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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' STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW [PROPOSED] HEARING DATE: April 26, 2010 TIME: 2:00 p.m. BEFORE: Judge Phillips

Defendants' Motion for Summary Judgment having come on for hearing, and the Court having considered the pleadings, evidence presented, and memorandum of points and authorities, the Court makes the following Findings of Fact and Conclusions of Law:

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I.

PROPOSED FINDINGS OF FACT REGARDING PLAINTIFF'S ASSOCIATIONAL STANDING

1. Plaintiff, Log Cabin Republicans (LCR), filed a complaint on October 12, 2004 (Doc. 1), challenging the constitutionality of the "Don't Ask, Don't Tell" (DADT) policy.

2. Defendants United States and the Secretary of Defense moved to dismiss, arguing, among other things, Plaintiff failed to establish associational standing by identifying by name a current member who had been harmed by the policy (Doc. 9 &12).

3. In ruling on Defendants' motion to dismiss for lack of standing, the Court held that LCR had not identified any member of its organization who had been personally harmed by the DADT policy (Doc. 24).

4. The Court, therefore, granted the motion to dismiss without prejudice and "ordered" LCR "to identify, by name, at least one of its members injured by the subject policy" (Doc. 24 at 17). Such named member would have to "submit a declaration establishing that he or she: (1) is an active member of the organization; (2) has served or currently serves in the Armed Forces; and (3) has been injured by the policy" (Doc. 24 at 17).

5. In purported compliance with the Court's Order, LCR filed an amended complaint and a declaration from John Alexander Nicholson on April 28, 2006 (Docs. 25, 26).

6 The First Amended Complaint alleged that Mr. Nicholson was a member of LCR and that he had been discharged pursuant to the DADT policy (Doc. 25 ¶¶ 13-14).

7. Mr. Nicholson's April 2006 declaration stated in part, "I am a member of the Log Cabin Republicans" (Doc. 26 ¶ 2).

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8. The organization's bylaws, at both the national and the local level, require payment of dues to retain membership, and one becomes a member by paying dues to the national organization or to a local chapter (Hamilton Dep. 23:2-12; 29:19-30:16, Mar. 13, 2010, Ex. 1).[1]

9. As of his deposition in March 2010, Mr. Nicholson had never paid dues to LCR; he merely "signed up to be a part of [the organization's] database" (Nicholson Dep. at 9:14-10:7, Mar. 15, 2010, Ex. 2).

10. Mr. Nicholson "signed up to be a part of [the organization's] database" in April 2006 (Nicholson Dep. at 9: 17-18, Mar. 15, 2010, Ex. 2) – the same month he signed the declaration in this case (Doc. 26).

11. The First Amended Complaint also alleged that another purported member of LCR, John Doe (anonymous), was then enlisted in the Armed Forces (Doc. 25 ¶ 20).

12. John Doe remains a member of the military, and thus has not been discharged – whether because of a statement or for any other reason (Hamilton Dep. 8:16-21, 33:17-35:20, Ex. 1). And there is no other record evidence to demonstrate that the DADT policy has ever been applied to John Doe, or that any statement he has made has been used by the military for any purpose, let alone for any purpose in connection with its application of the DADT policy.

II.

CONCLUSIONS OF LAW REGARDING PLAINTIFF'S STANDING

The power of federal courts extends only to Cases and Controversies, *see* U.S. Const. art. III, § 2, and a litigant's standing to sue is "'an essential and unchanging part of the case-or-controversy requirement.'" *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992) (citation

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[1] The transcript of the deposition of Terry Hamilton and of all other depositions cited herein have previously been lodged with the Court (Doc. 129).

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omitted). "Standing is determined as of the commencement of litigation." *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1171 (9th Cir. 2002). "The party seeking to invoke the jurisdiction of the court has the burden of alleging specific facts sufficient to satisfy" the requirements of standing. *Schmier v. U.S. Court of Appeals*, 279 F.3d 817, 821 (9th Cir. 2002).

An organization may have standing to bring suit on behalf of its members, but must demonstrate, among other requirements, that those members "would otherwise have standing to sue in their own right." *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L.Ed.2d 383 (1977). The persons whose interests an organization seeks to pursue must actually be members of the organization. *Cf. Washington Legal Found. v. Leavitt*, 477 F. Supp. 2d 202, 208 (D.D.C. 2007) (listing the "indicia of membership" in an organization without formal members as "(i) electing the entity's leadership, (ii) serving in the entity, and (iii) financing the entity's activities") (*citing Hunt*, 432 U.S. at 344-45). In addition, an organization's claim to associational standing is "weakened" if the members on which it relies were "manufactured . . . after the fact" for purposes of the litigation. *Washington Legal Found*, *id.* at 211.

It is, of course, an irreducible requirement that a plaintiff have a personal interest in a case sufficient to confer standing from the commencement of litigation and throughout its existence. *See Friends of the Earth v. Laidlaw Envir. Servs.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). This is especially so in cases based on associational standing. *See Biodiversity*, 309 F.3d at 1171. The Court thus ordered LCR to submit a declaration from someone demonstrating, among other things, that "he or she: (1) is an active member of the organization" (Doc. 24 at 17). Despite that opportunity, discovery now demonstrates that that Mr. Nicholson was not "an active member" of LCR when this action was commenced in 2004 or upon amendment. Indeed, Mr. Nicholson has never been a

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bona fide or "active member" of LCR and thus was not "an active member" even when it submitted Mr. Nicholson's declaration to the Court; at that point, and only at that very point, had Mr. Nicholson merely "sign[ed] up to be a part of [LCR's] database" (Nicholson Dep. at 9:21-10:4, Ex. 2).

Even if Mr. Nicholson had been "signed up" at the time this action was commenced, or even if he was "signed up" when the Court directed LCR to submit a declaration from "an active member," Mr. Nicholson was not, nor has he ever been, a bona fide or active member of LCR sufficient to permit the organization to qualify for associational standing. At his deposition in 2010, Mr. Nicholson conceded that he did not pay dues as required by the organization's own bylaws (Nicholson Dep. at 9:14-10:7, Ex. 2; Hamilton Dep. at 29:19-30:16, Ex. 1). *Cf. Washington Legal Found.*, 477 F. Supp. 2d at 208 (listing "financing the entity's activities" as one "indicia of membership"). Merely entering Mr. Nicholson's name into LCR's "database" did not make him a member under the bylaws (Nicholson Dep. 9:14-10:7, Ex. 2). Indeed, LCR's claim to associational standing is dramatically "weakened" to the extent it was "manufactured . . . after the fact" for purposes of the litigation. *Washington Legal Found*, *id.* at 211. But under no circumstances can LCR demonstrate, based on the record, that through Mr. Nicholson it has met the "irreducible requirement" that it demonstrate standing from the commencement of the litigation and throughout its existence. *Friends of the Earth*, 528 U.S. at 189.

LCR cannot establish standing based upon the anonymous John Doe. While the First Amended Complaint also alleged that another member, John Doe (anonymous), was then enlisted in the Armed Forces (Doc. 25 ¶ 20), LCR has wholly failed to show that John Doe has paid dues or has been aggrieved by the statute it challenges. John Doe is a member of the military and has never been discharged, let alone by application of the DADT policy. There is no evidence to

demonstrate that the DADT policy has ever been applied to John Doe, or that any statement he has made has been used by the military for any purpose, let alone for any purpose in connection with its application of the DADT policy.

Doe's asserted harm is based solely upon some future, possible, conjectural, or hypothetical application of the policy to him. But an injury must be "both 'concrete' and 'actual or imminent, not conjectural or hypothetical'" to confer standing. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771, 529 U.S. 765, 120 S. Ct. 1858 (2000) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)). An allegation of injury that is "remote, contingent and speculative," and that consists of "nothing more than the bare possibility of some injury in the future," fails to present a justiciable question. *Gange Lumber Co. v. Rowley*, 326 U.S. 295, 305, 66 S. Ct. 125, 90 L. Ed. 85 (1945).

This is especially so here where the relief sought is declaratory and injunctive relief. Where such relief is sought, a plaintiff must first show that "the injury or threat of injury" resulting from official conduct is both "'real and immediate,' not 'conjectural' or 'hypothetical.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983); *see Nat'l Treasury Employees Union v. Dep't of the Treasury*, 25 F.3d 237 (5th Cir. 1994) (rejecting assertion of organizational standing where allegation of any injury to members is "only hypothetical and conjectural"); *see also Hodgers-Durgin v. de la Viña*, 199 F.3d 1037, 1039 (9th Cir. 1999) (finding lack of standing due to "insufficient likelihood of future injury").[2] It is LCR's burden to establish standing, and it has failed to do so here through its presentation of speculative allegations about an

[2] John Doe's alleged "fear of investigation . . . and other negative repercussions resulting from enforcement of the [DADT] Policy" (Doc. 39) is both too subjective and too speculative to be the basis for standing. *Cf. Lyons*, 461 U.S. at 102 (mere threat of prosecution is insufficient to establish harm necessary for standing).

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anonymous "member."[3] Because this Court lacks subject-matter jurisdiction, Defendants are entitled to judgment as a matter of law and there is no need to reach the merits.

III.

CONCLUSIONS OF LAW REGARDING PLAINTIFF'S FACIAL SUBSTANTIVE DUE PROCESS CLAIM

Even if the Court were to reach the merits, however, to survive summary judgment with respect to its substantive due process claim, LCR has not carried its burden in a facial challenge of negating each and every constitutional application of the statute. Ninth Circuit precedent forecloses it from doing so. In *Philips v. Perry*, the Ninth Circuit already has observed that Congress could have rationally found the DADT policy to be necessary to "further military effectiveness by maintaining unit cohesion, accommodating personal privacy and reducing sexual tension." *Id*. at 1429. The Ninth Circuit in *Philips* continued by acknowledging that "we cannot say that the Navy's concerns are based on 'mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable' by the military. Nor can we say that avoiding sexual tensions lacks any 'footing in the realities' of the Naval environment in which Philips served." *Id.* (*quoting Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448, 105 S. Ct. 3249, 87 L.Ed.2d 313 (1985)). In light of that finding, LCR now has the burden of showing that these legitimate applications of the policy, as already found by the Ninth Circuit, are invalid.

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[3] The membership deficiencies identified through discovery regarding Mr. Nicholson, moreover, causes the Court to be skeptical of LCR's invitation to rely on its assertions about an anonymous John Doe as the basis to adjudicate a constitutional challenge to a statute that the Ninth Circuit already has determined to have been supported by a rational basis. *See Philips v. Perry*, 106 F.3d 1420, 1429 (9th Cir. 1997); *see Young America's Found. v. Gates*, 560 F. Supp. 2d 39, 49-50 (D.D.C. 2008) (expressing doubt regarding assertion of associational standing based on alleged harm to anonymous members, because, in light of anonymity, "[t]here [was] no way to tell" whether alleged members were still in a position to benefit from the relief requested).

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LCR has failed to make the showing required of it upon summary judgment. "A facial challenge to a legislative Act is the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).[4] In reviewing such a challenge, courts must be "careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases," and should act with caution because "facial challenges threaten to short circuit the democratic process." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-50, 128 S. Ct. 1184, 1190, 170 L. Ed. 2d 151 (2008).

Plaintiff's burden is particularly high here, because the Court has ruled already that LCR may not "rely upon [the] heightened scrutiny standard [adopted in *Witt*] as the Ninth Circuit limited this standard to as-applied challenges," and that this challenge is thus governed instead by the most deferential form of review available – the rational basis test (Doc. 83 at 17). Under that standard, the only question presented is whether Congress "rationally *could have believed*" that the conditions of the statute would promote its objective. *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-72, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981) (emphasis in original).

The Supreme Court has held that the rational basis test "is not subject to courtroom fact-finding," and rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Fed. Commuc'ns Comm'n v. Beach Commc'ns*, 508 U.S. 307, 315, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993). The Government, therefore, has "no obligation to produce evidence to

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[4] The Ninth Circuit has made clear that "[o]ur court adheres to [the *Salerno*] standard, notwithstanding the plurality opinion in the *City of Chicago v. Morales*, 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999)." *United States v. Inzunza*, 580 F.3d 896, 904 n.4 (9th Cir. 2009).

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sustain the rationality of a statutory classification." *Heller v. Doe*, 509 U.S. 312, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993). Rather, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111, 99 S. Ct. 939, 59 L. Ed. 171 (1979). "Only by faithful adherence to this guiding principle of judicial review," the Supreme Court has cautioned, "is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365, 93 S. Ct 1001, 35 L. Ed. 2d 351 (1973).

In *Philips*, 106 F.3d at 1429, the Ninth Circuit already has determined that "circumstances exist[] under which the [DADT policy] would be valid." *Salerno*, 481 U.S. at 745. Indeed, the Ninth Circuit has found that the DADT policy is valid under any of the following circumstances – to preserve unit cohesion, to accommodate personal privacy, and to reduce sexual tension so as to enhance military preparedness and effectiveness. *Philips*, 106 F.3d at 1429. LCR, moreover, has failed to carry its burden of showing that Congress could not have relied upon these consideration when in enacted the statute, as it is required to do under rational basis review. Defendants are accordingly entitled to summary judgment with respect to LCR's facial substantive due process challenge.

IV.

PROPOSED FINDINGS OF FACT REGARDING PLAINTIFF'S FIRST AMENDMENT CHALLENGE

The Court already has recognized that DADT policy is 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 nonetheless ruled in its June 9, 2009 Order that "[d]ischarge on the basis of statements not used

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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 suggested in that regard that LCR could pursue this claim only by showing that the military discharges service members based upon the use of a statement for a purpose other than as an admission of a propensity to engage in homosexual acts, but concluded that it could not "determine from the face of" LCR's complaint "whether Nicholson was, or Doe could yet" be discharged on a such a basis. *Id*. Discovery has now confirmed that:

1. 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 gave his commander a letter stating that "[a]fter considerable thought, [he had] come to the decision to make the very difficult disclosure that [he was] gay" (Nicholson Dep. 43:17-44:6, 58:21-59:12, Ex. 2 & Ex. 6). Mr. Nicholson stated in the letter, moreover, that he knew this disclosure would "require[ ] [his] involuntary discharge," but that he "chose to simply tell the truth and come out" (Nicholson Dep. 51:1-9, Ex. 2 & Ex. 6). Further, Mr. Nicholson's attorney stated in his own letter to the commander that Mr. Nicholson had asked the attorney "to assist [him] in disclosing his sexual orientation to the Army" (Nicholson Dep. 59:18-60:3, Ex. 2 & Ex. 7). The attorney's letter also stated that Mr. Nicholson was aware that this disclosure "create[d] a rebuttable presumption that he [had] the propensity to engage in 'homosexual conduct,'" but that Mr. Nicholson "elect[ed] not to rebut this presumption" (Nicholson Dep. 62:2-63:3, Ex. 2 & Ex. 7). Mr. Nicholson was thus discharged from the Army as a result of his admission of a likelihood of engaging in homosexual acts, which he chose not to rebut (Nicholson Dep. 63:4-11, 75:21-76:4, Ex. 2).

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2. As for the anonymous John Doe on whom LCR also seeks to rely, he remains a member of the military, and thus has not been discharged – whether because of a statement or for any other reason (Hamilton Dep. 8:16-21, 33:17-35:20, Ex. 1). No statement has thus been used as the basis to discharge John Doe under the challenged statute or otherwise.

V.

CONCLUSIONS OF LAW REGARDING PLAINTIFF'S FIRST AMENDMENT CHALLENGE

The undisputed facts put forth by LCR establish that service members who state that they are homosexual are discharged under the policy solely because such statements establish the service members' propensity to engage in homosexual acts, which the Court already has recognized in its June 9, 2010 fully comports with the requirements of the First Amendment. And given that LCR has presented no member to whom the policy has been applied based upon a statement of homosexuality, where that statement was used for a purpose other than as an admission of a propensity to engage in homosexual acts, LCR also lacks associational standing to pursue its remaining First Amendment claim. *See Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 476 n.14, 102 S. Ct. 752, 70 L.Ed.2d 700 (1982) (where organization relies entirely on associational standing, "its claim to standing can be no different from those of the members it seeks to represent").

Defendants are thus entitled to judgment in their favor.

DATED:

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Hon. Virginia A. Phillips
United States District Judge

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