First  
27 Amendment claims survived a motion to dismiss. In that 2009 Order, the Court  
28

1 ruled that LCR's due process claim is a facial challenge governed by the most  
2 deferential form of review – rational basis. To survive summary judgment under  
3 such a challenge, LCR has the burden of negating each of the constitutional  
4 applications of the statute and must show that Congress could not rationally have  
5 reached the policy judgments reflected in the statute. In *Philips v. Perry*, 106 F.3d  
6 1420 (9th Cir. 1997), the Ninth Circuit already has observed that Congress and the  
7 military could have rationally found that the DADT policy is necessary to “further  
8 military effectiveness by maintaining unit cohesion, accommodating personal  
9 privacy and reducing sexual tension.” *Id.* at 1429. LCR now has failed to carry its  
10 burden of showing that these applications are invalid or that Congress could not  
11 have rationally reached the conclusions that it did. Because LCR cannot make the  
12 required showing, Defendants are entitled to summary judgment with respect to  
13 LCR's substantive due process challenge to the DADT policy.

14 Defendants are also entitled to summary judgment with respect to LCR's  
15 remaining First Amendment claim. While the Court recognized, in its 2009 Order,  
16 that Section 654 was consistent with the First Amendment to the extent it permits  
17 the military to use statements as admissions of a propensity to engage in  
18 homosexual acts, the Court ruled that “[d]ischarge on the basis of statements not  
19 used as admissions of a propensity to engage in ‘homosexual acts’ would appear to  
20 be discharge on the basis of speech rather than conduct, an impermissible basis.”  
21 (Doc. 83 at 23). The Court thus suggested that the statute was unconstitutional to  
22 the extent it required the military to discharge service members based on  
23 statements other than when those statements were used as an admission of a  
24 propensity to engage in homosexual acts. Therefore, the Court concluded that it  
25 could not “determine from the face of” LCR's complaint “whether Nicholson was,  
26 or Doe could yet be, discharged based on statements” that were used for such a  
27 purpose. *Id.*

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1 Discovery has confirmed that Mr. Nicholson was discharged because his  
 2 statement that he was gay constituted an admission of his propensity to engage in  
 3 homosexual acts, a presumption that he chose not to rebut. Mr. Nicholson, thus,  
 4 indisputably was not discharged on the basis of a statement not used as an  
 5 admission of a propensity to engage in homosexual acts. As for John Doe, whether  
 6 or not he is an active member of LCR, he remains an active member of the  
 7 military; he has not been discharged. LCR has failed to demonstrate that any  
 8 action has been taken against John Doe on any basis whatsoever, let alone any  
 9 basis related to the DADT. There is nothing in the record to establish that any  
 10 statement made by or about John Doe has been used for any purpose. The claims  
 11 the Court allowed LCR to seek to cure and pursue through an amended complaint,  
 12 therefore, are wholly unsupported by any record evidence, and Defendants are  
 13 entitled to summary judgment on all remaining claims.

14 This Motion is made following the conference of counsel pursuant to L.R. 7-  
 15 3, which took place by telephone on Wednesday, March 17, and Thursday, March  
 16 18, 2010.

17 Dated: March 29, 2010

Respectfully submitted,

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