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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOG CABIN REPUBLICANS, a non-profit corporation, Plaintiff, v. UNITED STATES OF AMERICA and DONALD H. RUMSFELD, SECRETARY OF DEFENSE, in his official capacity, Defendants.	Case No. CV 04-08425-VAP (Ex) **[Motion filed on March 29, 2010]** **ORDER DENYING IN PART MOTION FOR SUMMARY JUDGMENT**

Log Cabin Republicans, ("Plaintiff" or "Plaintiff association"), a nonprofit corporation whose membership includes current, retired, and former homosexual members of the U.S. armed forces, challenges as "restrictive, punitive, . . . discriminatory," and unconstitutional the "Don't Ask Don't Tell" policy ("DADT Policy") of Defendants United States of America and Robert M. Gates ("Defendants"), including both the statute codified at 10 U.S.C. section 654 and the implementing instructions appearing at Department of Defense Instructions("DoDI" or

"implementing instructions") 1332.14, 1332.30, and 1304.26. Defendants now move for entry of summary judgment.

I. BACKGROUND

A. The DADT Policy

The DADT Policy includes both the statutory language appearing at 10 U.S.C. section 654 and the implementing instructions appearing as DoDIs 1332.14, 1332.30, and 1304.26. DADT can be triggered by three kinds of "homosexual conduct:" (1) "homosexual acts"; (2) statements that one "is a homosexual"; or (3) marriage to, or an attempt to marry, a person of one's same biological sex. 10 U.S.C. § 654 (b); DoDI 1332.14 at 17–18; 1332.30 at 9–10.

1. "Homosexual Acts"

First, Defendants may "initiate separation proceedings" – i.e., begin the process of removing an active service member from military ranks – if a service member engages in a "homosexual act," defined 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 (b)(1), (f)(3).

2. Statements About One's Homosexuality

Second, Defendants may initiate separation if a service member makes a statement "he or she is a homosexual or bisexual, or words to that effect." 10 U.S.C. § 654(b)(2). These words create a presumption the service member is a "person 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(b)(2). A propensity is "more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages or will engage in homosexual acts." DoDI 1332.14 at 18.

3. Marriage or Attempted Marriage to a Person of the Same Sex

The third route to separation under DADT, marriage or attempted marriage to a person of the same sex, is self-explanatory.

4. Discharge

Once Defendants find a service member has engaged in "homosexual conduct," as defined above, Defendants will discharge him or her unless the service member can demonstrate that, inter alia, such acts are not his or

her usual or customary behavior and that he or she has no propensity to engage in "homosexual acts." 10 U.S.C. § 654(b)(1); DoDI 1332.14 at 18.

B. Plaintiff and Its Members

According to the Complaint, Plaintiff Log Cabin Republicans ("Plaintiff") is a nonprofit corporation organized under the laws of the District of Columbia, is associated with the Republican Party, and is dedicated to the interests of the gay and lesbian community.[1]

John Alexander Nicholson is a member of Plaintiff organization. Mr. Nicholson enlisted in the United States Army in 2001; the Army discharged him one year later pursuant to the DADT Policy. (Declaration of John Alexander Nicholson ("Nicholson Decl.") ¶¶ 3, 5–6.) Mr. Nicholson signed up to be included in Plaintiff's database in April of 2006. (Stmt. of Genuine Issues ("SGI") at 6:5–20.) In 2006, Plaintiff's Georgia chapter awarded Mr. Nicholson honorary membership.[2] (Id.) Mr.

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[1]Although neither Defendants in their Motion nor Plaintiff in its Opposition point to any evidence concerning the corporate form of Plaintiff, the nature of Plaintiff organization does not appear to be in dispute.

[2]Although Defendants argue "the record contains no evidence that the national board of directors ever granted 'honorary membership' to Mr. Nicholson," Plaintiff has submitted evidence, in the form of the Declaration of Jamie Ensley, that the Georgia Chapter of Plaintiff organization granted Mr. Nicholson honorary membership. (See Decl. of Jamie Ensley ("Ensley Decl.")

(continued...)

Nicholson has attended several of Plaintiff's national conventions, (id.), and addressed Plaintiff's national convention in 2006. (SGI at 5:11–6:4.)

John Doe is also a member of Plaintiff organization. (Decl. of John Doe ("Doe Decl.") ¶ 2.) He joined Plaintiff at some time before October 12, 2004. (Decl. of C. Martin Meekins ("Meekins Decl.") ¶ 3.) John Doe is an officer in the United States Army Reserves who recently completed a tour of duty in Iraq. (SGI at 7:5–8:10; Doe Decl. ¶ 4.) Lt. Col. Doe is gay and wishes to continue his service in the United States Army. (Doe Decl. ¶¶ 2, 6.) He believes that identifying himself in this action would subject him to investigation and discharge under the DADT Policy. (Doe Decl. ¶ 8.)

C. Procedural History

Plaintiff filed its Complaint on October 12, 2004. On December 13, 2004, Defendants moved to dismiss the Complaint, alleging, inter alia, that Plaintiff lacked standing. The Honorable George P. Schiavelli granted the motion to dismiss the Complaint with leave to amend on March 21, 2006.

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[2](...continued)
¶ 4.)

On April 28, 2006, Plaintiff filed timely its Amended Complaint, attaching the declaration of Mr. Nicholson. According to the Amended Complaint, the DADT Policy violates the First and Fifth Amendments to the U.S. Constitution by violating guarantees to: (1) substantive due process; (2) equal protection; and (3) freedom of speech. On June 11, 2007, Plaintiff filed the declaration of Lt. Col. Doe, a current member of Plaintiff organization, a homosexual, and a current U.S. Army reservist on active duty.

On June 12, 2006, Defendants moved to dismiss the Amended Complaint. On May 23, 2008, Judge Schiavelli entered an order staying this action in light of the Ninth Circuit's May 21, 2008 decision in Witt v. Dep't of the Air Force, 527 F.3d 806 (9th Cir. 2008). After the case was transferred to this Court in late 2008, the Court heard the motion to dismiss, and denied it on June 9, 2009. On November 24, 2009, the Court denied a motion by Defendants to certify its June 9, 2009 Order for interlocutory appeal.

On March 29, 2010, Defendants filed this Motion for Summary Judgment. Plaintiff's Opposition and Defendants' Reply were filed timely. On April 21, 2010, the Court provided the parties with its tentative ruling relating to standing. On April 22, 2010, Plaintiff filed a

supplemental memorandum of points and authorities in support of its Opposition, and on April 23, 2010, Defendants filed a response to Plaintiff's supplemental brief. On April 26, 2010, Plaintiff submitted the Meekins Declaration in support of its Opposition. The Court held a hearing on the Motion on April 26, 2010, and granted the parties leave to submit further supplemental briefing concerning standing; both sides timely filed additional briefs on May 3, 2010.

D. Evidentiary Objections

The only evidentiary objection the Court need address in order to resolve the threshold issue of standing is Defendants' challenge to consideration of the Meekins declaration.

Defendants argue that the Court should strike the Meekins Declaration because Plaintiff failed to disclose Mr. Meekins as a witness during discovery. Defendants are correct that where a party fails to disclose the identity of a witness required by either Rule 26(a) or otherwise requested during discovery without substantial justification, the party may not later rely on evidence from that witness. See Wong v. Regents of Univ. of Cal., 410 F.3d 1052, 1062 (9th Cir. 2005); Fed. R. Civ. P. 37(c)(1).

Defendants' challenge to the declaration fails for two reasons, however. First, Rule 26(a) only requires a party to disclose the identity of persons "the disclosing party may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A)(i). The Meekins Declaration is offered solely to rebut Defendants' challenge to Plaintiff's standing to bring this lawsuit, by establishing Lt. Col. Doe's membership in Plaintiff organization at the time the action commenced. Mr. Meekins does not offer any testimony relating to the merits of Plaintiff's claims for relief. Accordingly, disclosure of Mr. Meekins' identity was not required by Rule 26(a). Defendants have pointed to no written discovery request they propounded upon Plaintiff that would have called for identification of Mr. Meekins. Plaintiff thus was not obligated to disclose Mr. Meekins' identity during discovery.

Furthermore, assuming disclosure was required either by Rule 26(a) or an as-yet unidentified discovery request, substantial justification exists for Plaintiff's failure to disclose Mr. Meekins' identity during discovery. Defendants have known that Plaintiff sought to use Lt. Col. Doe's membership as the basis of its claim to standing for almost three years, yet never challenged the timing of his membership in Plaintiff

organization.[3] The ambiguity that caused the Court to question when Lt. Col. Doe became a member of Plaintiff organization appears clearly on the face of the Doe Declaration, which has been in Defendants' possession since June 11, 2007. Based on Defendants' silence in the face of the Doe Declaration, Plaintiff reasonably may have believed that the timing of Lt. Col. Doe's membership was not in dispute. Plaintiff thus would have had no reason to seek out additional evidence of the date on which Lt. Col. Doe joined Plaintiff organization, let alone disclose such evidence.

For the foregoing reasons, the Court DENIES Defendants' request to strike the Meekins Declaration.

II. LEGAL STANDARD

A motion for summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The moving party must show that "under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson, 477 U.S. at 250.

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[3]Defendants did not raise this issue in their Motion; it was raised by the Court sua sponte in its tentative ruling distributed to the parties before the April 26, 2010 hearing.

Generally, the burden is on the moving party to demonstrate that it is entitled to summary judgment. Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998); Retail Clerks Union Local 648 v. Hub Pharmacy, Inc., 707 F.2d 1030, 1033 (9th Cir. 1983). The moving party bears the initial burden of identifying the elements of the claim or defense and evidence that it believes demonstrates the absence of an issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Where the non-moving party has the burden at trial, however, the moving party need not produce evidence negating or disproving every essential element of the non-moving party's case. Celotex, 477 U.S. at 325. Instead, the moving party's burden is met by pointing out that there is an absence of evidence supporting the non-moving party's case. Id. The burden then shifts to the non-moving party to show that there is a genuine issue of material fact that must be resolved at trial. Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324; Anderson, 477 U.S. at 256. The non-moving party must make an affirmative showing on all matters placed in issue by the motion as to which it has the burden of proof at trial. Celotex, 477 U.S. at 322; Anderson, 477 U.S. at 252. See also William W. Schwarzer, A. Wallace Tashima & James M. Wagstaffe, Federal Civil Procedure Before Trial § 14:144.

A defendant has the burden of proof at trial with respect to any affirmative defense. Payan v. Aramark Mgmt. Servs. Ltd. P'ship, 495 F.3d 1119, 1122 (9th Cir. 2007).

A genuine issue of material fact will exist "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson, 477 U.S. at 248. In ruling on a motion for summary judgment, the Court construes the evidence in the light most favorable to the non-moving party. Barlow v. Ground, 943 F.2d 1132, 1135 (9th Cir. 1991); T.W. Electrical Serv. Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987).

III. DISCUSSION

A. Standing

Defendants argue they are entitled to summary judgment because Plaintiff lacks standing to bring this action.

"To satisfy Article III's standing requirement, [plaintiffs] must demonstrate: (1) they suffered or will suffer an 'injury in fact' that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to [defendant's] challenged action; and (3) the injury is likely, not merely speculative, and will be redressed by a favorable decision." Biodiversity

Legal Found. v. Badgley, 309 F.3d 1166, 1171 (9th Cir. 2002); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). Plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing its standing. See Lujan, 504 U.S. at 561; Chandler v. State Mut. Auto. Ins. Co., 598 F.3d 1115, 1122 (9th Cir. 2010).

An association has standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977).

Plaintiff has identified two of its members who, it argues, have standing to sue in their own right and thus confer standing on it: John Doe and John Alexander Nicholson. Defendants do not dispute the second and third prongs of Hunt's associational standing elements as to Lt. Col. Doe and Mr. Nicholson, nor do they dispute that Mr. Nicholson has standing to sue in his own right. Defendants argue, instead, that Lt. Col. Doe and Mr. Nicholson are not bona fide members of Plaintiff. Defendants further argue that Lt. Col. Doe lacks standing

to sue in his own right because he has not yet been discharged from the military, and thus any harm to him from the DADT Policy is speculative. Defendants also argue that even if Lt. Col. Doe and Mr. Nicholson were bona fide members with standing to sue in their own right, they were not members at the time this action commenced, and the Court therefore lacks subject matter jurisdiction. Finally, Defendants argue that Plaintiff cannot proceed without disclosing Lt. Col. Doe's identity.

At the threshold, the Court must determine the date on which Plaintiff's standing should be evaluated. Defendants argue the Court should examine Plaintiff's standing as of the date the action was initiated, i.e., the date the original Complaint was filed – October 12, 2004. Plaintiff, on the other hand, contends the Court should inquire whether standing existed as of the date the First Amended Complaint was filed, April 28, 2006.

As a general matter, "[s]tanding is determined at the time of the lawsuit's commencement, and [the Court] must consider the facts as they existed at that time the complaint was filed." Skaff v. Meridien N. Am. Beverly Hills, LLC, 506 F.3d 832, 850 (9th Cir. 2007) (citing Lujan, 504 U.S. at 569 n. 4); see also Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., 528 U.S. 167, 180

(2000) ("[W]e have an obligation to assure ourselves that [plaintiff] had Article III standing at the outset of the litigation.").

Plaintiff urges that this case falls within an exception to the general rule. In his March 21, 2006 Order, Judge Schiavelli dismissed Plaintiff's original Complaint and granted Plaintiff leave to file a First Amended Complaint. Relying on Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967), Plaintiff argues that "[t]he dismissal of Log Cabin's original complaint and the filing of the first amended complaint rendered the original complaint of no legal effect and obsolete." (Pl.'s Apr. 22, 2010 Mem. of P. & A. at 1:19–20.) In support of this argument, Plaintiff cites County of Riverside v. McLaughlin, 500 U.S. 44 (1991). (Id. at 2:14–3:2.)

In McLaughlin, the class members claimed that the County of Riverside had violated their Constitutional rights when it failed to provide persons subject to warrantless arrest with timely probable cause determinations. McLauglin, 500 U.S. at 47. The original complaint in McLaughlin, filed in August 1987, named a single plaintiff. Id. at 48. The second amended complaint, filed in July 1988, named three additional plaintiffs. Id. at 48–49. In response to the

defendants' argument challenging the standing of the named plaintiffs, the Court examined the facts relating to standing as set forth in the second amended complaint, not the original complaint. Id. at 50–52.

Defendants attempt to avoid the effect of McLaughlin by arguing that the Supreme Court analyzed standing as of the date the second amended complaint was filed because new named plaintiffs were added in the second amended complaint, and the claims of these new plaintiffs were not included in the case before that date. This is unpersuasive, however. The procedural posture of this case closely resembles that before the Court in McLaughlin. Just as a class must identify a named plaintiff with standing, so too must an association seeking to assert claims of its members identify an individual member with standing. Although it is true that there has been but one named plaintiff here for the duration of the action, an association that newly identifies a member for standing purposes is analogous to a class that newly identifies a class member with standing. Accordingly, the analysis of McLaughlin applies here, and the critical date for standing is the date the First Amended Complaint was filed — April 28, 2006.

Turning to the specific standing arguments raised by the parties with respect to Lt. Col. Doe and Mr. Nicholson, the Court finds each of these challenges, too, lacks merit.

1. John Doe

Defendants raise three principal objections to Plaintiff's use of Lt. Col. Doe to confer standing: (1) he does not have standing to sue in his own right; (2) he was not a member of Plaintiff at the time the original Complaint was filed; and (3) Plaintiff may not rely on John Doe for standing without identifying him by name. The Court addresses each argument in turn.

a. Imminence of Harm

Defendants contend that because Lt. Col. Doe has not been discharged from the military yet, any harm to him is too speculative to constitute the actual or imminent harm required for standing. (Mot. at 11:8–12:17.)

The Supreme Court has rejected the argument that a plaintiff lacks standing to challenge the constitutionality of a statute merely because the statute has not been enforced against him yet. Instead, the Court has long held that so long as there is a reasonable threat of enforcement, "it is not necessary that petitioner first expose himself to actual arrest or

prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." Steffel v. Thompson, 415 U.S. 452, 459 (1974); see also, e.g., MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128–29 (2007) ("[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat – for example the constitutionality of a law threatened to be enforced."); Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 626 n. 1 (1986).

Here, the DADT Policy on its face shows that there is a reasonable threat that it will be enforced against Lt. Col. Doe if the military learns his identity. The language of the DADT Policy is mandatory, see 10 U.S.C. § 654(b)(2) ("A member of the armed forces shall be separated from the armed forces . . . if . . . the member has stated that he or she is a homosexual . . . .") (emphasis added), and does not leave the armed forces any discretion about enforcing the policy where a servicemember is unable to rebut a finding that he or she is "a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." Id. Lt. Col. Doe has stated that he is homosexual (see Doe Decl. ¶ 2); the mandatory nature of the DADT Policy requires it be applied to him if he is

identified. Furthermore, Defendants do not dispute that many service members have been discharged previously under the DADT Policy, or that the DADT Policy will continue to be applied to persons who admit to being homosexuals.

Indeed, Defendants have not argued that it is even within their discretion to decline to initiate separation proceedings against Lt. Col. Doe if he were identified. In fact, they are unwilling to stipulate not to initiate such proceedings against him were his identity revealed for purposes of this litigation. Defendants have offered no evidence suggesting that the DADT Policy will not be enforced against Lt. Col. Doe.

Defendants' legal authorities do not establish that no imminent threat of harm to Lt. Col. Doe exists. In support of their argument, Defendants rely on City of Los Angeles v. Lyons, 461 U.S. 95 (1983), Nat'l Treasury Employees Union v. Dep't of the Treasury, 25 F.3d 237 (5th Cir. 1994), and Hodgers-Durgin v. de la Viña, 199 F.3d 1037 (9th Cir. 1999).

Lyons is easily distinguishable from the facts here. In Lyons, the Supreme Court held that a plaintiff did not have standing to obtain injunctive relief preventing the Los Angeles Police Department from enforcing an unwritten

policy that officers employ choke holds to restrain suspects who pose no threat of deadly force to officers. Lyons, 461 U.S. at 98, 111–13. In Lyons, there was substantial uncertainty as to whether or not the plaintiff would engage in future activity sufficient to arouse the suspicions of police officers and if he did, whether or not the police officers would enforce the unwritten alleged choke hold policy. See id. at 105–06. The Court recognized there was nothing about the plaintiff that made it more likely the policy would be applied to him than any other individual. See id. at 111 ("[Plaintiff] is no more entitled to an injunction than any other citizen of Los Angeles.")

Here, by contrast, the DADT Policy is non-discretionary and based on a single criterion which Lt. Col. Doe meets. There is no reason to doubt it will be applied to him. His testimony that he is gay certainly suffices to raise a triable issue of material fact as to imminent harm. (See Doe Decl. ¶ 2.)

National Treasury similarly fails to support Defendants' position. There, the Fifth Circuit found the plaintiff organization lacked standing because the plaintiff had "not even alleged that there is a threat of such an injury to any individual member of the

association," Nat'l Treasury, 25 F.3d at 242, not because the policy it challenged had not been enforced against any of its members. Here, Plaintiff has identified Lt. Col. Doe as a member to whom a threat exists.

Finally, Hodgers-Durgin does not support Defendants' position. The named plaintiffs in Hodgers-Durgin sought to enjoin an alleged Border Patrol practice of stopping motorists in violation of the Fourth Amendment. Although Defendants maintain that the Ninth Circuit found the named plaintiffs lacked standing, the Ninth Circuit's holding actually was two-fold: (1) the named plaintiffs sufficiently alleged a "case or controversy" for purposes of Article III standing, but (2) failed to show a likelihood of substantial and immediate irreparable injury for the purposes of obtaining a preliminary injunction. See Hodgers-Durgin, 199 F.3d at 1041–44. The standard for obtaining injunctive relief, of course, is different from the standard for establishing standing, as evidenced by the Ninth Circuit's decision.

b. When John Doe Became A Member of Plaintiff

John Doe began paying membership dues to Plaintiff before the filing of the Original Complaint in 2004. (Meekins Decl. ¶ 4.) Although he apparently took measures to protect against disclosure of his identity — including paying his membership dues through a member of

Plaintiff's national board rather than directly to the organization, (see id.) — he appears to have become a dues-paying member before the Original Complaint was filed.

Summary judgment is inappropriate here whether the Court applies April 28, 2006 or October 12, 2004 as the appropriate date for its standing analysis. As discussed above, Plaintiff here must demonstrate it had standing to bring suit as of April 28, 2006, the date the First Amended Complaint was filed. Lt. Col. Doe was indisputably a member of Plaintiff before that date. Even assuming arguendo that Defendants are correct in their assertion that Plaintiff must establish it had standing as of the date the original complaint was filed, however, there is at a minimum a genuine issue of fact as to whether or not Lt. Col. Doe was a member of Plaintiff association on that date. (See id. ¶¶ 3–4.) This genuine issue of fact precludes summary judgment on this basis.[4]

[4]Defendants further appear to argue that Lt. Col. Doe was not a bona fide member of Plaintiff organization at any time. (See Mot. at 11:6–8.) As discussed above, however, it is clear that Lt. Col. Doe was a dues-paying member of Plaintiff organization.

c. Proceeding Pseudononymously

Finally, Defendants argue that Plaintiff should not be allowed to proceed without identifying Lt. Col. Doe by name, and that by allowing them to do so, the Court is departing from its March 21, 2006 ruling. (See Defs.' May 3, 2010 Mem. of P. & A. at 5:11–7:23.) The Court has already held that this case presents the rare set of circumstances in which anonymity is appropriate, however, and declines to revisit this ruling. (See Docket No. 83 at 13:13–20.) The rationale for that ruling is only strengthened by Defendants' refusal to stipulate that Lt. Col. Doe would not be subject to separation proceedings if he were identified by name. (Opp'n at 9:3–6.) Defendants cite Judge Schiavelli's March 21, 2006 Order on this issue, but that Order did not foreclose entirely the possibility that Plainiff could proceed without identifying the members on whom it relies for standing. (See Docket No. 24 at 16:1–17:14.) Accordingly, the Court's ruling that Plaintiff may proceed without identifying Lt. Col. Doe by name is not a "departure" from the March 21, 2006 Order.

2. Terry Nicholson

In addition to Lt. Col. Doe, Mr. Nicholson's membership in Plaintiff association provides a basis for the Court to find Plaintiff has standing here.

In 2006, Plaintiff's Georgia chapter made Mr. Nicholson an honorary member. (Ensley Decl. ¶ 4.) Though Plaintiff does not specify the date in 2006 on which Mr. Nicholson became an honorary member, the parties agree that he signed up to be included in Plaintiff's database in April 2006, (Stmt. of Undisputed Facts ("SUF") ¶ 10; SGI ¶ 10), and Plaintiff's records indicate that Mr. Nicholson has been a member since April 28, 2006. (See Decl. of Terry Hamilton ("Hamilton Decl.") ¶¶ 3–5, Ex. A.) Construing these facts in the light most favorable to Plaintiff, the non-moving party, it appears that Mr. Nicholson was an honorary member at the time the First Amended Complaint was filed, the applicable measuring date here.

Defendants argue that Mr. Nicholson's honorary membership is a nullity because the provision of Plaintiff's bylaws authorizing awards of honorary membership conflict with Plaintiff's articles of incorporation – which provide for a single class of dues-paying members – and thus Plaintiff has no ability to award honorary memberships. Plaintiff maintains that Mr. Nicholson's honorary membership is valid, and even if it were not, sufficient indicia of Mr. Nicholson's membership exist to provide for standing here.

Defendants respond that the line of authority permitting associational standing where sufficient indicia of membership exist is unavailable to Plaintiff, a traditional membership organization, and that in any case, the indicia of Mr. Nicholson's membership are insufficient to confer standing. As the Court finds Defendants have not met their burden of showing that Plaintiff's grant of honorary membership to Mr. Nicholson was invalid, the Court does not reach the question of whether Plaintiff may alternatively obtain standing based on Mr. Nicholson's indicia of membership.

Defendants' argument that Mr. Nicholson's honorary membership is insufficient to confer standing on Plaintiff fails for two reasons. First, although as a general principle of corporate law[5] bylaws that conflict with mandatory provisions of a corporation's articles of incorporation are ultra vires and void, see, e.g., Paolino v. Mace Sec. Int'l, Inc., 985 A.2d 392, 403 (Del. Ch. 2009), Defendants have not shown that the bylaw at issue actually conflicts with Plaintiff's articles of incorporation. In relevant part, Plaintiff's articles of incorporation provide that "[m]embers of the corporation

[5]Defendants have directed the Court to no authority specifically applying the District of Columbia Nonprofit Corporation Act, and the Court has found none; Defendants rely solely on Nev. Classified Sch. Employees Ass'n v. Quaglia, 177 P.3d 509 (Nev. 2008), which appears to have applied Nevada corporate law.

shall be individuals who support the purposes of the corporation and make a financial contribution to the corporation each calendar year," and that "[t]he corporation shall have one membership class." (Reply App. of Evid. Ex. 8 at 2.) It does not, however, contain any provision prohibiting Plaintiff's Board of Directors from using their authority to create additional classes and criteria of membership.

Furthermore, the law of the District of Columbia does not require the harsh result Defendants advocate. The District of Columbia Nonprofit Corporation Act (the "Corporation Act") provides that a nonprofit corporation shall designate its membership class or classes and accompanying qualifications "in the articles of incorporation or the bylaws." D.C. Code § 29-301.12 (emphasis added). The Corporation Act further provides that articles of incorporation shall contain "any provision which the incorporators elect to set forth . . . designating the class or classes of members, stating the qualifications and rights of the members of each class and conferring, limiting, or denying the right to vote." D.C. Code § 29-301.30(a)(5) (emphasis added). Viewed together, these provisions offer flexibility and broad discretion to incorporators as to where they choose to describe membership classes and qualifications. The ability to describe one class of members in the articles

of incorporation and another in the bylaws falls within this broad discretion.

B. Standard of Review

As indicated during the hearing on April 26, 2010, the Court is inclined apply the standard of review set forth in Witt v. Dep't of the Air Force, 527 F.3d 806, 819 (9th Cir. 2008) – i.e., that "when the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in Lawrence, the government must advance an important government interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest" – when considering Defendants' challenge to Plaintiff's substantive due process claim. Neither side addressed whether or not the DADT Policy survives the Witt standard in their papers in support of and opposition to the Motion. The Court thus grants both sides leave to submit further briefing addressing application of the Witt standard of review to the DADT Policy.

IV. CONCLUSION

For the reasons set forth above, the Court DENIES Defendants' Motion to the extent it is based on a lack of standing. The Court grants the parties leave to file supplemental briefs for the sole purpose of discussing

application of the Witt standard to Plaintiff's substantive due process claim. Defendant may file its supplemental memorandum of points and authorities, along with any further supporting evidence, no later than June 9, 2010. Plaintiff may file its response no later than June 23, 2010. Neither side's supplemental memoranda shall exceed fifteen pages, exclusive of tables of contents and authorities.

Dated: May 27, 2010

Virginia A. Phillips

VIRGINIA A. PHILLIPS
United States District Judge