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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOG CABIN REPUBLICANS, a non-profit corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA and ROBERT M. GATES, SECRETARY OF DEFENSE, in his official capacity,

Defendants.

Case No. CV04-8425 VAP (Ex)

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Date: April 26, 2010
Time: 2:00 p.m.
Place: Courtroom of Judge Phillips

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I.

INTRODUCTION

This case involves constitutional law issues of national importance concerning the rights of homosexuals[1] to serve in the United States Armed Forces. At trial, plaintiff Log Cabin Republicans ("Log Cabin") will ask the Court to declare unconstitutional the government's "Don't Ask, Don't Tell" policy ("DADT"), including both the statute codified at 10 U.S.C. section 654 and its implementing regulations, and to enjoin further enforcement of DADT. Such a decision would put a halt to the irrational law that prevents open homosexuals from serving in any capacity in our Armed Forces, allows the investigation and discharge of patriotic servicemembers, and requires brave men and women fighting and dying for our country in wars in Iraq and Afghanistan to conceal the core of their identity.

While that decision may be momentous, the Court's decision on the government's motion for summary judgment should be easy because the government has not come close to meeting its burden of showing that no genuine issues of material fact exist. With respect to standing, the evidence shows that both Alex Nicholson and John Doe are members of Log Cabin who have been injured by DADT, despite what the government claims in its motion. With respect to the claim that the government is entitled to judgment on the due process claim as a matter of law, the Court has already rejected this argument by recognizing the significance of Lawrence v. Texas and denying the government's motion to dismiss last June. The Court should do so again, as the government has not cited any new authority or made any new arguments. With respect to the evidence on the due process claim, the government submits no facts in its separate statement, ignores admissions by the President, the Chairman of the Joint Chiefs of Staff, and the

[1] As this Court did in its June 9, 2009 order, we use the term "homosexual" here and throughout this memorandum in its broad, inclusive sense, as in Witt v. Dep't of the Air Force, 527 F. 3d 806 (9th Cir. 2008).

Secretary of Defense, and ignores a mountain of evidence showing that no rational basis ever existed for DADT and certainly does not exist today. Similarly, the Court must deny the motion as to the First Amendment claim because genuine issues of material fact exist on that claim.

II.

BACKGROUND

A. Procedural History

Log Cabin initiated this action in 2004. The government moved to dismiss and, after a lengthy delay, Judge Schiavelli granted the motion with leave to amend as to standing and did not reach the constitutional law issues. Log Cabin amended its complaint in compliance with Judge Schiavelli's order, the government again moved to dismiss, another lengthy delay ensued, and Judge Schiavelli retired without deciding the motion. The case was then reassigned to this Court.

Following additional briefing and oral argument, on June 9, 2009, the Court granted the motion to dismiss as to Log Cabin's equal protection claim and a portion of its First Amendment claim and denied the motion to dismiss as to Log Cabin's due process claim and one prong of its First Amendment claim.

The Court then set a Rule 26(f) conference. In its portion of the joint Rule 26(f) report, the government argued that discovery was not necessary; Log Cabin disagreed. At the conference the parties argued their positions; the Court noted that it was "inclined to think that the topics that the plaintiff has set forth in terms of discovery, in terms of areas in which it wants to do discovery, seem appropriate." July 6, 2009 Transcript of Proceedings at 6:13-15. The Court took the matter under submission. Id. at 27:11-14.

On July 24, 2009, the Court ordered that "Plaintiff is entitled to conduct discovery in this case to develop the basis for its facial challenge." Dkt. No. 91. The Court also entered a scheduling order, setting a discovery cutoff date, pretrial dates, and a trial date of June 14, 2010. Dkt. No. 92. Discovery then commenced.

In October 2009, with written discovery pending to it, the government moved to certify the Court's June 9 order for interlocutory appeal and to stay all proceedings. Log Cabin opposed the motion, it was argued on November 16, 2009, and the Court denied the motion on November 24, 2009. Dkt. No. 100.

On February 18, 2010, the Court convened a status conference to determine the possible impact on the case of recent political developments. The government again requested a stay of the case or a continuance of the trial. On March 4, 2010, the Court issued an order declining to stay or continue the trial date.

On March 15, 2010, Magistrate Judge Eick heard argument on three discovery motions filed by Log Cabin. On the following day, he issued an order granting all three motions in large part. Dkt. No. 127.

Despite the government's efforts to avoid an adjudication of this case on its merits, Log Cabin remains ready, willing, and able to meet this Court's pretrial requirements and to commence trial on June 14.

B. The Government's Motion

The motion consists of a notice of motion, a memorandum of points and authorities, a proposed order, a document entitled "Defendants' Statement of Uncontroverted Facts and Conclusions of Law [Proposed]", and an "Appendix" of excerpts from four depositions and a few documents. No declarations from any witness were filed in support of the motion.[2]

The memorandum contains a section headed "The DADT Policy." Motion at

[2] The motion fails to comply with Local Rule 56-1. That rule requires a statement of uncontroverted facts to "set forth the material facts as to which the moving party contends there is no genuine issue." See also L.R. 56-2, 56-3. The government filed a document titled "Defendants' Statement of Uncontroverted Facts and Conclusions of Law" but its text describes "Proposed Findings of Fact," akin to a pretrial or trial filing. It contains 12 proposed findings of fact regarding standing and two proposed findings of fact regarding the First Amendment claim; on the due process claim, it lists no purported uncontroverted facts. It contains no reference to the Belkin and Frank deposition excerpts cited in the memorandum. The purported "Conclusions of Law" amount to additional briefing in violation of the 25-page limit of L.R. 11-6.

4:10-7:25. After noting that Congress held lengthy hearings and conducted an extensive review of DADT, the motion uses almost none of that information It repetitively cites Congress's conclusions, id. at 4:17-5:4, 5:12-6:1, 6:7-7:25, but Congress's conclusions are not determinative. See infra at 9-12. This Court need not abdicate its responsibilities and rubber-stamp Congress's conclusions; it must review whether a rational basis exists for the conclusions. For example, if Congress were to conclude that women with blonde hair could not serve because it found that they create sexual tension, the Court would not be obliged to accept such an irrational decision.

The only testimony from the congressional hearings contained in the motion is part of one sentence from Gen. Schwarzkopf's testimony about success "on the battlefield," id. at 5:5-8, a partial sentence from Gen. Powell's about going "into battle," id. at 5:8-12, and a footnote with ten lines of Gen. Powell's testimony. Id. at 6:16-25 and n.3. The gist of the selected portion of Gen. Powell's testimony is that unit cohesion requires excluding homosexuals from serving openly in our armed forces to protect the privacy of heterosexuals and to minimize sexual tension, particularly in combat.

No other evidence of any type is presented in the motion to support the government's claim that summary judgment is warranted. The government submits no declaration from any military or government official that DADT was or is necessary to achieve its ostensible purposes. Nor has it submitted any expert opinion testimony to that effect. Nor has it submitted any report or study to that effect. The Court can only conclude that the government has no evidence to support the constitutionality of DADT.

The motion also intentionally ignores many facts of which the government is certainly aware. It ignores the fact that Gen. Powell has changed his views on DADT. On February 3, 2010, Gen. Powell publicly stated: "In the almost seventeen years since the 'don't ask, don't tell' legislation was passed, attitudes and

circumstances have changed." See Log Cabin's Appendix of Evidence ("LCR App.") at 3094. It also ignores admissions by the highest military officials in the government, including President Obama's recent statements that DADT "doesn't contribute to our national security" and "weakens our national security," and that reversing DADT "is essential for our national security." LCR App. at 1975-76, 1979. The government also ignores admissions by Admiral Mullen, Chairman of the Joint Chiefs of Staff, and Secretary of Defense Gates, that there is no evidence showing that DADT is necessary for unit cohesion.

> Sen. Collins: We've heard today the concern that if don't ask, don't tell is repealed, that it would affect unit cohesiveness or morale. Are you aware of any studies, any evidence that suggests that repealing don't ask, don't tell would undermine unit cohesion?
>
> Adm. Mullen: I'm not.

LCR App. at 1802. Answering the same question, Secretary Gates said: "I think I would just underscore that … [P]art of what we need to do is address a number of assertions that have been made for which we have no basis in fact." (both emphases added.) LCR App. at 1803. Most importantly, the motion ignores a mountain of evidence showing that there was and is no rational basis for DADT. At a minimum, the evidence cited in this brief and included in Log Cabin's Statement of Genuine Issues shows that genuine issues of material fact exist.

III.

GOVERNING STANDARD

This Court is well-acquainted with the standard governing motions for summary judgment, including the moving party's burden and construing the evidence in the light most favorable to the non-moving party. E.g., Federal Ins. Co. v. Burlington N. & Santa Fe Ry., 270 F. Supp. 2d 1183 (C.D. Cal. 2003).

IV.

LOG CABIN HAS STANDING

An organization has standing to sue on behalf of its members if it satisfies the three conditions articulated in Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977): (1) at least one member of the organization has standing, in his or her own right, to present the claim asserted; (2) the interests sought to be protected are germane to the organization's purpose; and (3) neither the claim asserted nor relief requested requires that the organization's members participate individually. The government concedes that Log Cabin satisfies the second and third prongs of Hunt, challenges only the first, and claims Log Cabin has not established that any of its members have standing to challenge DADT.

The evidence is to the contrary. Log Cabin has presented evidence that two of its members, including a former servicemember discharged pursuant to DADT (Alex Nicholson) and a current officer in the Army Reserves ("John Doe"), are members of Log Cabin and would have standing in their own right to challenge DADT's constitutionality. Moreover, the Court need not conclude that both Mr. Nicholson and Lt. Col. Doe have standing. "[T]he standing of a single member is sufficient to support organizational standing." E.E.O.C. v. Nevada Resort Ass'n, 792 F.2d 882, 885-886 (9th Cir. 1986).[3] If either of these Log Cabin members has standing, then Log Cabin "has standing to bring suit on behalf of current and former homosexual members of the armed forces." June 9, 2009 Order Denying in Part and Granting in Part Motion to Dismiss ("June 9 Order") at 14 (emphasis added).

[3] This Court has already reached the same conclusion. June 9, 2009 Order Denying in Part and Granting in Part Motion to Dismiss at 13-14 ("[T]he declaration of one member of an association that he suffered a harm, coupled with the general assertions that other members would suffer similar harm, suffices to confer standing on an association.").

As to Mr. Nicholson, the government does not contest his individual standing to challenge DADT but claims that he is not "a bona fide or active member of LCR sufficient to confer organizational standing." Motion at 9:10-12. To the contrary: Mr. Nicholson is a member of Log Cabin today; he was a member in April 2006 when the First Amended Complaint was filed; and – contrary to the government's suggestion that Mr. Nicholson's membership in Log Cabin is "manufactured" for this case – Log Cabin has considered him to be a member from before the First Amended Complaint was filed on April 28, 2006 continuously through the present. See SGI re Standing 8-10.[4] In addition, the Georgia chapter of Log Cabin awarded Mr. Nicholson an honorary membership in 2006.[5] Id. 10. Log Cabin recognizes such "honorary members" as "Members" under its bylaws.[6] Id. 8.

In short, Mr. Nicholson's membership in Log Cabin is indisputable. As a result, the Court need not employ the associational standing test described in Washington Legal Foundation v. Leavitt, 477 F. Supp. 2d 202 (D.D.C. 2007), for an "organization with no formal members." But even if Mr. Nicholson were not, strictly speaking, a member of Log Cabin under its bylaws, Log Cabin still has standing because Mr. Nicholson satisfies the "indicia of membership" in the organization, based on: his long-standing self-identification as a Log Cabin member; his active involvement with the organization (including addressing the

[4] Log Cabin's Statement of Genuine Issues in Opposition to Motion for Summary Judgment, filed concurrently herewith, includes Log Cabin's response to the government's proposed findings of fact regarding Log Cabin's associational standing ("SGI re Standing") and regarding Log Cabin's First Amendment challenge ("SGI re 1st Am."). It also includes additional genuine issues of fact to be adjudicated at trial ("SGI").

[5] Counsel for Log Cabin notified the government of Mr. Nicholson's longstanding honorary membership in an email dated March 25, 2010. While portions of the email were quoted in footnote 5 of the government's brief, the government did not address or even mention the honorary membership.

[6] Terry Hamilton's testimony regarding the membership provisions of Log Cabin's bylaws was based on his recall of the bylaws and without reference to the bylaws themselves, which the government never requested be produced.

Log Cabin National Convention in 2006 and regularly attending meetings of the Georgia chapter for nearly two years); and the organization's officers' belief that he is and has continuously been a member. SGI re Standing 9-10; see Friends of the Earth, Inc. v. Chevron Chem. Co., 129 F.3d 826, 828-29 (5th Cir. 1997) ("failure to comply with state and internal rules for identification of its members" should not "overshadow the considerable activities of FOE with and for those persons its officers and staff have consistently considered to be members" where, *inter alia*, "members have voluntarily associated themselves with FOE," "testified in court that they were members of FOE" and "suit clearly is within FOE's central purpose, and thus within the scope of reasons that individuals joined the organization."); Sierra Ass'n for Env't v. F.E.R.C., 744 F.2d 661, 662 (9th Cir. 1984) (corporation that had been suspended and failed to take the steps necessary to preserve its corporate status under state law maintained its representational standing).

Lt. Col. Doe, as he testified in his declaration (Dkt. No. 39) is a member of Log Cabin and an officer in the United States Army Reserves who recently completed a one-year tour of duty in Iraq. SGI re Standing 12. Lt. Col. Doe is a member of Log Cabin and has been continuously since before this case was filed, paying his initial membership dues in 2004. Id. 11.

Lt. Col. Doe is also homosexual and subject to DADT. He wishes he had the "ability to exercise [his] constitutionally protected right to engage in private, consensual homosexual conduct without intervention of the United States government." Id. 12. Under DADT, he cannot do so without facing likely separation proceedings. Moreover, Lt. Col. Doe cannot identify himself in this lawsuit for "fear that challenging the constitutionality of [DADT], and/or making my own name or identity known in such an action, will subject me to investigation and discharge pursuant to [DADT]." Id.

Lt. Col. Doe's fear is well-founded. Notwithstanding the President's call for repeal, DADT is still in effect and discharges have not been stayed. SGI 89-91. Lt.

Col. Doe's Declaration alone likely constitutes evidence sufficient to support his discharge (including under the March 2010 revisions to DADT). See SGI 92. Thus, the government's claim that Lt. Col. Doe lacks standing because he has not "been discharged…by application of [DADT]" is nonsense, further evidenced by its refusal to stipulate that it would not interfere with the benefits or status of members identified by name in this suit. First Amended Complaint, ¶ 22 n.3.

In sum, either Alex Nicholson or John Doe satisfy the first prong of the Hunt test.[7] Therefore, Log Cabin has standing to challenge DADT.

V.

THE COURT MUST DENY THE MOTION ON THE DUE PROCESS CLAIM

A. Lawrence v. Texas Demands a Searching Constitutional Review

The government is incorrect that Log Cabin's challenge is governed by the most deferential form of constitutional review. Motion at 13:18-22. Lawrence v. Texas held that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." 539 U.S. 558, 562, 156 L. Ed. 2d 508, 123 S. Ct. 2472 (2003). The Ninth Circuit, in Witt v. Dep't of Air Force, 527 F.3d 806, 816 (9th Cir. 2008), made clear that Lawrence controls the scrutiny applied to DADT and concluded it could not "reconcile what the Supreme Court did in Lawrence with the minimal protections afforded by traditional rational basis review." Rather than picking through Lawrence to find talismanic language of rational basis, intermediate or strict scrutiny, however, Witt simply realized that it and other courts must follow what the Lawrence court "actually did." Id. (emphasis in original).

[7] The government does not challenge Lt. Col. Doe's anonymity, and the Court has already recognized that it is appropriate to protect that anonymity. "This is the unusual case where nondisclosure of the party's identity is necessary … to protect a person from harassment, injury, ridicule, or personal embarrassment." June 9 Order at 13 (internal quotation omitted).

The Ninth Circuit recognized that the Supreme Court in Lawrence investigated the extent of the liberty interest at stake, grounded its decision in cases which applied heightened scrutiny,[8] and sought more than merely a hypothetical state interest to justify the challenged law. Id. at 816-17. In sum, Witt held, the Supreme Court applied a heightened level of scrutiny – "something more than traditional rational basis review." Id. at 817.[9]

Faced with Major Witt's as-applied challenge to DADT, the Ninth Circuit defined the level of heightened scrutiny Lawrence demands in such cases. Id. at 818-19. But, as this Court previously recognized, Witt does not foreclose a facial challenge to DADT. June 9 Order at 15-17.[10] It is simply silent on the issue.

It is also evident that Lawrence requires more than the most deferential form of constitutional review here because Lawrence itself was a facial challenge. Lawrence reviewed the Texas sodomy statute on its face, generally examining "the validity of … making it a crime for two persons of the same sex to engage in certain intimate sexual conduct." 539 U.S. at 562. The question was whether the statute was unconstitutional as to any two persons, not just the two specific men involved. The lower court opinion in Lawrence confirms that that case was a facial challenge.[11]

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[8] Witt noted Lawrence's reliance on Griswold v. Connecticut, Roe v. Wade, Carey v. Population Servs. Int'l, and Planned Parenthood of Southeastern Pa. v. Casey. 527 F.3d at 817. Lawrence also reviewed Eisenstadt v. Baird, 405 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972), in which heightened scrutiny also applied. 539 U.S. at 565.

[9] The government's argument to the contrary on the basis of Ileto v. Glock, Inc., 565 F.3d 1126 (9th Cir. 2009) is unavailing. Motion at 17:6-8. First, Ileto addresses Lawrence only in passing and with far less depth than Witt. See id. at 1141. Second, the plaintiffs in Ileto challenged an economic statute that preempts certain civil claims against firearms manufacturers, not a statute that infringes on a protected liberty interest. Id. at 1131. Finally, Ileto's cursory examination of Lawrence focused on its effect on equal protection, not substantive due process. Id.

[10] The Court stated, "nothing in Witt bars Plaintiff from asserting a facial challenge to DADT." June 9 Order at 16. The government cites no authority to the contrary.

[11] "[B]ecause [the individuals] entered pleas of *nolo contendere*, the facts and circumstances of the offense are not in the record. …. Thus, the narrow issue presented here is whether Section 21.06 is facially unconstitutional." Lawrence v. State of Texas, 41 S.W.3d 349, 350 (Tex. App.-Houston [14th Dist.] 2001).

Because Lawrence mandates a heightened level of scrutiny here, this Court must analyze DADT under what the Ninth Circuit has termed "active rational basis." See Pruitt v. Cheney, 963 F.2d 1160, 1165-66 (9th Cir. 1992). Several cases illustrate the application of this standard.

First is City of Cleburne v. Cleburne Living Center, 473 U.S 432, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985), from which the Ninth Circuit derived this heightened level of rational basis scrutiny. See Pruitt, 963 F.2d at 1165-66. Cleburne requires examination of the government's actual – not hypothetical – bases for the challenged legislation. 473 U.S. at 448-50. This includes examining the record and delving behind the government's stated justifications to determine whether the legislation is based upon and furthers any such actual purpose or whether its relationship to the "asserted goal is so attenuated as to render the distinction arbitrary or irrational." Id. at 446.

Romer v. Evans also employed a heightened rational basis review in examining the constitutionality of Colorado's Amendment 2, which precluded the state from enacting legislation designed to protect homosexuals from discrimination. 514 U.S 620, 629, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996). The Supreme Court found Amendment 2 unconstitutional because "its sheer breadth [was] so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects." Id. at 632. Romer requires that legislation must be "grounded in a sufficient factual context" for the Court to ascertain some relationship between the legislation and its asserted purposes. Id. at 632-33.

Colorado claimed it enacted Amendment 2 to preserve its citizens' freedom of association and to preserve resources to fight discrimination against other groups. Id. at 635. The Court did not accept these rationales at face value. Rather, it examined the factual context of Amendment 2's enactment and determined its actual purpose was to disadvantage a politically unpopular group. Id. at 634-35.

Importantly, Romer, like Lawrence, applied this standard to a facial challenge. See id. at 643 (Scalia, J., dissenting) (identifying the challenge as facial).

These cases also dictate that, even in a facial challenge under rational basis review, the government may not enact legislation based merely upon animosity to those it would affect. Romer, 517 U.S. at 634-35; Cleburne, 473 U.S. at 448. "Private biases may be outside the reach of the law, but the law cannot, directly, or indirectly, give them effect." Cleburne, 473 U.S. at 448. "The Constitution cannot control such prejudices but neither can it tolerate them. … [T]he law cannot, directly or indirectly," give effect to private biases. Palmore v. Sidoti, 466 U.S. 429, 433, 80 L. Ed. 2d 421, 104 S. Ct. 1879 (1984). "A bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Romer, 517 U.S. at 634 (emphasis in original) (citation and quotation omitted).

The Supreme Court in Lawrence employed the more searching review it employed in Cleburne and Romer.[12] The Court rejected Texas' proffered legitimate governmental interest and held that restrictions on homosexuals' liberty interests cannot be justified merely on the basis of society's moral preferences. Id. at 571. Its investigation of the stated rationale and its factual context was searching, even including examination of foreign sources. Id. at 572, 576-77. Following Lawrence and Witt, this heightened level of scrutiny is the test the Court must apply in evaluating the constitutionality of DADT.

B. Log Cabin May Maintain Its Substantive Due Process Claim

Despite this Court's earlier ruling that rejected the government's position (June 9 Order at 14-18), the government rehashes the same arguments, using the same authority, to argue that Log Cabin's substantive due process claim fails as a matter of law. Motion at 15:6-18:15. On this point, the government relies heavily

[12] Indeed, Lawrence identified Romer as among the principal authorities that eroded the foundations of Bowers v. Hardwick, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986). 539 U.S. at 574-76.

again on Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997). Philips is unavailing, however, because its two core underpinnings have been compromised.

Most importantly, the rational basis standard applied in Philips predates Lawrence. Had Philips included a substantive due process challenge, its holding would have been abrogated by Witt's recognition that Lawrence controls the analysis of DADT and requires "something more than traditional rational basis." See supra at 9-10. Indeed, this Court recognized this exact principle when it held that Lawrence "dissolved" the foundation on which Holmes v. California Army National Guard, 124 F.3d 1126 (9th Cir. 1997), rested. June 9 Order at 18.

Second, the Supreme Court has refined the judicial deference afforded to military-effectiveness rationales – a foundational basis of Philips. See 106 F.3d at 1425, 1429. Since that decision, the Supreme Court has upheld a constitutional challenge to the government's policy of denying procedural due process to an American citizen classified as an enemy combatant. Hamdi v. Rumsfeld, 542 U.S. 507, 533, 159 L. Ed. 2d 578, 124 S. Ct. 2633 (2004). It rejected the government's argument that federal courts should only review that policy under a "very deferential 'some evidence' standard" in light of the grave threat terrorism poses to the Nation and the "dire impact" due process would have on the central functions of war-making. Id. at 527, 534. In Hamdan v. Rumsfeld, 548 U.S. 557, 588, 165 L. Ed. 2d 723, 126 S. Ct. 2749 (2006), the Supreme Court likewise held that "the duty rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty."

Military commanders are professionals but they are not a priestly caste whose judgment is immune from oversight. Civilian control of the military has been a fundamental principle since the first days of the Republic, and the Ninth Circuit has not hesitated to subject military-related legislation to a heightened "active" rational basis review. Pruitt, 963 F.2d at 1165-66. Pruitt made clear that courts of this circuit must scrutinize military rationales in the same manner

employed by the Supreme Court in Cleburne. Id. Indeed, "deference does not mean abdication" and Congress cannot subvert the guarantees of the Due Process Clause merely because it is legislating in the area of military affairs. Witt, 527 F.3d at 821.[13]

C. The Rationality of a Statute is Not Frozen at Enactment

The government's position is that a statute "must be reviewed at the time of enactment and is not subject to challenge on the ground of changed circumstances." Motion at 19:13-20:8. Once rational, always rational, the government contends. Even if such an extreme position were necessary to avoid the supposed evil of "periodic judicial review [of legislation] on the basis of changed circumstances," that supposed evil is a straw man put forth by the government, which should not prevent this Court from scrutinizing DADT. Furthermore, the government's "once rational, always rational" contention is untrue: if legislation once considered to have been enacted with a rational basis were forever immunized from review, the nation would still, for example, have laws in place for forced sterilization.[14] No law, once found constitutional under rational-basis review, would ever be subject to a second challenge, no matter how odious or irrational it later is seen to be.

More importantly, the government misstates the nature of the evidence proffered by Log Cabin to demonstrate the irrationality of DADT. Log Cabin does not simply rely on "changed circumstances" to argue that DADT is unconstitutional. Changed circumstances are themselves relevant in evaluating the continuing interpretation of a legislative enactment. See Northwest Austin Mun. Util. Dist. No. 1 v. Holder, ___ U.S. ___, 174 L. Ed. 2d 140, 129 S. Ct. 2504, 2512 (2009). This is equally true in evaluating legislation under rational basis review:

[13] The government, citing Newton v. Thomason, 22 F.3d 1455, 1460 (9th Cir. 1994), claims Philips remains binding Circuit precedent here. Motion at 14:18-21. However, Newton expressly exempts circumstances in which intervening Supreme Court authorities, such as Lawrence, Hamdi, and Hamdan exist. 22 F.3d at 1460.

[14] See, e.g., Buck v. Bell, 274 U.S. 200, 71 L. Ed. 1000, 47 S. Ct. 584 (1927), the infamous "three generations of imbeciles are enough" case.

> Those who drew and ratified the Due Process Clauses … knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Lawrence, 539 U.S. at 578-79.

But even the government's position that the statute should be reviewed without consideration of changed circumstances does not preclude this Court from re-examining the rationality of the statute at the time based on evidence not previously presented or considered, such as the expert opinion testimony that Log Cabin proffers here. Log Cabin intends to prove at trial the lack of a rational basis for DADT not simply by evidence of new or changed circumstances, such as polling data showing the lack of support for the policy both in the military and in the public at large, but also by extensive expert testimony explaining that there was no rational basis for Congress's original determination at the time of the enactment of DADT. As shown in Log Cabin's Statement of Genuine Issues, it is not simply the "wisdom" of DADT that is lacking, but the very rational basis for the policy.

The cases the government cites to argue that the rationality of a statute must be evaluated as of the time of its enactment do not compel a different conclusion, because all of those cases involved a challenge to the rational basis of a statute solely based on intervening events – a bare "changed circumstances" argument.[15]

[15] United States v. Jackson, 84 F.3d 1154 (9th Cir. 1996), rejected an equal protection challenge to the 100:1 disparity in sentencing for crack versus powder cocaine possession that was based on a later Sentencing Commission recommendation that the disparity be eliminated – a recommendation that Congress specifically disapproved. Montalvo-Huertas v. Rivera-Cruz, 885 F.2d 971 (1st Cir. 1989), denied a rational-basis attack on Puerto Rico's 1902-vintage Sunday closing law that relied on the later enactment of "numerous laws protective of workers' rights," which the challengers alleged undermined the original rationale for the law. Smart v. Ashcroft, 401 F.3d 119 (2nd Cir. 2005), was an as-applied challenge to a

In none of the cases on which the government relies did those who challenged the constitutionality of a statute do so on the basis of evidence that the statute, when enacted, lacked a rational basis, or was motivated by unconstitutional animus. Log Cabin does so here, with ample evidence. Log Cabin's experts' opinions show that, even independent of later events, the DADT policy did not have a rational basis when adopted and is therefore unconstitutional. The experts' opinions may be informed by post-enactment analysis, such as empirical studies of the actual effects of DADT and whether these effects are congruent with its stated purpose, but they do not arise only from new facts or changed circumstances since the enactment of DADT. Other events subsequent to the adoption of DADT – such as changed military and public opinion, and the changed views of those who formerly supported the policy like Gen. Powell – bolster the position that DADT is not rationally designed to accomplish its stated purposes; but that does not vitiate Log Cabin's independent showing that DADT had no rational basis for its enactment.

The government's own authority confirms that this Court must consider post-enactment evidence of whether the challenged statute has furthered the proffered governmental objectives, even under the most deferential "traditional rational basis" scrutiny. In Western & Southern Life Ins. Co. v. State Board of Equalization, 451 U.S. 648, 68 L. Ed. 2d 514, 101 S. Ct. 2070 (1981) (cited at Motion at 13:22-14:2), the Supreme Court examined evidence developed at trial regarding the post-enactment effect of a challenged tax scheme to determine whether the statue had produced the results that its advocates predicted would occur. Id. at 652, 673-74. The post-enactment evidence included empirical studies

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deportation order imposed on an individual under a section of the Immigration and Nationality Act that had been repealed, but not with retroactive effect, id. at 122; the court denied the petitioner's challenge and held that congressional reconsideration of a statute did not render it unconstitutional at enactment. Id. at 123. The court in Howard v. U.S. Dep't of Defense, 354 F.3d 1358 (Fed. Cir. 2004), denied a challenge to the constitutionality of a statute based on Congress's modification and partial repeal of the prohibition, for the same reason. Id. at 1361.

and statistical data presented by authorities in this field. Id. at 673-74. Log Cabin will present evidence of DADT's post-enactment effect to demonstrate that the law and its regulations have furthered not one of the stated objectives.

The evidence presented by Log Cabin in its Statement of Genuine Issues, including the reports of seven expert witnesses and the extensive scholarship and documents cited therein, is amply sufficient to call for a trial of those issues and to defeat this motion. On this motion, Log Cabin does not have the burden to prove the lack of rational basis for DADT, only to show evidence of genuine issues that must be tried and fully determined. Log Cabin has presented such evidence.

D. Genuine Issues of Material Fact Exist on the Due Process Claim

In contrast to the government's scanty showing in the moving papers, Log Cabin presents with this Opposition voluminous evidence in the form both of expert opinion from seven distinguished academics, researchers, and scholars, and of reports and documents from the government's own records. That evidence shows that DADT had no rational basis when enacted and continues to have no rational basis today, and therefore violates the constitutional due process rights of United States military servicemembers and Log Cabin's members.

Specifically, the evidence presented with this Opposition shows that:

- No objective studies, reports, or data, either pre- or post-enactment, support the rationality of DADT and its congruence to Congress's stated objectives (SGI 1-29, 141-158);
- At the time of the enactment of DADT, the only objective studies showed that DADT would not further unit cohesion and troop morale but those studies were either ignored by or hidden from Congress (SGI 30-39);
- Sexual orientation is not germane to military service; many homosexuals have served our country bravely (SGI 30-39);
- The enactment of DADT was motivated by animus, prejudice, hostility, ignorance, or fear of homosexuals (SGI 128-133);
- The enactment of DADT was based on the private biases of influential leaders about homosexuals rather than military judgment (SGI 128-133);

- DADT is applied more frequently in time of peace than in time of war; indeed, the military has knowingly deployed openly homosexual members to foreign theaters of combat (SGI 54-58);
- DADT has had a disproportionate impact on women (SGI 59-68);
- The privacy and sexual tension remarks by Gen. Powell did not apply to female service members (SGI 15);
- When DADT was enacted, some comparable foreign militaries, e.g., Canada, had already changed their policies to allow open service by homosexuals without any negative impact on unit cohesion, a factor ignored by Congress (SGI 40-53);
- Many comparable foreign countries' militaries have, both before and since the enactment of DADT, changed their policies to permit open service by homosexuals without any negative impact on unit cohesion (SGI 40-53);
- U.S. troops fight side-by-side with openly homosexual members of the armed forces of foreign militaries without any impact on unit cohesion and, in some instances, are commanded by openly homosexual officers from other countries (SGI 40-53);
- Service members in non-combat but critical occupations such as doctors, nurses, teachers, ophthalmologists, dentists, lawyers, linguists, translators, and others have been discharged under DADT (SGI 69-83);
- Open homosexuals are not allowed to serve in the armed forces but are allowed to work alongside our armed forces in the FBI, CIA, NSA, Department of Defense, private contracting firms performing military functions, and civilian paramilitary organizations such as police and fire departments. Indeed, the Commander-in-Chief of the Armed Forces could be openly homosexual (SGI 84-86);
- DADT undermines military effectiveness, military readiness, and national security (SGI 87-113);
- DADT undermines unit cohesion (SGI 87-113);
- DADT undermines troop morale (SGI 87-113);
- DADT violates First Amendment rights (SGI 134-140);
- DADT impairs recruitment and retention in the military; indeed, the military currently has over 4,000 convicted felons in service while discharging a greater number of honest, patriotic homosexuals (SGI 114-127).

Considerations of space preclude a detailed elaboration here of the facts supporting each of these issues, but Log Cabin refers the Court to the items set forth in the accompanying Statement of Genuine Issues for the evidence.

E. The Motion Misstates Log Cabin's Experts' Testimony

Even the minimal evidence the government does attempt to present on the due process issue is misleading. It misstates the testimony of two of Log Cabin's experts, Professors Nathaniel Frank and Aaron Belkin. It claims that "LCR's own experts acknowledged that Congress could rationally have considered the privacy and sexual tension rationales in enacting the statute." Motion at 20:19-21. Nothing could be further from the truth.

Professor Frank's opinion, expressed in his expert report, is that "the 'don't ask, don't tell' policy was based on moral animus toward [homosexuals], and not on empirical evidence or reasonable concerns about the impact that openly gay service would have on unit cohesion and overall military effectiveness."[16] His report explains in detail the bases for his opinion, including an examination of the historical records, conversations with military officials and experts who have indicated that their own participation in helping craft the policy took moral and personal concerns into consideration, and his opinion that three influential leaders argued for DADT for personal, not military reasons.[17] Professor Frank confirmed these opinions during his deposition and the deposition excerpts quoted in the motion do not show any belief on his part that Congress acted rationally.[18]

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[16] Frank Decl., Ex. A at 2.

[17] Id. at 2-6.

[18] With respect to rationality, Professor Frank only said: "Some people in the military have a desire not to serve with gay people because they believe it is an invasion of their privacy." Frank Depo. at 46:25-47:4 (See LCR. App. at 0020-34). He also said, in passages not quoted in the motion, that Gen. Powell argued for DADT based on personal reasons and not on the basis of military necessity. Id. at 111:7-19. He explained that Gen. Powell's statements about privacy as a justification to exclude homosexuals make no sense because Gen. Powell also has said that service in the military means sacrificing privacy. Id. at 111:20-112:21. With respect to Gen. Powell, Professor Frank testified: "When he draws a line in the sand around gay people, that reflects a personal basis because it's inconsistent with his acknowledgement that military service requires that privacy be sacrificed." Id. at 112:22-113:6. He also pointed out the inconsistency between Gen. Powell's statements that "youngsters from different backgrounds must get along together despite their individual preferences" and his testimony about DADT. Id. at 114:4-

The government also distorts Professor Belkin's testimony. It claims that he testified that the privacy basis is rational in combat situations but omits the question and answer immediately following the passage cited in the motion:

> Q: Well, is it your opinion that a policy would be appropriate in, say, combat conditions but not in non-combat conditions where accommodations permit individual showers or more private accommodations?
>
> A. The research show that, no, a Don't Ask, Don't Tell situation would not further heterosexual privacy in combat situations where individual accommodations are not possible.[19]

He then explained the bases of his opinion at length.[20] The government also misstates Professor Belkin's testimony about the Israeli military,[21] and his opinions about Congress's supposed concern about sexual tension: he only testified that people have sex in the military, including people of the same sex. He added, however, in passages ignored by the motion, that this has always been true, is built into the DoD regulations, and would occur even if all gays were excluded from the military.[22] Professor Belkin testified as follows regarding privacy and animus: "what was really motivating a lot of people who were formulating this policy was

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22. He also explained that gay men are just as uncomfortable undressing in front of others as heterosexual men and that gay males and straight males have not been separated in schools, locker rooms, gyms, camps, and the like, so that the military is not different in that regard from traditional cultural expectations. Id. at 115:11-116:4; 117:8-118:6. He concluded by testifying that "I believe that people's genuine discomfort in terms of the impact of known gays on their privacy does not rise to the level of undercutting military effectiveness." Id. at 193:1-12.

[19] Belkin Depo. at 35:12-20 (LCR App. at 0001-19) (emphasis added).

[20] Id. at 35:21-38:24.

[21] Professor Belkin identified one case, in a study of the Israeli military's successful reversal of its prior ban on openly gay service, where a heterosexual soldier was allowed to live off base, possibly because of a privacy concern on his part. Id. at 74:18-75:19.

[22] Id. at 27:13-29:3; 43:7-46:24, 209:5-210:19.

moral animus. But they knew they could not get away with a moral animus argument in public so they needed other argumentation."[23]

Thus, it is false to say, as the government does, that "even LCR's own experts acknowledge that Congress could rationally have credited the privacy and sexual tension rationales when it passed Section 654." Motion at 21:18-22:3. The opposite is true as to the opinions of Professors Frank and Belkin.[24] Other experts, whose opinions are not mentioned in the motion, also opine that the privacy and sexual tension rationales are insufficient and pretextual justifications for DADT.[25]

VI.

THE COURT MUST DENY THE MOTION AS TO THE FIRST AMENDMENT CLAIM

The very title of the statute and policy, "Don't Ask, Don't Tell," highlights that DADT necessarily raises First Amendment freedom of expression concerns. The circular nature of DADT only contributes to this. DADT provides that "Sexual orientation is considered a personal and private matter."[26] At the same time, homosexual "conduct" is grounds for separation.[27] The policy is circular, however, because it defines "conduct" to include "a statement by a member that demonstrates a propensity or intent to engage in homosexual acts."[28] Under the

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[23] Id. at 170:8-13.

[24] Professors Belkin and Frank were "surprised" to read how the defendants mischaracterized their opinions in the moving papers. Frank Decl., ¶¶ 5-8; Belkin Decl. ¶¶ 6-9. There was also no need for the government to derisively describe Log Cabin's experts as "experts" in quotation marks, Motion at 20:9, especially as the Defense Department itself has more than once described Dr. Frank's work as "thoughtful." SGI 113.

[25] See MacCoun Declaration, Ex. A; Embser-Herbert Decl., Ex. A.

[26] DoD Directive 1332.14 §E3.A1.1.8.1.1 (First Amended Complaint, Ex. A); DoD Directive1332.30, at pp. 31-22 (id., Ex. B); DoD Directive 1304.26 §E1.2.8.1 (id., Ex. C).

[27] DoD Directive 1332.14 §E3.A1.1.8.1.1; DoD Directive 1332.30, p. 31; DoD Directive 1304.26 §E1.2.8.1.

[28] DoD Directive 1332.14 §E3.A1.1.8.1.1.; DoD Directive 1332.20, pp. 31-32; DoD Directive 1304.26 §E1.2.8.1.

regulations, the statement "I am a homosexual" is such a statement.[29] In other words, the fact of one's status as a homosexual is supposedly not a basis for discharge but the statement of that permissible status is. Not surprisingly, given this framework, the vast majority of discharges under DADT are for "statements", not conduct.[30] This perverse framework led Admiral Mullen to inform the Senate on February 2, 2010 (SGI 88):

> No matter how I look at this issue, I cannot escape being troubled by the fact that we have in place a policy which forces young men and women to lie about who they are in order to defend their fellow citizens.

In its June 9 Order, the Court found that "[d]ischarge on the basis of statements not used as admissions of a propensity to engage in 'homosexual acts' would appear to be discharge on the basis of speech, rather than conduct, an impermissible basis." June 9 Order at 22-23. The government has not met its burden of showing that no genuine issue of material fact exists on this claim. Moreover, laws that chill constitutionally protected speech, such as DADT, are presumptively invalid and must withstand the strictest constitutional scrutiny. See, e.g., Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 116, 118, 123, 116 L. Ed. 2d 476, 112 S. Ct. 501 (1991).

Mr. Nicholson said he was homosexual only after someone intercepted and read a personal letter from him to another man in Portuguese.[31] He was confronted

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[29] 10 U.S.C. §654(b)(2); DoD Directive 1332.14 §E3.A1.1.8.1.2.2; DoD Directive 1332.30 p. 32. These statements create a rebuttable presumption that the member has a propensity or intent to engage in homosexual acts. The opportunity to rebut the presumption is illusory for a homosexual, however, as the number of successful challenges is not statistically significant. SGI 140.

[30] According to the government's statistics, produced during discovery, from fiscal years 1997 to 2003, 670 of 770 discharges (87.0%) were for statements, as opposed to acts or conduct, and from fiscal years 2004 to 2008, 9,059 of 10,507 discharges (86.2%) were for statements. SGI 139.

[31] Nicholson Depo. at 66:4-71:14 (LCR App. at 0035-50).

with a choice: either face investigation of his personal life and a dishonorable discharge and the loss of benefits, or tell the truth about who he is and preserve the opportunity for an honorable discharge.[32] He chose the latter option.

Lt. Col. John Doe has stated that DADT prevents him from communicating the core of his emotions and identity to others.[33] He is also unable to identify himself publicly in this case as a member of Log Cabin or even to participate in this opposition or testify at trial for fear he will be discharged.[34] This government-imposed restraint on Lt. Col. Doe's activities violates his First Amendment right to petition the government.

Log Cabin contends that these members have legitimate First Amendment claims under this Court's June 9 Order. Even if they themselves do not, however, this Court should still deny the motion as to Log Cabin's First Amendment claims. This Court's June 9 Order did not require that either Mr. Nicholson or Lt. Col. Doe personally suffer a First Amendment injury and prior orders by Judge Schiavelli did not either. Nor does the government cite any case so holding.

The government does not accurately cite the only two cases on which it relies in this section of its motion. It cites Gonzales v. Carhart, 550 U.S. 124, 168, 167 L. Ed. 2d 480, 127 S. Ct. 1610 (2007), for the point that "facial challenges present an inappropriate vehicle for challenging how a particular statute is applied." Motion at 23:11-12. The Supreme Court made no such general statement in that case. It stated the "latitude" given to facial challenges in the First Amendment context and then ruled only that in the "circumstances" of that case an as-applied challenge was the proper means to test the constitutionality of a statute. Id. at 167. The "circumstances" of that case involved a partial-birth abortion statute; the Court found that the nature of medical risks and medical complications to a mother were

[32] Id. at 82:22-84:11, 91:15-94:10.
[33] Doe Decl., ¶ 7 (Dkt. No. 39).
[34] Id., ¶ 8.

important considerations favoring an as-applied challenge.

The government also cites Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 476 n. 14, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982), for its claim that Log Cabin lacks associational standing to bring its First Amendment claims because no member has a First Amendment claim, as defined by this Court. Motion at 25 n. 18. Again, this case does not stand for the broad proposition urged by the government. Valley Forge involved a challenge to a federal statute allowing the sale of surplus government property by a non-profit group of "taxpayer members" whose alleged injury was the alleged deprivation of the "fair and constitutional use of [their] tax dollar." Id. at 469. Taxpayer standing cases implicate a different analysis and are not applicable here.

The government also oversimplifies the facts pertinent to this issue. It claims that "the undisputed facts put forth by Log Cabin establish that service members who state they are homosexual are discharged under the policy solely because such statements establish the service members' propensity to engage in homosexual acts," Motion at 24:21-25:1, but Log Cabin had not yet "put forth" any facts when the government made this claim. In opposition to the motion, Log Cabin is presenting evidence supporting a First Amendment claim permitted by the Court. For example, the government's training materials confirm that a servicemember who advocates, in a public, off-base forum for repeal of DADT is subject to discharge on that basis alone. SGI 136. In addition, one Log Cabin member was discharged for criticizing a general's biased comments about homosexuals. SGI 137. Another servicemember was investigated for making the statement "I have a profile on MySpace" or words to that effect. SGI 137.

The facts concerning Mr. Nicholson, Lt. Col. Doe, and these other servicemembers creates a genuine issue of material fact on this claim, precluding summary judgment.

VII.

IF IT DOES NOT DENY THE MOTION, THE COURT SHOULD CONTINUE THE HEARING

If a party opposing a motion for summary judgment shows that it cannot present facts essential to justify its opposition, the Court may deny the motion, continue the hearing, or issue "any other just order." Fed. R. Civ. P. 56(f). As explained in paragraphs 71-78 of the Woods Declaration, the government's obstructionist discovery tactics have prevented Log Cabin from completing critical discovery. The government refused to produce a witness for a 30(b)(6) deposition, Log Cabin moved to compel, and Magistrate Judge Eick ordered the government to appear for a deposition on ten important topics on or before April 15, 2010. The deposition has not been conducted yet but is expected to be taken before the hearing on this motion. In addition, on March 16, 2010, Magistrate Judge Eick ordered the government to provide an unqualified response to three requests for admission, but the government asked this Court to review that order and the matter has not yet been decided. Also, Log Cabin is still reviewing over 55,000 pages of documents belatedly produced by the government in the past three weeks. If the Court does not deny the motion outright, Log Cabin requests that the Court continue the hearing to allow it to present the evidence obtained from this discovery.

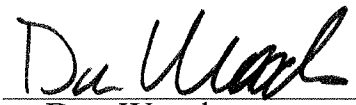
VIII.

CONCLUSION

For the reasons shown in this memorandum and in the Statement of Genuine Issues, the Court must deny the motion for summary judgment.

Dated: April 5, 2010

WHITE & CASE LLP

By: 

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