

APPENDIX 3

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION-RIVERSIDE

HONORABLE VIRGINIA A. PHILLIPS, JUDGE PRESIDING

LOG CABIN REPUBLICANS,)	
)	
Plaintiff,)	
)	
V.)	DOCKET NO. CV 04-8425 VAP
)	
UNITED STATES OF AMERICA,)	
et al.,)	
)	
Defendants.)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Riverside, California
Monday, November 16, 2009

PHYLLIS A. PRESTON, CSR
License No. 8701
Federal Official Court Reporter
United States District Court
3470 Twelfth Street
Riverside, California 92501

APPEARANCES

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For the Plaintiff: WHITE & CASE
 By: DAN WOODS
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 Los Angeles, California 90071-2007

For the Defendants: U.S. DEPARTMENT OF JUSTICE
 By: PAUL FREEBORNE
 20 Massachusetts Avenue, NW, Room 6108
 Washington, DC 20001

1 MONDAY, NOVEMBER 16, 2009, RIVERSIDE, CALIFORNIA

2 ---o0o---

3 THE CLERK: May it please the Court. Calling Item
4 No. 5 in the case of plaintiff Log Cabin Republicans versus
5 defendants United States of America, Case No. CV 04-8425.

6 May we have counsel please state your appearances
7 for the record.

8 MR. FREEBORNE: Good afternoon. Paul Freeborne for
9 the government, Your Honor.

10 THE COURT: Good afternoon.

11 MR. WOODS: Good afternoon, Your Honor. Dan Woods
12 from White & Case for plaintiff Log Cabin Republicans.

13 THE COURT: Good afternoon. Both counsel have seen
14 the tentative ruling?

15 MR. FREEBORNE: We have, Your Honor, and just a few
16 points in response.

17 THE COURT: Go ahead.

18 MR. FREEBORNE: Your Honor, we believe we have
19 satisfied both prongs in 1292(b). We don't believe that
20 there is any dispute that the Court's June 9th decision
21 raises controlling issues of law, and we would respectfully
22 submit that we've raised substantial ground for difference of
23 opinion with that order.

24 We also believe that certification now will
25 materially advance the case because, first, on the merits,

1 and I won't repeat our brief, but we believe that there are a
2 number of issues that call out for Court of Appeals'
3 clarification. And again, I won't belabor the points. And
4 they also, those same issues, relate to the discovery that's
5 been propounded by plaintiff.

6 THE COURT: Well, as to the argument that you made
7 about discovery, I doubt that you would go to the Circuit
8 with the argument -- perhaps I'm wrong, but it seems unlikely
9 to me that you would go to the Circuit with the argument that
10 -- well, with the argument that I glean from your papers that
11 it's awfully burdensome for us to answer discovery, so please
12 resolve these issues. I mean that alone I don't think is
13 going to be persuasive.

14 Furthermore, which brings up the issue that I think
15 at this point, at least in the tentative it's in a footnote,
16 but it troubles me that -- it's sort of related to the thing
17 that you first mentioned. I think the first few words out of
18 your mouth were that this ruling came down in June, and if it
19 was so imperative or it would have advanced the timely
20 resolution of this case then the government wouldn't have
21 waited five months or four months to bring this motion.

22 If the government's real motive, without getting
23 into what the government's motive is, if it really would have
24 helped in moving this case along more quickly to have an
25 interlocutory appeal filed, then the government shouldn't or

1 wouldn't have waited four months to file such a motion,
2 number one.

3 And, number two, related to that, in terms of your
4 argument that it's such a burden for the government to
5 respond to discovery on something that the government feels
6 the Court of Appeals would disagree with this Court about,
7 hasn't the government waived any objections to the discovery
8 by failing to respond?

9 MR. FREEBORNE: Your Honor --

10 THE COURT: You filed no responses at all by the
11 deadline.

12 MR. FREEBORNE: Your Honor, we --

13 THE COURT: So you've waived them.

14 MR. FREEBORNE: We responded to all of the
15 discovery. We interjected our objections and tied it to our
16 1292(b) motion. We've made the case --

17 THE COURT: But I don't think that filing a motion
18 preserves your objections. What authority do you have for
19 that?

20 MR. FREEBORNE: Richmark clearly says that as long
21 as the issues are brought before the Court, which we have.
22 We've taken on each of their requests by category and
23 explained why, A, they're improper and, B, why certification
24 now would guide those issues. Our argument before the Court
25 of Appeals --

1 THE COURT: But Richmark doesn't say -- I don't
2 recall that Richmark says that you have preserved your
3 objections by filing this motion, when all you have to do to
4 preserve objections to discovery is file objections to the
5 request to produce documents, which the government didn't do.

6 MR. FREEBORNE: Your Honor, in Richmark what the
7 Court said is, that if the issues are raised before the Court
8 or objected at the time of the motion to compel, there is no
9 grounds for waiver. That is our reading of Richmark. We
10 have --

11 THE COURT: Wait, Wait. I'm sorry. Let's leave
12 aside for the moment the issue of a motion to certify, all
13 right? Are you taking the position that a party can fail to
14 respond to a request for production of documents, wait until
15 the other side files their motion to compel, and you still
16 haven't waived your right to object, because I don't think
17 that's the case.

18 MR. FREEBORNE: Your Honor, again, we've asked the
19 Court to certify its order for --

20 THE COURT: No, that's not my question to you.

21 MR. FREEBORNE: Understood.

22 THE COURT: Leaving aside that issue, let's say
23 that wasn't the issue here. You haven't preserved your --
24 you can't fail to answer discovery, wait for the other side
25 to move to compel, and then say, okay, but now I'm going to

1 object.

2 MR. FREEBORNE: Your Honor, these issues have been
3 aired. We have aired them in our motion. We aired them at
4 the --

5 THE COURT: Well, would you answer my question?

6 MR. FREEBORNE: Well, Your Honor, yes, the normal
7 course is to respond to Rule 34 requests, but here we've
8 interjected a motion.

9 THE COURT: But you haven't responded to the
10 discovery.

11 MR. FREEBORNE: We have though.

12 THE COURT: How?

13 MR. FREEBORNE: We have in our motion.

14 THE COURT: Filing a motion is not the same as
15 responding to the discovery.

16 MR. FREEBORNE: We've responded and we've also
17 interjected case law for --

18 THE COURT: So, your position, just so I understand
19 it, your position is that filing a motion after the deadline
20 to respond to the discovery was sufficient? That's your
21 position?

22 MR. FREEBORNE: We interjected our objections in
23 our motion before the due date, before the due date.

24 THE COURT: So it's before the due date.

25 MR. FREEBORNE: There is no mystery as to what our

1 objections are to the discovery.

2 THE COURT: But you didn't make objections. You
3 filed a motion instead.

4 MR. FREEBORNE: They're objections, Your Honor.

5 THE COURT: You did not make objections. You filed
6 a motion, and in your motion you argue that you shouldn't
7 have to respond to the discovery because you wanted this
8 Court to certify.

9 MR. FREEBORNE: And on that issue, Your Honor --

10 THE COURT: So, if the Court doesn't certify, then
11 you have no objections?

12 MR. FREEBORNE: Your Honor, they're on clear notice
13 of what our objections are. In fact, we have taken them off.

14 THE COURT: You made a gamble here, didn't you?

15 MR. FREEBORNE: Your Honor, again, in our argument
16 to the Court of Appeals it would be more than just burden.
17 We don't believe, A, this case should go forward. We don't
18 believe that they are the proper plaintiff. We don't believe
19 as a facial challenge that they're entitled to discovery. We
20 think on all of those issues, Court of Appeals' clarification
21 would guide discovery, at the very least. We think that
22 we're correct as a matter of law --

23 THE COURT: Why would the Court of Appeals guide
24 discovery? If they disagree with my ruling, which it
25 wouldn't be the first time, it could happen, but why would

1 they get involved with a discovery ruling which hasn't even
2 been made? I mean, there is no motion to compel that's even
3 been made here. I'm not so arrogant that I'm going to
4 predict, but I really think if you're asking the Court -- if
5 you're asking me to certify this to go to the Court of Appeal
6 to make a ruling, an advisory ruling about what discovery
7 should take place when there hasn't even been a motion to
8 compel in this case because you haven't even made objections.

9 MR. FREEBORNE: Your Honor, to be clear, on the
10 controlling questions of law, we think that we would prevail.
11 We think that we've shown that it would not be just a
12 discovery motion. My point is, that clarification after
13 Witt, for example, can a facial claim proceed after the
14 analysis in Witt? If the Court disagrees with us and says,
15 "Yes, a facial claim can proceed, but it must challenge the
16 face of the statute," that would guide discovery.

17 So, we're not saying that we're bringing this
18 before the Court of Appeals to resolve discovery issues.
19 We're saying that that's a necessary byproduct of, at the
20 very least, Court of Appeals' clarification after Witt, which
21 completely changed the landscape and challenged the "Don't
22 Ask, Don't Tell," would, in our view, resolve this case with
23 a ruling and there would be no further proceedings in this
24 court. At the very least, Court of Appeals' resolution as to
25 whether or not facial challenges can proceed after Witt, and

1 we've made our case as to why we believe that they can't.

2 THE COURT: Well, if all of these issues that you
3 think could so clearly make a difference and streamline this
4 case or call for reversal of my order, why did the government
5 wait four or five months before seeking interlocutory appeal?

6 MR. FREEBORNE: Your Honor, when we received their
7 request, 77 requests that seek to probe the motivations of
8 Congress and the Executive when they enacted the statute as
9 well as implementing regulations, we had hoped when the Court
10 saw the scope and breadth of their discovery that the Court
11 would say, yes, it makes sense that --

12 THE COURT: But you didn't give the Court a chance
13 to do that, because instead of bringing a motion for a stay,
14 a protective order, you brought this motion.

15 MR. FREEBORNE: Your Honor, but that is the most
16 efficient way to resolve these issues. Again, the landscape
17 has changed after Witt. The landscape has changed --

18 THE COURT: Excuse me. But wasn't Witt decided
19 before my ruling?

20 MR. FREEBORNE: It was, Your Honor, but now we have
21 the benefit of their discovery, and we believe that --

22 THE COURT: You don't have the benefit of their
23 discovery. First of all, at the hearing on the motion
24 before, discovery was addressed. It's no surprise that the
25 plaintiffs were going to propound discovery. That was

1 argued. It was one of your arguments in favor of granting
2 your motion, so it's not a mystery or a shock that the
3 discovery was propounded.

4 MR. FREEBORNE: That's not my argument, Your Honor.
5 My argument is the breadth of that opinion should astound the
6 Court.

7 THE COURT: Well, my point is, that rather than --
8 if your answer to my question, why did the Government wait so
9 long to bring this motion is, well, we waited until we got
10 the discovery, I'm not satisfied with that answer because, it
11 seems to me, that your remedy, rather than saying, oh, well,
12 now there is grounds to seek certification for an
13 interlocutory appeal, really your remedy was to seek a
14 protective order.

15 MR. FREEBORNE: Your Honor, again, we believe
16 1292(b) resolution is the most efficient way to, in our view,
17 bring this case to a halt. They're an improper party, the
18 plaintiff. We don't believe that --

19 THE COURT: But that's unrelated to the discovery
20 issue. If that was your position -- that is your position,
21 you knew that you could have filed a motion for certification
22 the day after you received my ruling in June.

23 MR. FREEBORNE: And the second part, Your Honor,
24 is, even if we're wrong, even if we receive Court of Appeals'
25 resolution, which this case calls out for, that would guide

1 discovery. And that's why we believe --

2 THE COURT: But it doesn't answer my question as to
3 why, if your ground for seeking an interlocutory appeal and,
4 you know, guidance from the Court of Appeal or you think its
5 so clear that they're not a proper party, you could have
6 filed this motion in June, and you don't have an answer as to
7 why you didn't do that.

8 MR. FREEBORNE: Perhaps. But the argument would
9 have been from their side, you haven't seen our discovery,
10 and as Mr. Woods stood up here and said, our discovery is
11 reasonable. It's not reasonable.

12 THE COURT: If you don't think it's reasonable, you
13 could have moved for a protective order and limited
14 discovery, which you didn't do.

15 MR. FREEBORNE: Your Honor, again, we believe the
16 most efficient resolution is the 1292(b) process.

17 THE COURT: Well, it's not so efficient if you wait
18 five months. That's not efficient. Then you couple that
19 with the fact that you're now making an argument that the
20 government's position may change, which is a question I asked
21 about in January when this case was first transferred to me.

22 MR. FREEBORNE: I didn't understand that part of
23 Your Honor's ruling, but I said that we're here to defend the
24 statute. We are here to defend the statute. That hasn't
25 changed. What we're simply saying is, after Witt the legal

1 landscape has changed and the --

2 THE COURT: But that legal landscape had changed
3 before I got the new briefs and heard your motion. There is
4 no change since. There is no change from when I made my
5 ruling. The legal landscape had changed, that's why I asked
6 the parties to rebrief, and you did rebrief, and I considered
7 your briefs and I issued my ruling.

8 MR. FREEBORNE: I'm saying now what the new
9 discovery interjects, the Court has the opportunity to see
10 the breadth of their discovery. They seek every document
11 relating to "Don't Ask, Don't Tell" throughout the
12 government, as you read their requests.

13 THE COURT: Well, again, I'm repeating myself, but
14 the remedy for that is simple. I'll just say that there's
15 not a motion for protective order that's in front of me.
16 That, of course, if it had been filed, would have been heard
17 by Judge Ike.

18 I'll just say this: That when the matter was
19 argued in front of me in March, one of the arguments that was
20 made that I clearly recall, partly because it was very
21 persuasive, that was made by plaintiff's counsel on what
22 discovery would be propounded, and I'm not saying that it was
23 a promise that this would be the only discovery that would be
24 propounded, but one of the arguments that was made was that
25 the plaintiffs wanted to do discovery on the issue of who had

1 been actually discharged under this policy at different times
2 during the policy's existence; that is, I believe, that part
3 of the plaintiff's theory is that, and I may not be doing
4 quite justice to it, but part of the plaintiff's theory in
5 this case is that the policy has been enforced differently
6 depending on the need for soldiers.

7 And so part of the -- because the Government's
8 argument was very persuasive to me about the discovery, about
9 the problems with discovery, and when plaintiff's counsel
10 made an argument about discovery focused on this issue; that
11 is, the different levels of enforcement of the policy and how
12 that would go to some of the theories advanced in their case,
13 that was persuasive to me about allowing discovery.

14 MR. FREEBORNE: Why we think that's inappropriate,
15 Your Honor, is two reasons. One, it's a facial challenge.
16 It's not an as-applied challenge and, relatedly, they would
17 have to have someone -- they would have to have a member of
18 Log Cabin Republicans who has had the policy misapplied to
19 them. They've only identified Major Nicholson. That's the
20 only member they have identified who does not allege that he
21 was discharged, you know, in times of peace, whereas now they
22 are discharging people in times of war.

23 THE COURT: But my point is a little different. My
24 point is -- and I'm not saying that's the only discovery that
25 I would think is appropriate. My point is, that your

1 argument is that the discovery that was actually propounded
2 is much broader than it ought to be. All right. I'm giving
3 you an example of something that was said during argument,
4 and I'm not making a final ruling on it, but to something
5 that was said during argument that I thought was an example
6 of discovery, without going into your argument about a facial
7 challenge versus an as-applied challenge, that was persuasive
8 to me. All of this could have and, in my view, should have
9 been flushed out, briefed and argued in the appropriate
10 discovery motion.

11 Motion to compel, if you had filed objections then
12 they would have to file a motion to compel. You could have
13 filed a protective order. Either way it would have been
14 briefed under Rule 7.15 and presented to Judge Ike, but
15 that's not what was done.

16 MR. FREEBORNE: Again, Your Honor, on the issue
17 that Your Honor just raised, the standing issue that we
18 raised in the context of the First Amendment ruling by the
19 Court, equally applies to the scenario that you just
20 discussed regarding the purported misapplication of the
21 statute. We believe that, among other issues, the Court of
22 Appeals could clarify standing principles in this case.

23 Your Honor has posited a situation in which we use
24 an admission that somebody is gay for a purpose other than to
25 show propensity to engage in homosexual conduct, and they

1 have not identified a member that would reside within that
2 class of members of plaintiffs, and the same issue presents
3 itself in the scenario that Your Honor just gave. They have
4 to have a member who has been harmed in the way that the
5 Court is discussing. Absent that, they do not have standing,
6 because whatever standing they have as an associational
7 plaintiff is derivative of their members.

8 THE COURT: Well, we go back to one of the prongs
9 that's required for the Court to grant your motion which is a
10 showing that there will be greater efficiency served by
11 having a speedy resolution of these issues. It is hardly
12 speedy to wait four or five months to file this motion after
13 the Court has ruled on standing. It just isn't. And to say
14 that you didn't know the implications of this until you saw
15 the discovery that was propounded, I'm just not persuaded.

16 Let me hear from plaintiff's counsel to address
17 some of the issues you've raised.

18 MR. WOODS: Thank you, Your Honor.

19 I think it's obvious that you have the issues well
20 in mind. We, obviously, agree with the tentative ruling.
21 But let me talk about some of the things that Mr. Freeborne
22 had mentioned or didn't mention, as the case may be. There
23 is no doubt what the legal standard here is or what the
24 elements are. I disagree with Mr. Freeborne's suggestion
25 that it is a controlling question of law as to which there is

1 a substantial ground for difference of opinion.

2 The call, Your Honor, that all you did was to deny
3 a Rule 12 motion in this case, assuming that the facts
4 alleged in the complaint were true, ruled in some causes of
5 action claims for relief that we did state a claim and in
6 others that we didn't. That's all. Mr. Freeborne's motion
7 does not cite any cases that disagree with that. He doesn't
8 cite any conflicting authorities or any conflict among the
9 courts. His written motion rests in part on the Beller case,
10 but in the Witt case the Ninth Circuit destroyed Beller by
11 saying it is, quote, no longer good law.

12 His motion, in part, rests on the Holmes case, but
13 you have already found correctly that the Lawrence case
14 reversed the Bowers case and, therefore, removed the
15 foundation on which the Holmes case rested.

16 It is not enough for the government simply to
17 disagree with your order. That does not satisfy this prong
18 of the required elements of the test.

19 And second, where they have completely fallen down
20 is on showing that an immediate -- underline immediate --
21 appeal would advance the entire ultimate termination of the
22 case. You've pointed out several times that the government
23 should not have waited four months to file this motion, and I
24 don't think you have yet to hear a response to that that's
25 satisfactory.

1 More importantly, perhaps, there is a June 2010
2 trial date in this case. The government's motion ignored
3 that. After we pointed that out in our opposition brief, the
4 government's reply brief ignored that fact, and Mr. Freeborne
5 has still not said how the Ninth Circuit appeal, when we're
6 this close to trial, is going to advance the ultimate
7 termination of the case.

8 This is, Your Honor, as we pointed out, really
9 about the government trying to avoid its obligations under
10 discovery, and whether they've waived their objections to our
11 discovery or not, what they've tried to do is, one way or
12 another, avoid responding to the discovery. Responding to it
13 in a motion to certify an order of interlocutory appeal is
14 not an objection to discovery that's valid. But that's, you
15 know, the next motion that you'll have to hear or Judge Ike
16 will have to hear.

17 I thought you got the gist of our point about the
18 government's violation of Local Rule 7-3, and I thought you
19 were very courteous and generous to allow this motion to even
20 be heard. But the government's position about discovery,
21 Your Honor, ignores the fact that requesting a stay does not
22 give them a stay. There has been no stay in this case of
23 anything, even though the government asked for it, again,
24 without any evidence, as we pointed out in our papers, and
25 without even trying to show you that the elements required

1 for a stay have been satisfied. So, for all those reasons
2 and the reasons in our papers, your tentative ruling is
3 absolutely correct, and I would submit on that, Your Honor.

4 THE COURT: Well, Mr. Freeborne, I think you ought
5 to address, and I probably should have asked you to address
6 in your initial remarks, the Local Rule 7-3 failure.

7 MR. FREEBORNE: Your Honor, again, they concede in
8 their briefs that we've raised no new arguments. They've
9 said before that there is no resolution that's possible on
10 these issues. We had argument before the Court on these
11 issues.

12 THE COURT: Mr. Freeborne, what I often do when I
13 see a motion like yours where there really is no attempt to
14 comply with 7-3 is to issue a two line order saying the
15 motion is denied for failure to comply with 7-3. And the
16 only reason I didn't do that in this case was not because I
17 thought that your arguments about the futility were valid,
18 but because this case has dragged on for so long already that
19 I knew that the motion would come back after, I hope you had
20 a genuine meet and confer.

21 But that rule is not -- you know, if every lawyer
22 took the position that, oh, we won't agree, so I'm just not
23 going to have a meet and confer, we might as well abolish the
24 rule. It requires people to open their minds and meet and
25 confer and try to find common ground and, surprisingly,

1 people do that. I mean maybe that is a surprise, but it
2 shouldn't be because people often do manage to file a motion
3 on more narrow grounds because they have sat down, shared a
4 cup of coffee or lunch, and met and conferred with the spirit
5 of that rule and not just the letter, but you didn't even
6 meet the letter of that rule. And that is not -- the next
7 time -- I mean, I'm just really disappointed in your
8 response.

9 MR. FREEBORNE: Your Honor, I mean, I make that
10 response just because -- I recognize the purpose of the rule,
11 but I also, as I said to Mr. Kahn, given the history of this
12 case in which we've exchanged views, in fact, Mr. Woods and I
13 have exchanged argument before the Court, I sincerely
14 believed that there was no resolution that was possible on
15 this issue, no conceivable resolution of the legal issues
16 that come to bear on this case.

17 I take very seriously we have a good, professional
18 relationship. If I sincerely believed that there was any
19 potential resolution, I was not intending to run afoul of
20 that.

21 THE COURT: Well, you waited four months to file
22 this motion after my ruling and then you couldn't obey the
23 Local Rule that requires you to meet and confer and wait 20
24 days before you filed it. That's very disappointing. You
25 know, I don't like to sanction lawyers, and I particularly

1 don't like to sanction lawyers who are in public service,
2 and I'm not going to, but I'm very disappointed. And I
3 expect no matter how much you think you may disagree and be
4 unable, I expect in the future in this case to have full
5 compliance with the spirit as well as the letter of the Local
6 Rule about meet and confer.

7 MR. FREEBORNE: Yes, Your Honor.

8 THE COURT: Thank you. Did you wish to respond on
9 any of the other issues?

10 MR. FREEBORNE: No, Your Honor. Thank you.

11 THE COURT: I'm going to take the matter under
12 submission.

13 Please return your copies of the tentative ruling
14 to the clerk.

15 (Proceedings concluded)

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C E R T I F I C A T E

DOCKET NO. CV 04-8425 VAP

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and accurate transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

PHYLLIS A. PRESTON, CSR
Federal Official Court Reporter
License No. 8701

DATED: January 19, 2010