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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' REPLY IN SUPPORT OF MOTION FOR REVIEW OF MAGISTRATE JUDGE'S DISCOVERY RULING DATE/TIME: EXPEDITED RULING REQUESTED; DISCOVERY MATTER BEFORE: Judge Phillips

INTRODUCTION

Plaintiff does not dispute the primary point raised in Defendants' motion. As noted in Defendants' opening memorandum (Doc. 135), in the unique circumstances of this case, Defendants cannot in good faith "unqualifiedly admit or deny" Requests 3, 4, and 5 of Plaintiff's Requests for Admission ("Requests") because the United States does not have a single position on the questions

presented; as noted, the positions of the Executive Branch (as articulated by the President) and Congress differ on these questions. The only good faith response Defendants can thus make to these requests is a qualified response, which Fed. R. Civ. P. 36(a)(4) expressly permits. Plaintiff's only argument is that Defendants have somehow failed to argue that the Magistrate Judge was incorrect in his ruling that the United States must unqualifiedly admit these requests. Because the Magistrate's ruling is beyond the bounds of Rule 36, however, his ruling is erroneous and contrary to law, and, accordingly, should now be reversed.

ARGUMENT

Each of the arguments Plaintiff presents in support of the Magistrate's ruling fail to recognize that Fed. R. Civ. P. 36(a)(4) expressly permits a party to provide a qualified response to a request where "good faith" requires such a response. An unqualified response to Requests 3, 4, and 5, as ordered, under the unique circumstances presented here, would neither be accurate nor appropriate.

Ignoring the express language of Rule 36(a)(4), Plaintiff argues (Pl's Opp. at 6), that Defendants do "not even attempt to show that Magistrate Judge Eick's ruling was erroneous or contrary to law on the issue of a party's obligation to respond to requests for admission." A Magistrate's ruling is erroneous or contrary to law if it "does not comport with the standards set out in the statutes, ***rules***, and cases[.]" *Grimes v. City and County of San Francisco*, 951 F.2d 236, 241 (9th Cir. 1991) (emphasis added). Because Fed. R. Civ. P. 36(a)(4) expressly permits a party to provide a qualified response to a request where "good faith" requires it, the Magistrate's ruling directing otherwise is erroneous and contrary to law; Defendants have explained clearly why a qualified response is the only appropriate response in these circumstances, and the rules permit Defendants to make it.

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Plaintiff invokes *Marchand v. Mercy Medical Center*, 22 F.3d 933 (9th Cir. 1994), in support of the Magistrate's ruling (Pl's Opp. at 6), but *Marchand* did not address the situation in which a qualified response was required; the case instead addressed objections that were determined to be inappropriate and a denial that "had no reasonable basis" in the record. *Id*. at 938. To the extent *Marchand* has any relevance, it acknowledges that a party may "admit [a request] to the fullest extent possible, and explain in detail why other portions of a request may not be admitted." *Id*., *citing Holmgren v. State Farm Mutual Auto. Ins. Campaign*, 976 F.2d 573 (9th Cir. 1992) (recognizing that under Fed. R. Civ. P. 36(a)(4) a party may provide for a qualified response where good faith requires). This, of course, is fully consistent with the authority set forth in Defendant's opening memorandum (*see* Doc. 135 at 2-3).

Plaintiff also argues (Pl's Opp. at 6-8) that Defendants are somehow attempting to contravene the Court's July 24 Discovery Order (Doc. 91). Defendants, however, acknowledge that the Court has permitted discovery and, consistent with that order, Defendants have produced thousands of pages of documents and responded to hundreds of requests for admission and numerous interrogatories. Defendants are simply attempting to respond to Requests 3, 4, and 5 by providing the type of qualified response that Fed. R. Civ. P. 36(a)(4) expressly permits.

Defendants' right to make a qualified response is not only appropriate under the Rules, it is also consistent with the legal principles governing a case such as this involving a facial challenge and rational basis review. Classifications subject to rational-basis review are not subject to challenge on the ground of changed circumstances. *See, e.g.*, *United States v. Jackson*, 84 F.3d 1154, 1161 (9th Cir. 1996); *Montalvo-Huertas v. Rivera-Cruz*, 885 F.2d 971, 977 (1st Cir. 1989) ("[E]valuating the continued need for, and suitability of, legislation of this genre is

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exactly the kind of policy judgment that the rational basis test was designed to preclude."); *United States v. Teague*, 93 F.3d 81, 84 (2d Cir. 1996). Indeed, courts have found that even where Congress has determined that a previous enactment is no longer necessary, that finding does not render the statute unconstitutional. *See Smart v. Ashcroft*, 401 F.3d 119, 123 (2d Cir. 2005) ("A congressional decision that a statute is unfair, outdated, and in need of improvement does not mean that the statute when enacted was wholly irrational or, for purposes of rational basis review, unconstitutional."); *Howard v. U.S. Dept. of Defense*, 354 F.3d 1358, 1361-62 (Fed. Cir. 2004) ("Congress acts based on judgments as to preferable policy; the fact that Congress repeals or modifies particular legislation does not reflect a judgment that the legislation, in its pre-amendment form, lacked rational support."). This further supports the appropriateness of Defendant's responses to Requests 3, 4, and 5, which make explicit reference to the President's statements about the "Don't Ask, Don't Tell" (DADT) policy, but also state that Congress was of a different view in 1993 when it enacted the statute.

The question posed in this case, moreover, 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). Whether the President has a view about the need for the statute that differs from the considered judgment of Congress in 1993 is not the relevant question for purposes of the litigation. Plaintiff's suggestion (Pl's Opp. at 8) that *Western & Southern Life Ins. Co.* permits a court to examine "evidence of whether [a] questioned law further[s] the desired governmental objective post-enactment," *id*., misreads that decision (and the governing law).

In determining whether a law satisfies rational basis review, the court "must answer two questions: (1) Does the challenged legislation have a legitimate

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purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote the purpose?" *Western & Southern Life Ins. Co.*, 451 U.S. at 668. The first question has already been answered. *See Witt v. Department of the Air Force*, 527 F.3d 806, 821(9th Cir. 2008) ("[i]t is clear that the government advances an important governmental interest" in enacting the DADT statute). That leaves the second question, and the Supreme Court has made clear that "whether *in fact*" a law "will accomplish its objectives is not the question." *Western & Southern Life Ins. Co*., 451 U.S. at 671-72 (emphasis in original). The question is instead whether the legislature "*rationally could have believed*" that the statute "would promote its objective." *Id*. (emphasis in original). Because it is Congress' judgment in 1993 that controls that question, Defendants' responses to Requests 3, 4, and 5 not only satisfy Fed. R. Civ. P. 36, they are also in accord with the governing law.

Finally, Plaintiff contends (Pl's Opp. at 9-10) that a qualified response on behalf of the "United States" is somehow inconsistent with Defendant's objections to discovery, which sought (successfully) to limit document production to the Department of Defense. Pl's Opp. at 9-10. It is not; unlike Plaintiff's document requests, which the Magistrate limited to the Department of Defense (Doc. 127 at 1), the Magistrate's Order requires "Defendant United States of America [to] unqualifiedly admit or deny Requests for Admission[] Nos. 3, 4, 5] (*id*. at 3)." The only way in which Defendants can offer a good faith and accurate response on behalf of the United States is to offer a qualified response: the Executive being of the view that the DADT policy does not contribute to and even weakens our national security, and the Congress being of the view that enactment of the statute furthered a governmental interest in military effectiveness, and thus national security, in the unique setting of the military. In these circumstances, the only appropriate response is a qualified one, and that is precisely why Fed. R. Civ. P.

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36(a)(4) expressly permits qualified answers. The Magistrate Judge's Order goes beyond the bounds of Rule 36 to direct the United States to "unqualifiedly admit or deny," thus placing the United States in an untenable situation of picking between two words, neither of which alone, in the circumstances, would constitute a good faith response as to the position of the United States as contemplated by Rule 36.

For all of the reasons set forth herein, Defendants request that the Magistrate Judge's Order directing Defendants to "unqualifiedly admit or deny" Plaintiff's Requests for Admission 3, 4, and 5 be modified or reversed.[1]

Dated: April 1, 2010

Respectfully submitted,

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[1] The terms "contribute," "weakens," and "national security" in the context of this litigation are vague and ambiguous, and thereby violate the intent of Fed. R. Civ. P. 36 requiring that requests be drafted in a manner that is "'simple and direct . . . and limited to singular relevant facts.'" *Safeco of America v. Rawstron*, 181 F.R.D. 441, 446 (C.D. Cal. 1998) (*quoting S.E.C. v. Micro-Moisture Controls*, 21 F.R.D. 164, 166 (S.D.N.Y. 1957)). These requests also fail to relate to "facts, the application of law to fact, or opinions about either," as Rule 36 requires. Fed. R. Civ. P. 36(a)(1)(A). Because the Magistrate's ruling also failed to recognize and apply these principles of law, the ruling is erroneous and contrary to law for these additional reasons.

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