TONY WEST
Assistant Attorney General
ANDRÉ BIROTTE, Jr.
United States Attorney
JOSEPH H. HUNT
VINCENT M. GARVEY
PAUL G. FREEBORNE
W. SCOTT SIMPSON
JOSHUA E. GARDNER
RYAN B. PARKER
U.S. Department of Justice
Civil Division
Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 353-0543
Facsimile: (202) 616-8460
E-mail: paul.freeborne@ usdoj.gov

Attorneys for Defendants United States of America and Secretary of Defense

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

LOG CABIN REPUBLICANS, Plaintiff, v. UNITED STATES OF AMERICA AND ROBERT M. GATES, Secretary of Defense, Defendants.	No. CV04-8425 VAP (Ex) DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT DATE: April 26, 2010 TIME: 2:00 p.m. BEFORE: Judge Phillips

Filed herewith:
1. Notice of Motion and Motion for Summary Judgment
2. Memorandum of Points And Authorities in support of Motion for Summary Judgment
3. Statement of Uncontroverted Fact and Conclusions of Law
4. Appendix
5. Proposed Order

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

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

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

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

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CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
P.O. BOX 883, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044
(202) 353-0543

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

Defendants are also entitled to summary judgment with respect to LCR's remaining First Amendment claim. While the Court recognized, in its 2009 Order, that Section 654 was consistent with the First Amendment to the extent it permits the military to use statements as admissions of a propensity to engage in homosexual acts, the Court ruled 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." (Doc. 83 at 23). The Court thus suggested that the statute was unconstitutional to the extent it required the military to discharge service members based on statements other than when those statements were used as an admission of a propensity to engage in homosexual acts. Therefore, the Court concluded that it could not "determine from the face of" LCR's complaint "whether Nicholson was, or Doe could yet be, discharged based on statements" that were used for such a purpose. *Id.*

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P.O. BOX 883, BEN FRANKLIN STATION
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Discovery has confirmed that Mr. Nicholson was discharged because his statement that he was gay constituted an admission of his propensity to engage in homosexual acts, a presumption that he chose not to rebut. Mr. Nicholson, thus, indisputably was not discharged on the basis of a statement not used as an admission of a propensity to engage in homosexual acts. As for John Doe, whether or not he is an active member of LCR, he remains an active member of the military; he has not been discharged. LCR has failed to demonstrate that any action has been taken against John Doe on any basis whatsoever, let alone any basis related to the DADT. There is nothing in the record to establish that any statement made by or about John Doe has been used for any purpose. The claims the Court allowed LCR to seek to cure and pursue through an amended complaint, therefore, are wholly unsupported by any record evidence, and Defendants are entitled to summary judgment on all remaining claims.

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

Dated: March 29, 2010

Respectfully submitted,

TONY WEST
Assistant Attorney General

ANDRÉ BIROTTE, JR
United States Attorney

JOSEPH H. HUNT
Director

VINCENT M. GARVEY
Deputy Branch Director

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
P.O. BOX 883, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044
(202) 353-0543

/s/ *Paul G. Freeborne*

PAUL G. FREEBORNE
W. SCOTT SIMPSON
JOSHUA E. GARDNER
RYAN B. PARKER
Trial Attorneys
U.S. Department of Justice,
Civil Division
Federal Programs Branch
20 Massachusetts Ave., N.W.
Room 6108
Washington, D.C. 20044
Telephone: (202) 353-0543
Facsimile: (202) 616-8202
paul.freeborne@usdoj.gov

Attorneys for Defendants United States of America and Secretary of Defense