Exhibit B

U.S. Department of Justice

Civil Division

Washington, D.C. 20530

January 29, 2010

VIA FEDERAL EXPRESS

Patrick O. Hunnius
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Tel. (213) 620-7714

Re: Log Cabin Republicans v. United States of America, et al.
Case No. 04-CV (C.D. Cal.)

Dear Mr. Hunnius:

This letter sets forth the Defendants' objections to Plaintiff's 30(b)(6) Notice of Deposition received on January 14, 2009. While we understand that the Court has permitted discovery in this case, Plaintiff's Notice seeks testimony regarding matters that are irrelevant to the claims and defenses that remain in this case, legal conclusions, and information that is not known or reasonably available to Defendants. Other areas of testimony identified in the Notice are so vaguely worded that we cannot tell what type of testimony is seeking from Defendants. Unless you withdraw the 30(b)(6) Notice, therefore, Defendants intend to move for the entry of a protective order pursuant to Fed. R. Civ. P. 26(c)(1)(A).

Notwithstanding Defendants' objections, I would point out that the Notice seeks testimony on matters that can be more readily addressed through other means of discovery. Indeed, even though Defendants received it on January 14, 2010, Plaintiff's Notice is dated December 21, 2009, which indicates that it was propounded prior to Defendant's production of 7,000 pages of materials, including statistical information and studies and reports, which address certain areas identified in the Notice. Moreover, the Notice seeks testimony on many of the same matters addressed in Plaintiff's Interrogatories and First and Second Sets of Requests for Admission. Defendants thus intend to move, pursuant to Fed. R. Civ. P. 26(c)(1)(C), for entry of a protective order regarding subjects that can be addressed more readily through alternative, less burdensome means of discovery.

I. The Application of the Statute to Women, to Other Groups, and in Particular Circumstances Are Not Appropriate Subjects of Discovery in Plaintiff's Facial Challenge

The Notice seeks testimony regarding the application of the DADT policy to women in the United States Armed Forces to purportedly show that the policy disproportionately impacts women. See Notice ¶ II.1. Testimony regarding the impact of the policy on women is not relevant – and not likely to lead to the discovery of admissible evidence. Plaintiff lacks standing to bring such a claim; the only members Plaintiff has identified among its membership are Mr. Nicholson and John Doe, both of whom are male. Plaintiff has not identified any women among its membership who have been purportedly affected by the policy. Because Plaintiff's associational standing only extends to the type of harm suffered by its members, see Hunt v. Washington State Apple Adver. Comm'n v. Advertising Comm'n, 432 U.S. 333, 343 (1977) (recognizing that associational plaintiff's standing only extends to matters for which "members would otherwise have standing to sue in their own right"), it lacks associational standing to challenge the policy's impact on women. Such a claim of disparate treatment, moreover, is an equal protection, not a substantive due process, challenge. As you know, the Court's June 9, 2009 Order dismissed Plaintiff's equal protection claim. And to the extent Plaintiff is positing a misapplication of the statute and implementing regulations, such a theory falls far outside of the facial claim Plaintiff presents, which presumes a proper application of the statute and regulations.

In addition, to the extent relevant, the information Plaintiff seeks concerning the application of the policy to women, other groups, and in particular circumstances[1] is more properly sought though alternative forms of discovery. Defendants have attempted to be as forthcoming as possible in discovery, producing over 7,000 pages of materials in response to Plaintiff's Requests for Production of Documents. Plaintiff drafted this notice before it had the opportunity to review Defendants' document production, which included hundreds of pages of statistical information regarding the policy. The Government has also responded to, among other things, Plaintiff's First Set of Requests for Admission, including those requests that address statistical information regarding the application of the statute. To the extent that statistical information regarding how the policy has been applied to women and other groups or in certain circumstances is relevant to Plaintiff's remaining claims, responses to these discovery requests address that subject.[2]

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[1] See Notice ¶'s 2 (application of the statute to "medical, linguistic, administrative, or other non-combat assigned service members), 3 (application of statute to service members deployed overseas to areas of combat from 2001 to present), 9 and 10 (deployment of "known" or "suspected gay or lesbian" service members) and 12 (general statistics regarding total number of discharges by occupation).

[2] The information sought in paragraphs 3, 9, and 10 does not exist. With respect to paragraph 3, the statute applies regardless of whether a service member is deployed overseas or stationed in the United States. Paragraph 9 requests testimony regarding the application of the

II. The Effect of *Lawrence v. Texas* and Whether Unit Cohesion, Privacy, and Sexual Tension Forms a Rational Basis for the Statute Are Not Appropriate Subjects for Discovery

Plaintiff's demand that Defendants produce "officers, directors, managing agents and other persons" to provide testimony regarding "[t]he effect of Lawrence v. Texas, 539 U.S. 558 (2003) on the Policy, the application of the Policy, or the legality of the Policy," see Notice ¶ 5, and the rationality of the Policy, see Notice ¶'s 4 and 8, is also beyond the scope of appropriate discovery. As an initial matter, it is well-established in this Circuit (and others) that a witness cannot be called upon to testify as to a legal conclusion. United Stats v. Crawford, 239 F.3d 1086, 1090 (9th Cir. 2001), Evangelista v. Inlandboatmen's Union of Pac., 777 F.2d 1390, 1398 n.3 (9th Cir. 1985); Quicksilver v. Kymsta Corp., 247 F.R.D. 579, 585 (C.D. Cal. 2007).

The Ninth Circuit, moreover, has recognized that the Government "has no obligation to produce evidence to sustain the rationality of a statutory classification" set forth in the "Don't Ask, Don't Tell" ("DADT") statute. Philips v. Perry, 106 F.3d 1420, 1425 (9th Cir. 1997)(quoting Heller v. Doe, 509 U.S. 312, 320 (1993), which, in turn, quotes FCC v. Beach Communications, 508 U.S. 307, 313 (1993)). Such a legislative choice is not subject to "factfinding" – and may be based on "rational speculation unsupported by evidence and empirical data." Phillips, 106 F.3d at 1425 (quotations and citations omitted). "[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." Id. (same). Indeed, it is well-settled in this and other Circuits that judicial deference is greatest when, as here, legislative action is taken under the "congressional authority to raise and support armies and [make] rules and regulations for their governance[.]" Id. It is especially true given that the statute was "extensively considered by Congress in hearings, committee and floor debate." Id.

The Ninth Circuit already has observed that Congress and the military found in 1993 that the statute was "necessary to further military effectiveness by maintaining unit cohesion, accommodating personal privacy and reducing sexual tension." Id. at 1429. Discovery into these subjects is thus improper. As Judge Noonan recognized in his concurring opinion in Philips,

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statute to "the deployment of known or suspected gay or lesbian service members." As noted, however, the statute applies in the same manner to deployed and non-deployed service members – and the Department of Defense does not discharge service members who are "suspected" of being homosexual. Paragraph 10 is vague; Defendants note, however, that the Department of Defense only tracks discharges – not service members subject to investigation or who are in the "process of discharge proceedings." Defendants also reserve the right to assert privilege, including the deliberative process. Paragraph 3 of the Notice calls for Defendants' "consideration, discussion or deliberation" of whether to suspend either the statute or any investigation. To the extent such deliberations exist, they are subject to privilege under the deliberative process privilege, the attorney-client privilege, and/or the work-product doctrine. Paragraph 14 similarly calls for deliberative materials that are subject to privilege protection.

permitting judges to weigh the merits of such a policy requires courts "to take from the President and assign to [themselves] a responsibility for a supervision of military discipline unknown to the Constitution and our traditions and beyond [their assigned] roles as judges of the United States." Id. at 1430. Such judgments are to be based solely upon the professional judgment of Congress and the military regarding the needs of the military and are not amenable to factual or "empirical" proof. Id. at 1432.

Given this well-settled precedent, Defendants object to designating witnesses to speak to legal questions or to testify about the rational bases for the statute. Defendants have clearly stated that they intend to defend the statute by relying on its text and legislative history. Defendants do not plan to call witnesses to testify concerning the rational bases of the statute – the legislative history is more than sufficient in that regard – and should not be forced to provide such witnesses to Plaintiff.

Pursuant to Fed. R. Civ. P. 26(c)(1)(A), Defendants thus intend to move for the entry of a protective order prohibiting inquiry into these subjects. The bases for the statute identified by the Ninth Circuit – unit cohesion, sexual tension and privacy – are well known to the parties. Indeed, they are set forth in the applicable case law. Defendants' legal position regarding Lawrence and the policy is also well known, having now been extensively briefed and argued by the parties in this case. To the extent Plaintiff seeks attorney work-product or other privileged material under the Notice, that provides further grounds for the entry of a protective order. See e.g., SEC v. Jasper, No. 07-6122, 2009 WL 1457755 (N.D. Cal.) (Rule 30(b)(6) deposition notice may be quashed and a protective order entered to protect attorney work-product).

III. Defendants Are Unable to Designate an Executive Agency Witness to Testify Regarding Information No Agency Officer Knows or Can Reasonably Obtain

The Notice also improperly demands that Defendants name a deponent to testify to matters that no agency officer knows or can reasonably obtain. Plaintiff's attempted use of Fed. R. Civ. P. 30(b)(6) is wholly improper. See Kay Beer Distributing, Inc. v. Energy Brands, Inc., 2009 WL 3170886, *4 (E.D. Wis. 2009) (plaintiff "misinterprets the scope of the duties placed on corporate representatives under Rule 30(b)(6). The person designated does not become a private investigator of the party noticing the deposition–he is only required to provide testimony about information known or reasonably available to the organization."); Dravo Corp. v. Liberty Mut. Ins. Co., 164 F.R.D. 70, 76 (D. Neb. 1995) ("If [defendant] does not possess such knowledge as to so prepare [its proffered 30(b)(6) witness] or another designate, then its obligations under Rule 30(b)(6) obviously cease, since the rule requires testimony only as to "'matters known or reasonably available to the organization,'" quoting Fed. R. Civ. P. 30(b)(6)).

Paragraph 6 of the Notice calls for the designation of a 30(b)(6) witness to provide testimony regarding "[r]eports, studies, analyses conducted by or on behalf of Defendants relating to the experience of the armed forces of nations other than the United States with military service by individuals with a homosexual orientation or by individuals who engage in homosexual conduct, including the consideration or evaluation of such service by those foreign states or their armed services." The Department of Defense has not conducted its own independent study of the experience of other nations regarding gay and lesbian service members and their military service.

Paragraph 7 of the Notice calls for the designation of a 30(b)(6) witness to provide testimony regarding "[r]eports, research, or analysis concerning United States Armed Forces personnel and homosexual conduct or homosexual orientation commissioned, required, or received by Defendants[.]" The Department of Defense has not conducted or commissioned such a "report, research, or analysis." And while the Notice fails to explain what type of testimony is sought, to the extent it is requesting that Defendants provide a government witness to testify about the findings and conclusions of private contractors, Defendants are without the knowledge contemplated for a Rule 30(b)(6) deposition regarding those subjects.

Paragraph 11 of the Notice calls for the designation of a 30(b)(6) witness to testify about "[t]he recruiting and hiring policies of private contractor corporations employed since 2002 by the United States in Iraq or Afghanistan, specifically relating to any non-discrimination policies or guidelines as to those policies." Again, the Notice is vague: It is unclear whether the Notice calls for the designation of a Government officer or agent to testify about the hiring practices of private contractors. To the extent it does, Defendants are without knowledge regarding such subjects. To the extent the Notice is requesting information about what non-discrimination policies are required under the Federal Acquisition Regulations ("FAR") and how the FAR applies to government contracts, information relating to these subjects can be obtained in the FAR.

Paragraph 15 of the Notice calls for the deposition of a 30(b)(6) witness regarding "[p]olls conducted by on behalf of the Defendants measuring public opinion regarding service by gay and lesbian individuals[.]" The Department of Defense has not conducted or commissioned any such poll.

Paragraph 16 of the Notice calls for the designation of a 30(b)(6) witness to testify about the "fiscal impact of the Policy, including any studies, reports, research or analysis regarding the expenses associated with the Policy, the costs of recruiting additional personnel to replace service members discharged pursuant to the Policy, and the costs expended training service members discharged pursuant to the Policy." As you know, the Government Accountability Office provided estimated costs in 2005, but that Office is an arm of Congress, not an Executive Branch agency.

IV. Testimony Regarding Enlistment Waivers is Irrelevant to the Issues in This Case

Paragraphs 13 and 14 of the Notice demand the designation of a witness to testify regarding enlistment waivers for applicants for the Military Services. Such testimony is completely irrelevant. Directive-Type Memorandum ("DTM") 08-018, which governs such waivers, has no application to the DADT statute. Defendants will thus move to quash such testimony pursuant to Fed. R. Civ. P. 26(c)(1)(A), as irrelevant to the claims and defenses that remain.

V. Other Subjects Are Properly Addressed Through Alternative Means of Discovery

The final paragraph of the Notice (paragraph 17) seeks the identity of the person(s) responsible for administering the DADT Policy. That information can be more readily obtained through interrogatories. Absent agreement that such matters can be more readily addressed through alternative, less burdensome forms of discovery, Defendants intend to move for the entry of a protective order.

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Pursuant to Local Rule 37-1 and Fed. R. Civ. P. 26(c)(1), please let us know when you are available to meet and confer regarding these objections in an effort to resolve the dispute without court action.

Sincerely,

Paul G. Freeborne
Federal Programs Branch
Civil Division