

**Appendix of Evidence in  
Support of Log Cabin Republican's  
Opposition to Defendants'  
Motion for Summary Judgment**

**LCR Appendix Pages 1-200  
(Part 1 of 19)**

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

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LOG CABIN REPUBLICANS,

Plaintiff,

vs.

UNITED STATES OF AMERICA AND ROBERT  
GATES, Secretary of Defense,

Defendants.

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)  
) Case No.  
)  
) CV04-8425  
) (VAP) (Ex)  
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DEPOSITION OF AARON BELKIN, Ph.D.  
March 5, 2010  
San Francisco, California

Reported by:  
EMI ALBRIGHT  
RPR, CSR No. 13042  
Job No. 19676

1 San Francisco, California, March 5, 2010

2 9:01 a.m. - 2:53 p.m.

3

4 AARON BELKIN, Ph.D.,

5 having been first duly sworn, was examined and

6 testified as follows:

7 EXAMINATION

8 BY MR. FREEBORNE:

9 Q Dr. Belkin, for the record could you  
10 state your name and your address, please?

11 A Aaron Belkin, 2208 Derby Street,  
12 Berkeley, California 94715.

13 Q You understand you are under oath?

14 A I do.

15 Q Have you been deposed before?

16 A No, this is my first time.

17 Q You have never testified as a fact  
18 witness?

19 A I testified in a case but it wasn't  
20 like this. It is that I saw an instance of  
21 harassment and I was called to say what I said.

22 Q That was in an Equal Employment  
23 Opportunity case?

24 A No, I think it was criminal, actually.

25 Q Did you testify at trial?

1    there is a range of knowledge.  But on the polls,  
2    at least Zogby and Military Times, there is a  
3    distinction between people who, quote, unquote,  
4    say they know for sure versus people who suspect.  
5    So that is as fine grained an analysis as we can  
6    do because that's what the questions ask.  But I  
7    take your point that there are many different ways  
8    of knowing something.  But we only know in this  
9    case of the distinction between know -- sorry --  
10   know for sure, suspect, and don't know.

11           Q    Let's take know for sure and suspect.

12           A    Uh-huh.

13           Q    And let's put aside the actual polling  
14   data.  But why do you believe or do you believe  
15   that if heterosexuals know or suspect that they  
16   are serving with gay and lesbian service members,  
17   that has an impact in evaluating the privacy  
18   rationale?

19           A    The privacy rationale is premised on  
20   the assumption that after the repeal of the ban  
21   that conditions in living spaces will change.  And  
22   if it is true that service members are serving  
23   with people -- sorry -- that heterosexual service  
24   members know that they are serving with gays and  
25   lesbians now and if it is also the case that that

1 is not likely to change or to change much  
2 postrepeal, then the privacy rationale by  
3 definition cannot be plausible because there would  
4 be no change in showers or barracks or intimate  
5 spaces. So the baseline condition of whether  
6 people are serving with gays and lesbians now  
7 sustains that argument. That is point 1.

8 Point 2 is because the data to the  
9 extent that a significant portion of service  
10 members, straight service members know they are  
11 serving with gays and lesbians, that casts doubt  
12 on the heat surrounding the privacy rationale. If  
13 you listen to the main proponents of the privacy  
14 rationale and the way they express their claims,  
15 their point is that there are no gays and lesbians  
16 serving -- there are no -- straights are not aware  
17 of any gays and lesbians in their units now. And  
18 if they were, we have a privacy disaster and the  
19 sky would fall.

20 Well, the fact is to the extent that  
21 the data show that they are serving with people  
22 who they know to be gay, then the claim of the  
23 privacy rationale proponents is wrong because  
24 people are serving already. And also the claims  
25 about the sky falling down are at very least cast

1 into significant doubt because, obviously, the sky  
2 hasn't fallen now. So that's the reason why those  
3 data are important.

4 Q And in terms of the baseline that you  
5 made reference to, why do you believe that the  
6 baseline would not change postrepeal?

7 A It is two factors -- well, possibly  
8 more than two factors, but I will start with two  
9 factors.

10 One is that the literature suggests  
11 that what determines the level of outness, in  
12 other words, what derives a decision to reveal  
13 sexual orientation is not the presence or absence  
14 of a ban but it is the safety of the unit. And it  
15 is the service member's assessment of the  
16 climate -- the culture or the climate of the work  
17 environment. And not only is there scholarship on  
18 that but to me that makes intuitive sense. So  
19 that's point 1.

20 And point 2 is that in analogous  
21 institutions that I have studied, we have not seen  
22 waves of mass disclosures postrepeal of a ban.  
23 And so that is what informs my conclusion.

24 Q And with respect to the first basis,  
25 when you say it is the service member's perceived

1 A Under certain conditions?

2 Q Yes?

3 A Absolutely, under certain conditions  
4 private showers are not possible.

5 Q Do you believe that would be important  
6 to take into consideration in evaluating the  
7 privacy rationale?

8 A I would say that if that were true --  
9 and I have just acknowledged it is -- then the  
10 privacy rationale could be valid in those  
11 circumstances.

12 Q Well, is it your opinion that a Don't  
13 Ask, Don't Tell policy would be appropriate in,  
14 say, combat conditions but not in noncombat  
15 conditions where accommodations permit individual  
16 showers or more private accommodations?

17 A The research shows that, no, a Don't  
18 Ask, Don't Tell situation would not further  
19 heterosexual privacy in combat situations where  
20 individual accommodations are not possible.

21 Q What is that research that you are  
22 referring to?

23 A Well, my research, for one thing.

24 Q What research?

25 A The point -- well, it is many points.

1 I will go over all the points, yeah, I will  
2 because you asked me the question.

3 Q Yes.

4 A First of all, because there will be no  
5 change, no meaningful change among disclosure  
6 rates postrepeal. So whether you have -- and in  
7 other words, even if you granted that every  
8 heterosexual person in the military is grossly  
9 discomfort in the nude around gays and lesbians,  
10 there will be no change in the privacy conditions  
11 even in combat postrepeal because again you won't  
12 have any difference in the shower because  
13 straights are already serving with people they  
14 know to be gay, and the extent to which that is  
15 true will not change in any meaningful way. So  
16 that is one.

17 Q Can I just stop? Can I stop you there  
18 just -- you want to finish?

19 A I actually would like to finish.

20 Q That's fine.

21 A Second of all, because actually in  
22 combat situations what we find is that you have  
23 men and women quartering together. And so  
24 actually in combat the military realizes and in  
25 deployment situations when the bullets are flying,



1 those are the moments when the troops are most  
2 focused on the mission. And to the extent they  
3 are most focused on the mission, other concerns  
4 recede to the background.

5 And, third of all, because my research  
6 and others' research has shown that the level of  
7 extreme discomfort around gays and lesbians has  
8 diminished drastically, and so the percent of  
9 people for whom even in theory this could be an  
10 issue, which again would not change pre and  
11 postrepeal, is very tiny. So that is why I don't  
12 believe that -- well, the research shows that  
13 whether or not you have a gay ban is immaterial  
14 for privacy in the shower.

15 Q Okay. And correct me if I'm wrong.  
16 The baseline reasoning that you just set forth  
17 that there would be no change in the percentage of  
18 acknowledged gay and lesbian service members  
19 between a prerepeal environment and a postrepeal  
20 environment is based upon your research of foreign  
21 militaries; correct?

22 A I actually wouldn't say that. I  
23 wouldn't say that is totally the case.

24 Q What would you say?

25 A I would say that it is based on -- it

1 is based on a range of data analogous in the  
2 institutions in the U.S. We did not have reports  
3 of mass disclosures in police or fire departments,  
4 the CIA, basically any organization that changed  
5 from a discriminatory to an inclusionary policy.  
6 So we have never seen that. So I guess that would  
7 be Point 1.

8 Point 2, in the U.S. military itself  
9 when the ban has been relaxed or softened, we did  
10 not see any change in disclosure rates. So we  
11 have evidence from our militaries. And then third  
12 of all is the foreign militaries.

13 And then fourth of all is the  
14 theoretical point -- it is not empirical but it is  
15 theoretical, but consistent with all the empirics,  
16 that what drives disclosure is not the presence or  
17 absence of a ban but the service member's read of  
18 the climate in the unit.

19 Q And that finding applies across foreign  
20 militaries that you studied, paramilitary  
21 organizations such as police departments, federal  
22 agencies such as the FBI, CIA, that permit the  
23 disclosure of one's sexual orientation?

24 A Yes, and the U.S. military.

25 Q Right. And describe for me the context

1 Q Okay. Anything else?

2 A Yes, but I'm not recalling off the top  
3 of my head. But if I remember later, then I hope  
4 I can say it later.

5 Q You can absolutely say it later.

6 A Okay.

7 Q The third factor you set forth in  
8 evaluating the privacy rationale was the  
9 counterfactual. And I have to admit you lost me  
10 on that one.

11 What would be in the example of a  
12 counterfactual of the complete ban that you were  
13 referring to?

14 A The counterfactual is a hypothetical.  
15 It is a claim about something that never happened.  
16 And so if you made a hypothetical or  
17 counterfactual claim that God came in and told the  
18 military who every gay person was, even if they  
19 are closeted, have never -- they might not even  
20 know themselves they are gay, but just identified  
21 every person with a gay or possibly gay identity  
22 and just got them out of the military so the  
23 military was 100 percent straight, 100 percent  
24 straight, no gays whatsoever, no closeted gays, no  
25 future gays, what would happen in privacy

1 settings, in intimate settings in the shower in  
2 the barracks. So that's the hypothetical  
3 experiment.

4 And my argument is that to the extent  
5 you believe that the shower and barracks are  
6 places where privacy violations take place because  
7 of gays, then that hypothetical counterfactual  
8 world with no gays would still have just as many  
9 privacy violations involving just the same kinds  
10 of things that people who articulate the privacy  
11 rationale worry about now.

12 And the reason for that is because  
13 straight service members have sex in the military  
14 with each other. And even if there were no gays,  
15 they would just go right on having sex with each  
16 other. And so to the extent that that's what you  
17 are concerned about, kind of looking and sexual  
18 play and sex itself, that is actually not about  
19 gay people being in the military. That is a  
20 phenomenon that is independent of whether or not  
21 gays are in the military. And there are three  
22 reasons why I know that.

23 Q What are those three reasons?

24 A There is statistical evidence,  
25 ethnographic evidence, and legal evidence.

1           Q    And take me through each of those  
2 pieces of evidence.

3           A    Well, the legal evidence is the queen  
4 for a day exception, which has this lengthy  
5 history, that the military itself knows that this  
6 is going on which is why they need a queen for a  
7 day exception.  If it wasn't going on, then they  
8 would not need a queen for a day exception.  So  
9 the very fact that this regulation has lived in --  
10 well, in regulation and in statute for most of the  
11 last century is evidence that the military itself  
12 knows quite well that this is going on.

13                   The ethnographic evidence is just  
14 descriptions from the literature.  I actually  
15 wrote a whole study on this.  But, for example, a  
16 marine chaplain who says something to the effect  
17 of, oh, yeah, marines are always jacking off  
18 together in the showers, that is very common from  
19 what I have seen, so things like that.  A unit of  
20 navy seals that I know of where the seals all in a  
21 unit in a circle masturbate together, so things  
22 like that -- straight seals.

23                   And then the statistical evidence is  
24 that the best available evidence we have is that  
25 the percent of men -- gay men in the population

1 and the percent of gay men in the military is just  
2 about the same, very close to each other.

3 However, if you look at statistical evidence about  
4 the frequency of male/male sex among veterans, it  
5 is much higher than in the general population.

6 And what that -- it does not prove that  
7 the veterans are having the -- the straight  
8 veterans are having gay sex in the military  
9 because it is possible that veterans have more gay  
10 sex than civilians because they have their gay sex  
11 after their military service; that is absolutely  
12 possible. But I would say at the very least it is  
13 not inconsistent with the notion supported by  
14 ethnographic and legal evidence that straight  
15 people are having gay sex in the military. And  
16 even if you could get rid of all gays, they would  
17 just keep right on having that sex. It is kind of  
18 like a fraternity ritual, I mean, some of the  
19 hazing rituals you hear about.

20 So I actually make this argument at  
21 military academies when I go speak there. And you  
22 get a perplexed look from some people, but a lot  
23 of people kind of nod and smirk and they know what  
24 is going on.

25 Q The fourth factor or fourth layer of

1 Q All right. And what specific questions  
2 did she say to anticipate in that regard?

3 A I don't think she specified anything,  
4 but she said that that was -- my memory is  
5 correct, she said that was an area where your  
6 side, the Government seems intent on trying to  
7 make a point.

8 Q Okay. With respect to we talked  
9 earlier about the privacy rationale, did the  
10 Israeli defense forces make any special  
11 accommodation for gays and lesbians or  
12 heterosexuals postrepeal?

13 A Are you talking about special  
14 accommodations in terms of systematic policy law  
15 or regulation or are you talking about special  
16 accommodations in terms of micro-practices,  
17 discretionary practices on the ground?

18 Q Let's start with the latter. What I am  
19 thinking of is either in terms of facilities or  
20 allowing heterosexuals, for example, to serve, to  
21 live at home if they had a particular privacy  
22 interest that they felt was being infringed upon  
23 by allowing gays and lesbians to openly serve.

24 A I believe we found one case where a  
25 commander had allowed a straight service member to

1 shower at different times. So I believe it was he  
2 would not have to be in the shower with other  
3 people. And I believe we found one case where  
4 someone was allowed to live off base. And I am  
5 sorry I don't remember if that was the same person  
6 or not.

7 Q So that was a heterosexual service  
8 member?

9 A If my memory is correct.

10 Q And the special accommodation that was  
11 provided for that heterosexual member or members  
12 was based upon a privacy concern expressed by the  
13 heterosexual member?

14 A I don't know the details but my strong  
15 suspicion would be yes.

16 Q What is that suspicion based upon?

17 A That they wouldn't have done the --  
18 they wouldn't have made the accommodation if there  
19 wasn't a concern.

20 Q Did you find any other -- well, step  
21 back.

22 You have looked at the Canadian,  
23 Australian, Israeli, and Great Britain examples;  
24 right?

25 A Me personally or the center?



1 the pluralistic ignorance hypothesis. And I could  
2 get you references of that. It is a well  
3 established hypothesis in the psychological  
4 literature.

5 Q I only have one more question. You  
6 submitted your report -- or we submitted your  
7 report to the Government on January 15th 2010.  
8 Has anything happened since then that either  
9 bolsters your expert opinion or is relevant to  
10 your expert opinion in this case?

11 A Well, the chairman of the Joint Chiefs  
12 of Staff said that he thinks the policy  
13 compromises the integrity of the forces by forcing  
14 service members to lie. And a currently serving  
15 chairman of the Joint Chiefs of Staff has never  
16 said that. And he said that our troops are pretty  
17 robust and professional and that they can make the  
18 adjustment to an inclusive policy without  
19 problems. So I would say that that testimony  
20 bolstered the research.

21 And I would say in terms of the  
22 conviction, that people who express reservations  
23 about unit cohesion and privacy and things like  
24 that are not coming from a place based on evidence  
25 but are coming from a place based on moral

1 intolerance. I just found out that, in fact,  
2 General Conway of the Service Chief of the Marines  
3 is coordinating opposition to repeal efforts with  
4 Peter Pace. And Peter Pace is the former chairman  
5 of the Joint Chiefs of Staff who was honest enough  
6 to admit when asked by the Chicago Tribune  
7 editorial board why we have a Don't Ask, Don't  
8 Tell policy, he was honest enough to admit it is  
9 because homosexual conduct is immoral.

10 Now, he was rowdly criticized for that,  
11 but I was actually happy he said that because for  
12 the first time we had a military person being  
13 honest about the policy. So the fact that he is  
14 back in the quarterback seat tells me --  
15 reinforces my conviction that this policy is not  
16 and never has been about cohesion or privacy or  
17 any other rational military ends but it is about  
18 promoting the moral convictions of a particular  
19 group of individuals.

20 MS. FELDMAN: I have no other  
21 questions.

22 MR. FREEBORNE: Thank you, Doctor. No  
23 further questions.

24 (Deposition concluded at 2:53 p.m.)

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CERTIFICATE OF DEPONENT

I hereby certify that I have read and examined the foregoing transcript, and the same is a true and accurate record of the testimony given by me.

Any additions or corrections that I feel are necessary, I will attach on a separate sheet of paper to the original transcript.

\_\_\_\_\_

Signature of Deponent

I hereby certify that the individual representing himself/herself to be the above-named individual, appeared before me this \_\_\_\_\_ day of \_\_\_\_\_, 2010, and executed the above certificate in my presence.

\_\_\_\_\_

NOTARY PUBLIC IN AND FOR

\_\_\_\_\_

County Name

MY COMMISSION EXPIRES:

1 STATE OF CALIFORNIA )  
 2 : ss )  
 3 County of Alameda )

4 I, the undersigned, a Certified  
 5 Shorthand Reporter of the State of California, do  
 6 hereby certify: That the foregoing proceedings  
 7 were taken before me at the time and place herein  
 8 set forth; that any witnesses in the foregoing  
 9 proceedings, prior to testifying, were placed  
 10 under oath; that a verbatim record of the  
 11 proceedings was made by me using machine shorthand  
 12 which was thereafter transcribed under my  
 13 direction; further, that the foregoing is an  
 14 accurate transcription thereof. I further certify  
 15 that I am not a relative, employee, attorney or  
 16 counsel of any party to this action or relative or  
 17 employee of any such attorney or counsel and that  
 18 I am not financially interested in the said action  
 19 or the outcome thereof;

20 IN WITNESS WHEREOF, I have this date  
 21 subscribed my name.

22 Dated: \_\_\_\_\_

23

24 EMI ALBRIGHT, CSR No. 13042

25

1 UNITED STATES DISTRICT COURT  
2 CENTRAL DISTRICT OF CALIFORNIA  
3 EASTERN DIVISION

4 -----

5 LOG CABIN REPUBLICANS,  
6 Plaintiff,

7 vs. No. CV04-8425

8 (VAP) (Ex)

9 UNITED STATES OF AMERICA  
10 AND ROBERT GATES,  
11 Secretary of Defense,  
12 Defendants.

13 -----

14  
15 February 26, 2010  
16 10:02 a.m.

17 Deposition of Expert Witness  
18 NATHANIEL FRANK, Ph.D., held at the  
19 offices of White & Case, LLP, 1155 Avenue  
20 of the Americas, New York, New York,  
21 pursuant to Notice, before Theresa  
22 Tramondo, a Notary Public of the State of  
23 New York.

24  
25

1 N A T H A N I E L F R A N K, P h. D.,  
2 called as a witness, having been duly  
3 sworn by a Notary Public, was examined and  
4 testified as follows:

5 EXAMINATION BY

6 MR. FREEBORNE:

7 Q. State your name for the record,  
8 please.

9 A. Dr. Nathaniel Frank, Ph.D.

10 Q. What is your address?

11 A. Home address is 118 Gates Avenue,  
12 Brooklyn, New York 11238.

13 Q. Dr. Frank, good morning.

14 A. Morning.

15 Q. I introduced myself this morning,  
16 but my name is Paul Freeborne. I'm an  
17 attorney at the Department of Justice. I am  
18 counsel of record in the case captioned Log  
19 Cabin Republicans versus The United States.  
20 The action has been brought against the  
21 United States and Secretary Gates. As you  
22 know, it involves a facial challenge to the  
23 "Don't Ask, Don't Tell" statute.

24 To my left is Ryan Parker. He's

25

1 Frank

2 irrational in a legal sense, but go ahead  
3 answer the question.

4 Q. Are you entering any legal opinions  
5 in this case?

6 A. No.

7 When you say "in this case," do you  
8 mean --

9 Q. As an expert in this case.

10 A. You mean LCRVUS or in this issue  
11 we're discussing?

12 Q. I see them as co-extensive, but in  
13 "this case" being Log Cabin versus United  
14 States, as an expert, are you rendering any  
15 legal opinions?

16 A. Well, I am not a lawyer, so I  
17 have --

18 Q. I just note that because I am not  
19 asking you for a legal conclusion.

20 A. Okay.

21 Q. When I use "irrational," I mean it  
22 in a -- from the vantage point of expert  
23 opinion as a factual matter.

24 A. Let me try to answer that question  
25 this way: Some people in the military have a

1 Frank  
2 desire not to serve with gay people because  
3 they feel that it is an invasion of their  
4 privacy. I'm not comfortable concluding that  
5 some people's feelings and desires are  
6 irrational, that those people's desires and  
7 feelings are irrational.

8 Q. Do you have anything else to add on  
9 that? I don't want to cut you off?

10 A. No.

11 Q. Have you ever been involved either  
12 as an expert or a nontestifying expert in any  
13 other challenge to the "Don't Ask, Don't  
14 Tell" policy?

15 A. Legal challenge?

16 Q. Legal challenge?

17 A. I was involved as an expert witness  
18 in a case -- a military criminal case of  
19 nonconsensual sex. My understanding is that  
20 was not a challenge to "Don't Ask, Don't  
21 Tell."

22 Q. Is that United States V Sergeant  
23 Dale Boldware?

24 A. That's right.

25 Q. What did you do in that case?



1 Frank

2 Q. Do you believe that General  
3 Powell's testimony in that record was based  
4 upon a moral animus towards gay and lesbian  
5 service members?

6 A. Based on that assertion, no.

7 Q. Do you believe that he was  
8 motivated by an animus towards gay and  
9 lesbian service members in providing the  
10 testimony he did before the Senate?

11 A. What I say in my report is that  
12 Powell is one of the people who argued for  
13 the ban based on personal reasons. I don't  
14 know that that rises in his case to moral  
15 animus. I believe that he believed that open  
16 homosexuals should not be allowed to serve in  
17 the military but didn't base that belief on  
18 military necessity. It was a personal  
19 belief. I am not calling it animus.

20 Q. Do you agree or disagree that his  
21 concern with privacy was based upon his  
22 professional military judgment?

23 A. His concern with privacy as a  
24 general matter may certainly be based on his  
25 professional military judgment, but what he

1 Frank

2 says here does not constitute an argument for  
3 keeping out open homosexuals.

4 Q. Why is that?

5 A. Because what he says here is that  
6 service members are required to serve with  
7 very little privacy, so it doesn't make any  
8 sense to me to conclude from that that there  
9 is a justification to exclude open  
10 homosexuals since he's just acknowledged that  
11 part of being in the military means  
12 sacrificing privacy.

13 Q. Isn't it fair to say that the  
14 concern that he was expressing is that if the  
15 military were to permit gay and lesbian  
16 service members to serve openly that that  
17 would infringe upon the privacy interests of  
18 heterosexual service members?

19 A. No. More than all of the other  
20 infringements of privacy he just said service  
21 members would have to endure.

22 Q. Right. He's recognizing the  
23 privacy --

24 A. It is consistently infringed in the  
25 military; hence, my interpretation when he

1 Frank  
2 draws a line in the sand around gay people,  
3 that reflects a personal basis because it's  
4 inconsistent with his acknowledgment that  
5 military service requires that privacy be  
6 sacrificed.

7 Q. I direct your attention further  
8 down that same page. This is in reference to  
9 the sexual tension point. The sentence that  
10 reads "The separation of men and women is  
11 based upon the military necessity to minimize  
12 conditions that would disrupt unit cohesion,  
13 such as the potential for increased sexual  
14 tension that could result from mixed living  
15 quarters." Then it goes onto quote General  
16 Powell. He states, "Cohesion is strengthened  
17 or weakened in the intimate living  
18 arrangements we force upon our people.  
19 Youngsters from different backgrounds must  
20 get along together despite their individual  
21 preferences. Behavior too far away from the  
22 norm undercuts the cohesion of the group. In  
23 our society gender differences are not  
24 considered conducive to bonding and cohesion  
25 within barracks living spaces."

1 Frank

2 Do you see that?

3 A. Yes.

4 Q. Then he goes on to -- well, do you  
5 have any reason to question the testimony he  
6 gave as it relates to the accommodation we  
7 must make for men and women?

8 A. If I could have a second to read it  
9 over again.

10 Q. Sure.

11 A. Again, you ask me if I agreed with  
12 his assertion there? It's a contradictory  
13 statement as it relates to -- as it relates  
14 to an argument in favor of excluding open  
15 gays. He says "Youngsters from different  
16 background must get along together despite  
17 their individual preferences." And then he  
18 says "Behavior too far away from the norm  
19 undercuts cohesion of the group," having just  
20 said that youngsters must get along despite  
21 individual preferences. So the assertion is  
22 confusing to me at best.

23 Q. Do you take issue with the separate  
24 accommodations that the military provides for  
25 men and women?

1 Frank  
2 according to this concern if it were to be  
3 fully honored, you couldn't put individual  
4 gay males together either because then they  
5 could be uncomfortable undressing in front of  
6 one another.

7 Q. Beyond the financial cost, what  
8 other costs are you referring to?

9 A. Costs to cohesion; for instance,  
10 General Carl Mundy, who is former opponent of  
11 allowing open gay service has said  
12 nevertheless that if open gay service is to  
13 be the new policy there should not be  
14 separate facilities, a finding that echoed in  
15 the RAND study, because that breeds  
16 resentment and undercuts the cohesiveness of  
17 the force by separating people out that need  
18 to be training and living together.

19 Q. Part three of your report you  
20 attribute certain statements to Senator Nunn.  
21 If you could return back to your expert  
22 report and look at part three, I ask you  
23 where I could find the statements that you  
24 attribute to Senator Nunn? I am sorry. On  
25 page 5.

1 Frank

2 A. Well, I would recommend looking in  
3 my book where I believe those quotes appear  
4 with footnotes.

5 Q. Okay.

6 Describe for me the conversations  
7 you had with Professor Moskos?

8 A. I first interviewed Professor  
9 Moskos about this issue in the year 2000 for  
10 an article I wrote. I focused in part on the  
11 question of unit cohesion and began examining  
12 what, if any, evidence there might be for the  
13 argument that open homosexuality creates a  
14 risk to unit cohesion. I spoke to him and  
15 e-mailed him across a period of months  
16 probably at that time for that article, and  
17 subsequent to that I had several  
18 conversations, again e-mail, phone and in  
19 person, over the course of another eight  
20 years. Not frequent but from time to time.  
21 You know, a couple of years -- a few years.

22 In one of the early conversations  
23 in 2000 for the article I was writing at the  
24 time, I asked him about the role of unit  
25 cohesion in this argument and that's when he

1 Frank  
2 dismissed unit cohesion saying "fuck unit  
3 cohesion, I don't care about that," and told  
4 me instead that his argument for supporting a  
5 band on open service had to do with a moral  
6 concern about the right, as he saw it, of  
7 straight people not to have to share intimate  
8 quarters with a gay person.

9 Q. It's the privacy concern that we  
10 have been discussing that Colin Powell  
11 expressed for one?

12 A. That's right. But Professor Moskos  
13 didn't always rely exclusively on the privacy  
14 argument alone.

15 Q. Based upon your interaction with  
16 Professor Moskos, did you have any reason to  
17 believe that he had a personal animus towards  
18 gay and lesbian service members?

19 A. Yes.

20 Q. What was that based upon?

21 A. He often used to joke that he knew  
22 he served with gay people, but it worked out  
23 because they didn't hit on him, which implied  
24 to me a personal belief that gay people were  
25 more likely to be sexual predators than

1 Frank  
2 proximity' and soldiers 'are told whom you're  
3 going to live with' and because it is such an  
4 important institution of American power  
5 Powell said, 'We have to be careful when we  
6 change the policy.'"

7 Q. The quotes that Dr. Frank -- those  
8 are from Colin Powell, correct?

9 A. Yes.

10 Q. Why are you being critical of Colin  
11 Powell here?

12 A. Because in my view he's -- these  
13 assertions are irrelevant to the question of  
14 whether openly gay service undermines the  
15 military, so to repeat assertions that are  
16 not untrue necessarily but are not relevant  
17 to the question at hand in my view in order  
18 to make a reform in policy seem difficult and  
19 dangerous is arguing in bad faith.

20 Q. Why is it arguing in bad faith?

21 A. Because he's saying these things as  
22 though simply by saying them people should  
23 understand that there is great risk to  
24 letting gay serve in the military when, in  
25 fact, in my view there isn't.



1 Frank

2 Q. Because you believe the privacy  
3 rationale to be irrelevant?

4 A. The privacy rationale to propping  
5 up the policy?

6 Q. The privacy rationale that we  
7 discussed earlier that Colin Powell espoused  
8 during the Senate hearing?

9 A. I believe that people's genuine  
10 discomfort in terms of the impact of known  
11 gays on their privacy does not rise to the  
12 level of undercutting military effectiveness.

13 Q. Dr. Frank, I would like to now mark  
14 as Defendants' Exhibit 17 another opinion  
15 piece that appears in the Huffington Post on  
16 January 22, 2010.

17 (Defendants' Exhibit 17, opinion  
18 piece appearing in the Huffington Post  
19 entitled "Refuting the Latest Arguments  
20 Against Gay Troops," marked for  
21 identification, as of this date.)

22 Q. This article is entitled "Refuting  
23 the Latest Arguments Against Gay Troops."  
24 Again, it appeared in --

25 Let me step back. We have a posted

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CERTIFICATE OF DEPONENT

I hereby certify that I have read and examined the foregoing transcript, and the same is a true and accurate record of the testimony given by me. Any additions or corrections that I feel are necessary, I will attach on a separate sheet of paper to the original transcript.

\_\_\_\_\_

Signature of Deponent

I hereby certify that the individual representing himself/herself to be the above-named individual, appeared before me this \_\_\_\_ day of \_\_\_\_\_, 2010, and executed the above certificate in my presence.

\_\_\_\_\_

NOTARY PUBLIC IN AND FOR

\_\_\_\_\_

County Name

MY COMMISSION EXPIRES:

1 C E R T I F I C A T E

2 STATE OF NEW YORK )

3 : ss.

4 COUNTY OF NEW YORK )

5

6 I, THERESA TRAMONDO, a Notary  
7 Public within and for the State of New  
8 York, do hereby certify:

9 That NATHANIEL FRANK, Ph.D., the  
10 witness whose deposition is hereinbefore  
11 set forth, was duly sworn by me and that  
12 such deposition is a true record of the  
13 testimony given by the witness.

14 I further certify that I am not  
15 related to any of the parties to this  
16 action by blood or marriage, and that I  
17 am in no way interested in the outcome of  
18 this matter.

19 IN WITNESS WHEREOF, I have hereunto  
20 set my hand this 8th day of March, 2010.

21

22

\_\_\_\_\_  
THERESA TRAMONDO

23

24

25

1 UNITED STATES DISTRICT COURT  
 2 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
 3 EASTERN DIVISION

4 - - - - - x

5 LOG CABIN REPUBLICANS, :

6 :

7 Plaintiff, :

8 :

9 v. : CA No. CV04-8425

10 : (VAP) (Ex)

11 UNITED STATES OF AMERICA AND :

12 ROBERT GATES, Secretary of :

13 Defense, :

14 :

15 Defendants. :

16 - - - - - x

17

18 Washington, D.C.

19 Monday, March 15, 2010

20

21

22

1 the -- that was the trigger that started a process  
2 that included the -- the happenings that we just  
3 finished going over, and ended with my separation.

4 Q It says in paragraphs five and six, it  
5 says that a fellow service member learned that you  
6 were a homosexual and revealed that to other  
7 members of the army. As a consequence, you were  
8 subject to separation proceedings.

9 You told me earlier about the  
10 proceedings that started when you talked to your  
11 supervisor about the harassment.

12 Are those the same separation  
13 proceedings you're referring to in paragraph six?

14 A Yes. That was, like I said, sort of the  
15 mid point of the entire process.

16 Q What point was the mid point?

17 A The point at which I spoke to my  
18 supervisor about the harassment issues, the issues  
19 of people asking me if I was gay, telling me they  
20 knew I was gay or suspected I was gay.

21 Q You said the mid point. Let's make sure  
22 we have the sequence of events down correctly.

1                   Which came first, your talking to your  
2 supervisor about the harassment, or a fellow  
3 service member learning that you were a  
4 homosexual?

5           A     The latter.

6           Q     Your talking to your supervisor?

7           A     No, a fellow service member learning  
8 that I was a homosexual.

9           Q     Okay. You said the latter.

10                   And you say that this fellow service  
11 member revealed -- well, first of all, let's go  
12 back to how the fellow service member learned.

13                   Can you tell me how the fellow service  
14 member learned that you were a homosexual?

15           A     Yeah. She basically read it in a letter  
16 that I had written to someone that I used to date,  
17 that basically revealed the fact that I was gay.  
18 And that's how she came across the information.

19           Q     What were the circumstances of her  
20 reading the letter?

21           A     What do you mean?

22           Q     How did she --

1           A       How did she come across the letter? I  
2       had left the letter out in the course of drafting  
3       it, because it was written in another language.  
4       And so I had -- it was probably about five pages  
5       long. So I had, if I remember correctly, I had  
6       more than five pages, because it was drafted and  
7       rewritten a couple of times.

8                   And let's see. So I had a number of  
9       these pages out on the table, on a table where I  
10      was sitting. And if I remember correctly, she  
11      came over and sat down with me. And if I remember  
12      correctly -- and I'm trying to think through this,  
13      so as to be as accurate as possible without  
14      portraying as assumptions, portraying as fact what  
15      may be assumptions.

16                  So basically I had a letter -- several  
17      pages of a letter laying out in which -- that I  
18      was writing to someone that I used to date, in  
19      which I was sort of making amends with that  
20      person, so going through quite a bit of, you know,  
21      past history, and clearing things up, and  
22      apologizing, and, you know. So most of the

1 content of the pages were about that relationship  
2 and things like that.

3 So and then they were out. She came  
4 over and joined me where I was, where I had these  
5 pages spread out and they were drafted. And then  
6 she saw the content of at least one of the pages.  
7 And she also happened -- it was written in  
8 Portuguese. And she also happened to speak  
9 Portuguese. And so in seeing some of the content  
10 of the letter there on the table, with the pages  
11 spread out, that's how she came to realize that I  
12 was gay.

13 Q How did you know that that's how she  
14 came to realize that you were gay?

15 A Because -- I can't -- and I don't  
16 remember exactly the expressions or words she  
17 used, but she made it clear to me that that's what  
18 she had picked up and seen. And I think she said  
19 something to the effect of -- if I remember  
20 correctly, I want to say she said something to the  
21 effect of that's okay, I still respect you, or  
22 something like that.



1                   She said something to clearly indicate  
2   to me that she had saw something in there that  
3   indicated that I was gay. And I took that to  
4   mean -- well, I mean, yeah, I took that to mean  
5   that she had seen it or that she had picked that  
6   up from that.

7           Q     And then you say in paragraph five of  
8   Exhibit 42, your declaration, that she revealed  
9   that to other members of the army.

10                   To whom did she reveal it?

11           A     I don't know everyone she revealed it  
12   to. I do know a couple of the people who came  
13   back and specifically referenced things related to  
14   that particular letter I had written. Are you  
15   looking for specific names?

16           Q     No, not specific names.

17           A     Oh. Yeah, there were just a couple of  
18   the people who approached me right after that and  
19   said that they, you know, knew I was -- some  
20   people approached me and told me -- like one  
21   person, for example, approached me and said you  
22   need to be more careful. This person is saying

1 that she's recently found out about -- found out  
2 things about you that made her lose a lot of  
3 respect for you in some letter you've written.

4 And you just need -- you know, and another person  
5 who was friends with her then, you know, made an  
6 anti-gay remark at -- within a couple of days  
7 towards me.

8           And so there was a series of a couple of  
9 different people either who were close friends  
10 with that person, or -- making remarks, or people  
11 who made remarks and specifically referenced  
12 something that let me know that the information  
13 that they were referencing came from that  
14 particular source. If that makes sense.

15           Q     Were any of those other people who  
16 mentioned that to you, were any of them among your  
17 supervisors?

18           A     I don't think they were at the time that  
19 they approached me about that. And I don't  
20 think -- I have to think about it, because I don't  
21 exactly recall. I don't think those particular  
22 people that we were just talking about had been or

1 investigated," again I think that if I were  
2 telling the story myself, especially in a way in  
3 which I would want to be as accurate and technical  
4 as possible, I probably wouldn't choose some of  
5 these words.

6           But I can -- I can definitely see I  
7 guess -- and I'm trying to be as accurate as  
8 possible here without being confusing, so I'm  
9 searching for the right words. Well, I guess let  
10 me just put it this way. And let me know if this  
11 doesn't suffice. I think it's not all technically  
12 correct. But it's a pretty typical, from what  
13 I've seen, way in which writers will summarize or  
14 try to convey the substance of an interview  
15 they've done with me about my experience. If that  
16 makes sense.

17           Q     Would you have -- you said you may have  
18 chosen different words.

19                     In the sentence that you just read from  
20 the Frank book, would you have chosen the word  
21 "investigated"?

22           A     [Witness examined document]. I think

1 so. I think I would describe what I feared would  
2 be the outcome if I didn't go with the process  
3 that was being recommended to me would be that I  
4 would be interrogated or investigated in a perhaps  
5 more abusive and malicious manner --

6 Q Who told --

7 A -- because of --

8 Q Who told you you would be investigated?

9 A I don't think anyone specifically said  
10 to me you will be investigated. I think it -- and  
11 I'm trying to remember. And as I'm talking, I'm  
12 trying to also think at the same time if someone  
13 specifically told me that. I can't recall if  
14 anyone did tell me that exact phrase or not.

15 But the way I recall it is it was my  
16 understanding that if things proceeded as they --  
17 it looked like they were going to had I not gotten  
18 an attorney involved, that would have in -- that  
19 process would have included being interrogated by  
20 the first sergeant and possibly being investigated  
21 in other ways that I may have not have known  
22 specifically. But I just had a general

1 understanding that that would be the case.

2 I'd seen -- and part of that

3 understanding was based on the fact that I'd seen

4 that happen once before. And I -- I'd -- I'd been

5 told by someone else in the unit that that was

6 what the command and the first sergeant had done

7 before and might consider doing again, or might

8 consider doing with me, and that I think suspicion

9 or fear was sort of confirmed when they told me

10 that I was going to be interrogated or questioned

11 by the first sergeant.

12 Q Who told you you were going to be

13 interrogated by the first sergeant?

14 A The platoon sergeant, Messenger.

15 Q Do you know what Messenger's rank was?

16 A He was a Sergeant First Class, an E7.

17 Q Now, you said at some point that you had

18 some communication with the squad leader?

19 A What do you mean?

20 Q I think earlier, before the break, you

21 testified that there was some communication with

22 the squad leader about the process that they were

1 knew of the need to be accurate and correct  
2 obviously here today, I at least wanted to be  
3 aware of what, you know, might be brought up that  
4 might not contradict but -- well, in a way  
5 contradict what I was saying here, because I knew  
6 there was some stuff out there that's largely  
7 inaccurate and some other stuff that's not so much  
8 inaccurate but just more of a summary than actual  
9 detail.

10 BY MR. SIMPSON:

11 Q If I could get back --

12 A Sure.

13 Q -- Exhibit 43 from you, please.

14 A [Handing document].

15 Q Is it correct -- it says, Nicholson  
16 worried that even though discharges for  
17 homosexuality are normally honorable, if he  
18 contested the charges, vengeful superiors might  
19 seek to give him less than an honorable discharge.

20 Does that accurately reflect your  
21 thoughts during the time of your discharge?

22 A I remember thinking about the issue of

1 the characterization of discharge at some point,  
2 but I don't remember exactly when it was. Let me  
3 see.

4 [Witness examined document]. Okay. I  
5 don't remember exactly if -- state the question  
6 one more time so I can make sure I'm answering  
7 exactly --

8 Q I read the sentence that starts with,  
9 "Nicholson worried that," at the bottom of the  
10 page.

11 A You're just asking if it's accurate, if  
12 the sentence is accurate?

13 Q Correct.

14 A Okay.

15 [Witness examined document]. My only  
16 concern -- the only reason I hesitate in saying  
17 that it's accurate or inaccurate is because I'm  
18 trying to -- the sentence sort of implies a  
19 chronological sequence I guess to my thought  
20 process. And I'm trying to remember -- and I  
21 don't know that I can right now -- if the  
22 chronology implied in the sentence is accurate

1 here.

2 I generally remember at some point being  
3 concerned about the characterization of  
4 discharges, of discharge. But I honestly don't  
5 remember if it was specifically -- if it  
6 specifically related to whether or not I contested  
7 the discharge. That may have been a part of the  
8 calculus. But I remember the larger part being  
9 how wide-ranging is this line of inquiry going to  
10 be if -- if I choose to contest it.

11 And it's -- it -- one other phenomena I  
12 guess going on here too, it's -- in my mind it's a  
13 little bit blurred too. I mean, like I said,  
14 first of all, it's been eight years. And a lot of  
15 this stuff I haven't thought of or thought about  
16 in minute detail. But I feel like my mind is also  
17 a little bit blurred by the fact that I do this a  
18 lot from an advocacy standpoint.

19 And so I know I talk a lot about the  
20 fact that people fear that if you con -- if you  
21 pursue or contest -- if you contest a discharge or  
22 pursue the remedies, administrative remedies you



1 have available, that there is a general fear that  
2 you could end up with a less than honorable  
3 discharge.

4 But I -- I honestly can't remember the  
5 exact order. And I hope I'm making sense here. I  
6 can't remember whether the chronology implied in  
7 the sentence is one hundred percent accurate or  
8 not. Like I said, the best I can really give you  
9 is that I remember that at some point that was  
10 part of my thought process.

11 Q You mean share --

12 A But it was a smaller part of it than the  
13 other fear, which was that this wide-ranging line  
14 of inquiry would proceed.

15 Q When you say that was part of your  
16 thought process, you mean in sharing that it was  
17 an honorable discharge?

18 A Right. At some point the concern about  
19 making sure that the discharge was honorable  
20 entered my thought process for the whole issue,  
21 you know, at the time.

22 Q After the disclosure that you are gay,

1 CERTIFICATE OF DEPONENT

2 I hereby certify that I have read and examined the  
3 foregoing transcript, and the same is a true and  
4 accurate record of the testimony given by me.

5 Any additions or corrections that I feel are  
6 necessary, I will attach on a separate sheet of  
7 paper to the original transcript.

8

9

\_\_\_\_\_

10

Signature of Deponent

11 I hereby certify that the individual representing  
12 himself/herself to be the above-named individual,  
13 appeared before me this \_\_\_\_ day of \_\_\_\_\_,  
14 2010, and executed the above certificate in my  
15 presence.

16

17

\_\_\_\_\_

18

NOTARY PUBLIC IN AND FOR

19

\_\_\_\_\_

20

County Name

21

22 MY COMMISSION EXPIRES:

1 CERTIFICATE OF NOTARY PUBLIC  
2 I, BARBARA A. HUBER, CSR, the officer  
3 before whom the foregoing deposition was taken, do  
4 hereby certify that the witness whose testimony  
5 appears in the foregoing deposition was duly sworn  
6 by me; that the testimony of said witness was  
7 taken by me in stenotypy and thereafter reduced to  
8 print under my direction; that said deposition is  
9 a true record of the testimony given by said  
10 witness; that I am neither counsel for, related  
11 to, nor employed by any of the parties to the  
12 action in which this deposition was taken; and,  
13 furthermore, that I am not a relative or employee  
14 of any attorney or counsel employed by the parties  
15 hereto, nor financially or otherwise interested in  
16 the outcome of this action.

17 \_\_\_\_\_  
18 BARBARA A. HUBER, CSR  
19 Notary Public, in and for the  
20 District of Columbia  
21 My Commission Expires: March 14, 2012

22

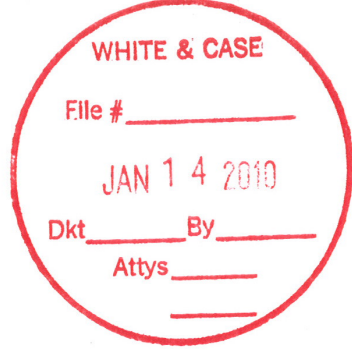
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2  
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11 **UNITED STATES DISTRICT COURT**  
12 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
13 **EASTERN DIVISION**

14 LOG CABIN REPUBLICANS,  
15 Plaintiff,  
16 v.  
17 UNITED STATES OF AMERICA AND  
ROBERT GATES, Secretary of Defense,  
18 Defendants.  
19  
20  
21

No. CV04-8425 GPS (Ex)  
DEFENDANTS' OBJECTIONS  
AND RESPONSES TO  
PLAINTIFF'S FIRST SET OF  
REQUESTS FOR PRODUCTION  
OF DOCUMENTS



22  
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DEFENDANTS' OBJECTIONS AND RESPONSES TO  
PLAINTIFF'S FIRST SET OF REQUESTS FOR PRODUCTION  
OF DOCUMENTS

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

1 Pursuant to Federal Rules of Civil Procedure 26 and 34, and subject to the  
2 objections stated below, Defendants United States and Secretary Gates hereby  
3 respond to Plaintiff's First Set of Requests for Production of Documents  
4 ("Document Requests").

5 To the extent possible, Defendants plan to scan the documents they produce  
6 onto compact discs, which will then be mailed to Plaintiff's counsel. If production  
7 in this manner becomes unduly burdensome, Defendants will make responsive  
8 documents available for inspection.

9 **GENERAL OBJECTIONS**

10 1. Defendants object to Plaintiff's Document Requests to the extent that  
11 Plaintiff seeks to probe the motivations of the Legislative and Executive Branches  
12 in passing statutes and promulgating regulations implementing the law.  
13 Well-established Supreme Court precedent squarely holds that inquiry into the  
14 motivations of Congress in enacting a statute is not appropriate. See United States  
15 v. O'Brien, 391 U.S. 367, 383-84 (1968) (noting that inquiries into congressional  
16 motives or purposes is a "hazardous matter" and that courts may not strike down a  
17 statute based upon "alleged illicit motive"); Board of Educ. of the Westside  
18 Community Schools v. Mergens, 496 U.S. 226, 249 (1990) (in evaluating  
19 constitutionality of statute, "what is relevant is the legislative purpose of the  
20 statute, not the possibly religious motives of the legislators who enacted the law")  
21 (emphasis in original); Las Vegas v. Foley, 747 F.2d 1294, 1298 (9th Cir. 1984)  
22 (same). The same is true of attempts to probe the motivations of the Executive  
23 Branch. See e.g., Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.,  
24 429 U.S. 252, 268 n.18 (1977) ("judicial inquiries into legislative or executive  
25 motivation represent a substantial intrusion into the workings of other branches of  
26 government").

1           2.     Defendants object to Plaintiff’s Document Requests to the extent that  
2 they are not reasonably calculated to lead to the discovery of admissible evidence.  
3 The Court has ruled that Plaintiff’s challenge is governed by the rational basis  
4 standard of review. It is well understood that a legislative choice subject to the  
5 rational basis test “is not subject to courtroom fact-finding.” Federal  
6 Communications Comm’n v. Beach Communications, 508 U.S. 307, 315 (1993)  
7 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).  
8 Defendants accordingly have “no obligation to produce evidence to sustain the  
9 rationality of a statutory classification.” Heller v. Doe, 509 U.S. 312, 320 (1993).  
10 The analysis instead asks whether the legislature “rationally *could have believed*”  
11 that the conditions of the statute would promote its objective. Western and  
12 Southern Life Insurance Co. v. State Bd. of Equalization of California, 451 U.S.  
13 654, 671-72 (1981) (emphasis in original).

14           Rational basis review, moreover, “is not a license for courts to judge the  
15 wisdom, fairness, or logic of legislative choices.” Beach Communications, 508  
16 U.S. at 313. Rather, “those challenging the legislative judgment must convince  
17 the court that the legislative facts on which the classification is apparently based  
18 could not reasonably be conceived to be true by the governmental decisionmaker.”  
19 Vance v. Bradley, 440 U.S. 93, 111 (1979). While we understand that the Court  
20 has permitted Plaintiff to attempt to engage in discovery, the congressional  
21 findings and legislative history underlying the statute are “legislative fact[s]”  
22 subject to judicial notice and are not appropriate subjects for fact-finding or  
23 discovery.

24           3.     Defendants object to Plaintiff’s Document Requests to the extent that  
25 they attempt to probe the “continued rationality” of the statute. Classifications  
26 subject to rational-basis review are not subject to challenge on the ground of  
27 changed circumstances. See, e.g., United States v. Jackson, 84 F.3d 1154, 1161  
28

1 (9th Cir. 1996) (Congress’s initial decision to enact the 100:1 ratio “was rational,  
2 even though it differs from the Sentencing Commission’s current recommendation  
3 regarding the magnitude of the disparity”); Montalvo-Huertas v. Rivera-Cruz, 885  
4 F.2d 971, 977 (1st Cir. 1989) (“[E]valuating the continued need for, and suitability  
5 of, legislation of this genre is exactly the kind of policy judgment that the rational  
6 basis test was designed to preclude”); United States v. Teague, 93 F.3d 81, 85 (2d  
7 Cir. 1996) (“Nor does Congress’s failure to adopt the [Sentencing] Commission’s  
8 proposal render the current 100:1 [crack to powder cocaine] ratio unconstitutional  
9 for lack of a rational basis. The 100:1 ratio had a rational basis when enacted, and  
10 the Commission’s continuing consideration of the appropriate sentencing scheme  
11 for crack and powder cocaine counsels against judicial intervention.”). Indeed,  
12 courts have found that even where Congress has determined that a previous  
13 enactment is no longer necessary, that finding does render the statute  
14 unconstitutional. See Smart v. Ashcroft, 401 F.3d 119, 123 (2d Cir. 2005) (“A  
15 congressional decision that a statute is unfair, outdated, and in need of  
16 improvement does not mean that the statute when enacted was wholly irrational or,  
17 for purposes of rational basis review, unconstitutional.”); Howard v. U.S. Dept. of  
18 Defense, 354 F.3d 1358, 1361-62 (Fed. Cir. 2004) (“Congress acts based on  
19 judgments as to preferable policy; the fact that Congress repeals or modifies  
20 particular legislation does not reflect a judgment that the legislation, in its pre-  
21 amendment form, lacked rational support.”). Were it otherwise, all legislation  
22 subject to rational basis review could potentially be subject to periodic judicial  
23 review on the basis of changed circumstances, a prospect incompatible with these  
24 principles and the Supreme Court’s well known and repeated admonition that “a  
25 legislative choice is not subject to courtroom factfinding and may be based on  
26 rational speculation unsupported by evidence or empirical data.” Heller, 509 U.S.  
27 at 320.

1           4. Defendants object to the Document Requests to the extent they  
2 request that Defendants produce documents that are not in their possession,  
3 custody, or control. Fed. R. Civ. P. 34.

4           5. Defendants object to the Document Requests as duplicative and  
5 unduly burdensome to the extent they call for production of identical copies of the  
6 same document.

7           6. Defendants object to the definitions and instructions in Plaintiff's  
8 Document Requests to the extent that they conflict with or purport to expand upon  
9 Defendants' obligations under the Federal Rules of Civil Procedure or the local  
10 rules of this Court.

11           7. Defendants object to Plaintiff's Document Requests to the extent that  
12 they are overbroad or attempt to impose obligations on Defendants that are unduly  
13 burdensome, expensive, and/or oppressive.

14           8. Defendants object to Plaintiff's Document Requests as unduly  
15 burdensome to the extent that they require production of electronic information,  
16 the retrieval of which, to the extent possible, would involve undue expense, time,  
17 and allocation of resources for minimal return. Defendants, accordingly, object to  
18 instruction nos. 16 and 17. Counsel will meet and confer as to the production of  
19 electronically stored documents in an effort to arrive at a mutually agreeable  
20 approach to the production of such information.

21           9. Defendants object to Plaintiff's Document Requests to the extent that  
22 they seek information and documents protected by the work-product doctrine,  
23 Privacy Act, attorney-client privilege, law enforcement privilege, deliberative  
24 process privilege, and any other applicable privilege. Defendants object to  
25 paragraph (2) of the instructions purporting to require Defendants to set forth  
26 "[t]he identity of each Person who received and/or saw [an] original or a copy" of  
27 a privileged document. To the extent there are any documents subject to the  
28



1 privileges and protections listed above, Defendants will produce a privilege log  
2 that identifies (to the extent relevant, ascertainable, and not privileged or  
3 otherwise protected from disclosure) the author or creator of the document,  
4 the recipient(s) of the document (including any individuals who were sent copies  
5 of the document), the date of the document, the privilege or protection claimed,  
6 and a description of the document sufficient to enable the parties to assess the  
7 applicability of the privilege or protection. See Fed. R. Civ. P. 26(b)(5)(A).

8 10. A statement that Defendants will produce documents responsive to a  
9 particular request indicates that Defendants will conduct a good-faith search for  
10 such documents, and does not constitute a representation that such documents do,  
11 in fact, exist.

12 11. Defendants object to the Document Requests to the extent they seek  
13 “any and all” or “all” documents as overly broad, unduly burdensome, and not  
14 reasonably calculated to lead to the discovery of admissible evidence.

15 12. Defendants object to searching beyond the Department of Defense for  
16 responsive documents. Defendants object to any request that current and former  
17 employees, attorneys, accountants, agents, affiliates and representatives of the  
18 United States must search for responsive documents as overly broad and unduly  
19 burdensome. Defendants also specifically object to any requests that can be  
20 interpreted as requiring a search for responsive documents from Congress. This  
21 action is subject to review under the Administrative Procedure Act, which limits  
22 review to “[a]gency action.” See 5 U.S.C. § 702. Defendants will thus conduct a  
23 reasonable search for responsive documents maintained within the agency charged  
24 with administering 10 U.S.C. § 654—the United States Department of Defense.

25 13. To the extent that the Department of Defense houses documents  
26 belonging to another agency, Congress, or an instrumentality of the Government,  
27 the Department of Defense will only produce those documents with the consent of  
28

1 the agency, instrumentality or Congress.

2 14. Defendants object to the Plaintiff's characterization of any particular  
3 document.

4 15. Defendants reserve the right to amend, supplement, or alter these  
5 objections and responses to Plaintiff's Document Requests at any time.  
6 Defendants further reserve the right to redact any portions of documents for any  
7 reason contemplated under the Federal Rules of Civil Procedure or the local rules  
8 of this Court without waiving any rights either by doing so or by producing  
9 unredacted portions of documents.

10 16. The foregoing General Objections shall be considered as made, to the  
11 extent applicable, in response to each of the Document Requests, as if General  
12 Objections were fully set forth in each response.

13 **GENERAL DEFINITION**

14 1. The term "Documents housed at the Pentagon" means documents in  
15 the possession of the Office of the Joint Chief of Staff; the Office of the Secretary  
16 of Defense; the Offices of the Under Secretaries of Defense for Policy,  
17 Comptroller, Personnel and Readiness, Acquisition, Technology and Logistics,  
18 and Intelligence; the Offices of the Assistant Secretaries of Defense for Network  
19 and Information Integration, Public Affairs, and Legislative Affairs; the  
20 Department of Defense Office of General Counsel; the Department of Defense  
21 Office of the Inspector General; and the Offices of the Secretaries of the Army,  
22 Navy and Air Force.

1 **DOCUMENT REQUESTS**

2 **DOCUMENT REQUEST NO. 1:**

3 All Documents referring or relating to the United States Armed Forces  
4 statement that “[h]omosexuality is incompatible with military service.” DOD  
5 Directive 1332.14 (January, 1981).

6 **RESPONSE:**

7 Defendants object to this request, as it is currently drafted, as overly broad  
8 and unduly burdensome. Accordingly, the parties have met, and conferred and  
9 Plaintiff has agreed to limit its request to documents Defendants intend to use  
10 to support the statement contained in the request.

11 Defendants presently intend to rely upon, among other things, the text of the  
12 statute, the legislative history, and any other basis that Congress “rationally *could*  
13 *have believed*” supported the objectives of the statute. Western and Southern Life  
14 Ins. Co., 451 U.S. at 671-72 (1981) (emphasis in original).

15 The text and legislative history of the statute are publically available and  
16 will not be produced by Defendants. Subject to the specific and general objections  
17 set forth above, Defendants will produce documents they intend to rely on to  
18 support the statement contained in Plaintiff’s request and will supplement their  
19 response as necessary.

20 **DOCUMENT REQUEST NO. 2:**

21 All drafts of the Policy.

22 **RESPONSE:**

23 Defendants object to this request, as it is currently drafted, as overly broad  
24 and unduly burdensome. Accordingly, the parties have met and conferred and  
25 Plaintiff has agreed to limit its request to drafts housed at the Pentagon.

26 Defendants object to this request, even in its narrowed form, because  
27 requesting “drafts of the Policy” calls for the discovery of deliberative documents,  
28

1 which are subject to privilege. In addition, the request is not reasonably calculated  
2 to lead to the discovery of admissible evidence relating to Plaintiff's facial  
3 challenge to the Policy. To the extent that Plaintiff requests the production of bills  
4 considered by Congress, they are publically available.

5 Based on the specific and general objections set forth above, Defendants  
6 will not produce documents in response to this request.

7 **DOCUMENT REQUEST NO. 3:**

8 All Documents, including studies, research, and/or analysis of the Policy.

9 **RESPONSE:**

10 Defendants object to this request, as it is currently drafted, as overly broad  
11 and unduly burdensome. Accordingly, the parties have met and conferred and  
12 Plaintiff has agreed to limit its request to studies of the policy housed at the  
13 Pentagon.

14 Defendants object to this request, even in its narrowed form, to the extent  
15 that Plaintiff already has access to studies of the Policy. Indeed, many are  
16 publically available on the internet.

17 Subject to the specific and general objections set forth above, Defendants  
18 will produce studies of the Policy housed at the Pentagon that are not specifically  
19 mentioned in Plaintiff's document requests.

20 **DOCUMENT REQUEST NO. 4**

21 All Documents referring or relating to the drafting of the DOD Directives  
22 1332.14, 1332.30, and 1304.26.

23 **RESPONSE:**

24 Defendants object to this request, as it is currently drafted, as overly broad  
25 and unduly burdensome. Accordingly, the parties have met and conferred and  
26 Plaintiff has agreed to limit its request to drafts of the listed DOD regulations or  
27 documents relating to the process of drafting those regulations that are housed at  
28

1 the Pentagon.

2 Defendants object to this request, even in its narrowed form, because by  
3 requesting drafts and documents relating to the drafting process, the request calls  
4 for the discovery of deliberative documents, which are subject to privilege. In  
5 addition, the request is not reasonably calculated to lead to the discovery of  
6 admissible evidence relating to Plaintiff's facial challenge to the Policy.

7 Based on the specific and general objections set forth above, Defendants  
8 will not produce responsive documents to this request.

9 **DOCUMENT REQUEST NO. 5:**

10 All Documents, including studies, research, and/or analysis, relating to the  
11 Department of Defense Directives 1332.14, 1332.30 and 1304.26.

12 **RESPONSE:**

13 Defendants object to this request, as it is currently drafted, as overly broad  
14 and unduly burdensome. Accordingly, the parties have met and conferred and  
15 Plaintiff has agreed to limit its request to studies, research and analysis of the  
16 listed Directives that are housed at the Pentagon.

17 Defendants object to this request that the requested studies are publically  
18 available or already in Plaintiff's possession.

19 Subject to the specific and general objections set forth above, Defendants  
20 will produce studies, research and analysis of the listed Directives that are housed  
21 at the Pentagon and not specifically mentioned in Plaintiff's document requests.

22 **DOCUMENT REQUEST NO. 6:**

23 All Documents referring or relating to the statement that the "presence in  
24 the armed forces of persons who demonstrate a propensity or intent to engage in  
25 homosexual acts would create an unacceptable risk to the high standards of  
26 morale, good order and discipline, and unit cohesion that are the essence of  
27 military capability." 10 U.S.C. § 654(a)(15).

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1 **RESPONSE:**

2 Defendants object to this request, as it is currently drafted, as overly broad  
3 and unduly burdensome. Accordingly, the parties have met, and conferred and  
4 Plaintiff has agreed to limit its request to documents Defendants intend to use  
5 to support the statement contained in the request.

6 Notwithstanding these objections, Defendants presently intend to rely upon,  
7 among other things, the text of the statute, the legislative history, and any other  
8 basis that Congress “rationally *could have believed*” supported the objectives of  
9 the statute. Western and Southern Life Ins. Co., 451 U.S. at 671-72 (1981)  
10 (emphasis in original).

11 The text and legislative history of the statute are publically available and  
12 will not be produced by Defendants. Subject to the general and specific objections  
13 set forth above, Defendants will produce documents they intend to rely on to  
14 support the statement contained in Plaintiff’s request and will supplement their  
15 response as necessary.

16 **DOCUMENT REQUEST NO. 7:**

17 All Documents referring or relating to members of the Armed Forces  
18 discharged under the Policy and DOD Regulations whose primary mission was not  
19 “to engage in direct combat.”

20 **RESPONSE:**

21 Defendants object to this request as vague because it is unclear what  
22 Plaintiff means by servicemembers “whose primary mission was not ‘to engage in  
23 direct combat.’” All members of the Armed Forces are expected to be prepared to  
24 engage in direct combat and servicemembers are not classified on the basis  
25 suggested by Plaintiff’s request. Servicemembers are categorized based on their  
26 military occupations.

27 Notwithstanding this objection, Defendants will thus produce statistical data  
28

1 regarding servicemembers discharged under the Policy broken down by military  
2 occupation.

3 **DOCUMENT REQUEST NO. 8:**

4 All Documents, including studies, research, and/or analysis, relating to the  
5 application of the Policy.

6 **RESPONSE:**

7 Defendants object to this request, as it is currently drafted, as overly broad  
8 and unduly burdensome. Accordingly, the parties have met and conferred and  
9 Plaintiff has agreed to limit its request to studies housed at the Pentagon that relate  
10 to the application of the Policy.

11 Subject to the specific and general objections set forth above, Defendants  
12 will produce studies housed at the Pentagon that relate to the application of the  
13 Policy.

14 **DOCUMENT REQUEST NO. 9:**

15 All Documents, (dating from January 1, 2003 to the present), including  
16 studies, research, and/or analysis, relating to the application of the Policy to  
17 women in the United States Armed Forces.

18 **RESPONSE:**

19 Defendants object to this request, as it is currently drafted, as overly broad  
20 and unduly burdensome. Accordingly, the parties have met and conferred and  
21 Plaintiff has agreed to limit its request to statistical information and studies that  
22 relate to the application of the policy to women and are housed at the Pentagon.

23 Defendants object to this request, even in its narrowed form, because  
24 Plaintiff has failed to identify any women among its membership who have been  
25 purportedly harmed by the Policy. Plaintiff, accordingly, lacks standing to bring  
26 any challenge relating to the application of the Policy to women and, therefore,  
27 any discovery on this issue is not likely to lead to admissible evidence.

28

1 Subject to the specific and general objections set forth above, Defendants  
2 will produce statistical information and studies that are housed at the Pentagon and  
3 relate to the application of the Policy to women.

4 **DOCUMENT REQUEST NO. 10:**

5 All Documents (dating from January 1, 2003 to the present) referring or  
6 relating to the compatibility or incompatibility of gay and lesbian Americans with  
7 service in the United States Armed Forces for January 1, 2003 to the present.

8 **RESPONSE:**

9 Defendants object to this request, as it is currently drafted, as overly broad  
10 and unduly burdensome. Accordingly, the parties have met and conferred and  
11 Plaintiff has agreed to limit its request to documents that are housed at the  
12 Pentagon and contain studies or analysis of the compatibility or incompatibility of  
13 gay and lesbian Americans with service in the United States Armed Forces for  
14 January 1, 2003 to the present.

15 Subject to the specific and general objections set forth above, Defendants  
16 will produce documents responsive to Plaintiff's narrowed request. Defendants  
17 note, however, that the request is predicated on a fundamental misunderstanding  
18 of the statute and applicable regulations, which set forth a conduct-based policy.

19 **DOCUMENT REQUEST NO. 11:**

20 All documents (dating from January 2003 to the present) relating to any  
21 effect or lack of effect on combat effectiveness caused by, resulting from,  
22 associated with, or accompanying the presence in the United States Armed Forces  
23 of gay or lesbian servicemembers.

24 **RESPONSE:**

25 During a meeting on November 18, 2009, Plaintiff's counsel agreed to  
26 narrow their request to documents that Defendants intend to rely upon to support  
27 the findings referenced above, in a manner consistent with request nos. 1, 6,  
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1 and 11-22. In addition, Plaintiff's counsel emphasized that this request did not call  
2 for the production of documents relating to individual service members. Plaintiff  
3 has since reneged on its agreement and has chosen instead to stand on the request  
4 as written.

5 Defendants have proceeded to search for documents within the bounds  
6 agreed to by Counsel on November 18, 2009 and presently intend to rely upon,  
7 among other things, the text of the statute, the legislative history, and any other  
8 basis that Congress "rationally *could have believed*" supported the objectives of  
9 the statute. Western and Southern Life Ins. Co., 451 U.S. at 671-72 (1981)  
10 (emphasis in original).

11 The text and legislative history of the statute are publically available and  
12 will not be produced by Defendants. Defendants have, however, conducted a  
13 reasonable search and will, subject to the specific and general objections set forth  
14 above, produce studies housed at the Pentagon that relate to the finding referenced  
15 in Plaintiff's request.

16 Defendants note, moreover, that this request rests on a fundamental  
17 misunderstanding of the statute and applicable regulations. The statute sets forth a  
18 conduct-based policy focused on the conduct of members of the Armed Forces,  
19 not "the presence in the United States Armed Forces of gay or lesbian  
20 servicemembers."

21 **DOCUMENT REQUEST NO. 12:**

22 All Documents (dating from January 1, 2003 to the present) relating to any  
23 effect or lack of effect on combat effectiveness caused by, resulting from,  
24 associated with, or accompanying the presence in the United States Armed Forces  
25 of servicemembers who engage in or have engaged in homosexual conduct.

26 **RESPONSE:**

27 During a meeting on November 18, 2009, Plaintiff's counsel agreed to  
28

1 narrow their request to documents that Defendants intend to rely upon to support  
2 the findings referenced above, in a manner consistent with request nos. 1, 6,  
3 and 11-22. In addition, Plaintiff's counsel emphasized that this request did not call  
4 for the production of documents relating to individual service members. Plaintiff  
5 has since reneged on its agreement and has chosen instead to stand on the request  
6 as written.

7 Defendants have proceeded to search for documents within the bounds  
8 agreed to by Counsel on November 18, 2009 and presently intend to rely upon,  
9 among other things, the text of the statute, the legislative history, and any other  
10 basis that Congress "*rationally could have believed*" supported the objectives of  
11 the statute. Western and Southern Life Ins. Co., 451 U.S. at 671-72 (1981)  
12 (emphasis in original).

13 The text and legislative history of the statute are publically available and  
14 will not be produced by Defendants. Defendants have, however, conducted a  
15 reasonable search and will, subject to the specific and general objections set forth  
16 above, produce studies housed at the Pentagon that relate to the findings  
17 referenced in Plaintiff's request.

18 **DOCUMENT REQUEST NO. 13:**

19 All Documents (dating from January 1, 2003 to the present) relating to any  
20 effect or lack of effect on unit cohesion caused by, resulting from, associated with,  
21 or accompanying the presence in the United States Armed Forces of gay or lesbian  
22 servicemembers.

23 **RESPONSE:**

24 During a meeting on November 18, 2009, Plaintiff's counsel agreed to  
25 narrow their request to documents that Defendants intend to rely upon to support  
26 the findings referenced above, in a manner consistent with request nos. 1, 6,  
27 and 11-22. In addition, Plaintiff's counsel emphasized that this request did not call  
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1 for the production of documents relating to individual service members. Plaintiff  
2 has since reneged on its agreement and has chosen instead to stand on the request  
3 as written.

4 Defendants have proceeded to search for documents within the bounds  
5 agreed to by Counsel on November 18, 2009 and presently intend to rely upon,  
6 among other things, the text of the statute, the legislative history, and any other  
7 basis that Congress “rationally *could have believed*” supported the objectives of  
8 the statute. Western and Southern Life Ins. Co., 451 U.S. at 671-72 (1981)  
9 (emphasis in original).

10 The text and legislative history of the statute are publically available and  
11 will not be produced by Defendants. Defendants have, however, conducted a  
12 reasonable search and will, subject to the specific and general objections set forth  
13 above, produce studies housed at the Pentagon that relate to the findings  
14 referenced in Plaintiff’s request.

15 Defendants note, moreover, that this request rests on a fundamental  
16 misunderstanding of the statute and applicable regulations. The statute sets forth a  
17 conduct-based policy focused on the conduct of members of the Armed Forces,  
18 not “the presence in the United States Armed Forces of gay or lesbian  
19 servicemembers.”

20 **DOCUMENT REQUEST NO. 14:**

21 All Documents (dating from January 1, 2003 to the present) relating to any  
22 effect or lack of effect on unit cohesion caused by, resulting from, associated with,  
23 or accompanying the presence in the United States Armed Forces of  
24 servicemembers who engage in or have engaged in homosexual conduct.

25 **RESPONSE:**

26 During a meeting on November 18, 2009, Plaintiff’s counsel agreed to  
27 narrow their request to documents that Defendants intend to rely upon to support  
28

1 the findings referenced above, in a manner consistent with request nos. 1, 6,  
2 and 11-22. In addition, Plaintiff's counsel emphasized that this request did not call  
3 for the production of documents relating to individual service members. Plaintiff  
4 has since reneged on its agreement and has chosen instead to stand on the request  
5 as written.

6 Defendants have proceeded to search for documents within the bounds  
7 agreed to by Counsel on November 18, 2009 and presently intend to rely upon,  
8 among other things, the text of the statute, the legislative history, and any other  
9 basis that Congress "*rationally could have believed*" supported the objectives of  
10 the statute. Western and Southern Life Ins. Co., 451 U.S. at 671-72 (1981)  
11 (emphasis in original).

12 The text and legislative history of the statute are publically available and  
13 will not be produced by Defendants. Defendants have, however, conducted a  
14 reasonable search and will, subject to the specific and general objections set forth  
15 above, produce studies housed at the Pentagon that relate to the findings  
16 referenced in Plaintiff's request.

17 **DOCUMENT REQUEST NO. 15:**

18 All Documents (dating from January 1, 2003 to the present) relating to any  
19 effect or lack of effect on unit morale caused by, resulting from, associated with,  
20 or accompanying the presence in the United States Armed Forces of gay or lesbian  
21 service members.

22 **RESPONSE:**

23 During a meeting on November 18, 2009, Plaintiff's counsel agreed to  
24 narrow their request to documents that Defendants intend to rely upon to support  
25 the findings referenced above, in a manner consistent with request nos. 1, 6,  
26 and 11-22. In addition, Plaintiff's counsel emphasized that this request did not call  
27 for the production of documents relating to individual service members. Plaintiff  
28

1 has since reneged on its agreement and has chosen instead to stand on the request  
2 as written.

3 Defendants have proceeded to search for documents within the bounds  
4 agreed to by Counsel on November 18, 2009 and presently intend to rely upon,  
5 among other things, the text of the statute, the legislative history, and any other  
6 basis that Congress “rationally *could have believed*” supported the objectives of  
7 the statute. Western and Southern Life Ins. Co., 451 U.S. at 671-72 (1981)  
8 (emphasis in original).

9 The text and legislative history of the statute are publically available and  
10 will not be produced by Defendants. Defendants have, however, conducted a  
11 reasonable search and will, subject to the specific and general objections set forth  
12 above, produce studies housed at the Pentagon that relate to the findings  
13 referenced in Plaintiff’s request.

14 Defendants note, moreover, that this request rests on a fundamental  
15 misunderstanding of the statute and applicable regulations. The statute sets forth a  
16 conduct-based policy focused on the conduct of members of the Armed Forces,  
17 not “the presence in the United States Armed Forces of gay or lesbian  
18 servicemembers.”

19 **DOCUMENT REQUEST NO. 16:**

20 All Documents (dating from January 1, 2003 to the present) relating to any  
21 effect or lack of effect on unit morale caused by, resulting from, associated with,  
22 or accompanying the presence in the United States Armed Forces of  
23 servicemembers who engage in or have engaged in or have engaged in  
24 homosexual conduct.

25 **RESPONSE:**

26 During a meeting on November 18, 2009, Plaintiff’s counsel agreed to  
27 narrow their request to documents that Defendants intend to rely upon to support  
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1 the findings referenced above, in a manner consistent with request nos. 1, 6,  
2 and 11-22. In addition, Plaintiff's counsel emphasized that this request did not call  
3 for the production of documents relating to individual service members. Plaintiff  
4 has since reneged on its agreement and has chosen instead to stand on the request  
5 as written.

6 Defendants have proceeded to search for documents within the bounds  
7 agreed to by Counsel on November 18, 2009 and presently intend to rely upon,  
8 among other things, the text of the statute, the legislative history, and any other  
9 basis that Congress "rationally *could have believed*" supported the objectives of  
10 the statute. Western and Southern Life Ins. Co., 451 U.S. at 671-72 (1981)  
11 (emphasis in original).

12 The text and legislative history of the statute are publically available and  
13 will not be produced by Defendants. Defendants have, however, conducted a  
14 reasonable search and will, subject to the specific and general objections set forth  
15 above, produce studies housed at the Pentagon that relate to the findings  
16 referenced in Plaintiff's request.

17 **DOCUMENT REQUEST NO. 17:**

18 All Documents (dating from January 1, 2003 to the present) relating to any  
19 effect or lack of effect on good order caused by, resulting from, associated with, or  
20 accompanying the presence in the United States Armed Forces of gay or lesbian  
21 servicemembers.

22 **RESPONSE:**

23 During a meeting on November 18, 2009, Plaintiff's counsel agreed to  
24 narrow their request to documents that Defendants intend to rely upon to support  
25 the findings referenced above, in a manner consistent with request nos. 1, 6,  
26 and 11-22. In addition, Plaintiff's counsel emphasized that this request did not call  
27 for the production of documents relating to individual service members. Plaintiff  
28

1 has since reneged on its agreement and has chosen instead to stand on the request  
2 as written.

3 Defendants have proceeded to search for documents within the bounds  
4 agreed to by Counsel on November 18, 2009 and presently intend to rely upon,  
5 among other things, the text of the statute, the legislative history, and any other  
6 basis that Congress “rationally *could have believed*” supported the objectives of  
7 the statute. Western and Southern Life Ins. Co., 451 U.S. at 671-72 (1981)  
8 (emphasis in original).

9 The text and legislative history of the statute are publically available and  
10 will not be produced by Defendants. Defendants have, however, conducted a  
11 reasonable search and will, subject to the specific and general objections set forth  
12 above, produce studies housed at the Pentagon that relate to the findings  
13 referenced in Plaintiff’s request.

14 Defendants note, moreover, that this request rests on a fundamental  
15 misunderstanding of the statute and applicable regulations. The statute sets forth a  
16 conduct-based policy focused on the conduct of members of the Armed Forces,  
17 not “the presence in the United States Armed Forces of gay or lesbian  
18 servicemembers.”

19 **DOCUMENT REQUEST NO. 18:**

20 All Documents (dating from January 1, 2003 to the present) relating to any  
21 effect or lack of effect on good order caused by, resulting from, associated with, or  
22 accompanying the presence in the United States Armed Forces of servicemembers  
23 who engage in or have engaged in homosexual conduct.

24 **RESPONSE:**

25 During a meeting on November 18, 2009, Plaintiff’s counsel agreed to  
26 narrow their request to documents that Defendants intend to rely upon to support  
27 the findings referenced above, in a manner consistent with request nos. 1, 6,  
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1 and 11-22. In addition, Plaintiff's counsel emphasized that this request did not call  
2 for the production of documents relating to individual service members. Plaintiff  
3 has since reneged on its agreement and has chosen instead to stand on the request  
4 as written.

5 Defendants have proceeded to search for documents within the bounds  
6 agreed to by Counsel on November 18, 2009 and presently intend to rely upon,  
7 among other things, the text of the statute, the legislative history, and any other  
8 basis that Congress "rationally *could have believed*" supported the objectives of  
9 the statute. Western and Southern Life Ins. Co., 451 U.S. at 671-72 (1981)  
10 (emphasis in original).

11 The text and legislative history of the statute are publically available and  
12 will not be produced by Defendants. Defendants have, however, conducted a  
13 reasonable search and will, subject to the specific and general objections set forth  
14 above, produce studies housed at the Pentagon that relate to the findings  
15 referenced in Plaintiff's request.

16 **DOCUMENT REQUEST NO. 19:**

17 All Documents (dating from January 1, 2003 to the present) relating to any  
18 effect or lack of effect on discipline caused by, resulting from, associated with or  
19 accompanying the presence in the United States Armed Forces of gay or lesbian  
20 servicemembers.

21 **RESPONSE:**

22 During a meeting on November 18, 2009, Plaintiff's counsel agreed to  
23 narrow their request to documents that Defendants intend to rely upon to support  
24 the findings referenced above, in a manner consistent with request nos. 1, 6,  
25 and 11-22. In addition, Plaintiff's counsel emphasized that this request did not call  
26 for the production of documents relating to individual service members. Plaintiff  
27 has since reneged on its agreement and has chosen instead to stand on the request  
28



1 as written.

2 Defendants have proceeded to search for documents within the bounds  
3 agreed to by Counsel on November 18, 2009 and presently intend to rely upon,  
4 among other things, the text of the statute, the legislative history, and any other  
5 basis that Congress “rationally *could have believed*” supported the objectives of  
6 the statute. Western and Southern Life Ins. Co., 451 U.S. at 671-72 (1981)  
7 (emphasis in original).

8 The text and legislative history of the statute are publically available and  
9 will not be produced by Defendants. Defendants have, however, conducted a  
10 reasonable search and will, subject to the specific and general objections set forth  
11 above, produce studies housed at the Pentagon that relate to the findings  
12 referenced in Plaintiff’s request.

13 Defendants note, moreover, that this request rests on a fundamental  
14 misunderstanding of the statute and applicable regulations. The statute sets forth a  
15 conduct-based policy focused on the conduct of members of the Armed Forces,  
16 not “the presence in the United States Armed Forces of gay or lesbian  
17 servicemembers.”

18 **DOCUMENT REQUEST NO. 20:**

19 All Documents (dating from January 1, 2003 to the present) relating to any  
20 effect or lack of effect on discipline caused by, resulting from, associated with, or  
21 accompanying the presence in the United States Armed Forces of servicemembers  
22 with a homosexual orientation.

23 **RESPONSE:**

24 During a meeting on November 18, 2009, Plaintiff’s counsel agreed to  
25 narrow their request to documents that Defendants intend to rely upon to support  
26 the findings referenced above, in a manner consistent with request nos. 1, 6,  
27 and 11-22. In addition, Plaintiff’s counsel emphasized that this request did not call  
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1 for the production of documents relating to individual service members. Plaintiff  
2 has since reneged on its agreement and has chosen instead to stand on the request  
3 as written.

4 Defendants have proceeded to search for documents within the bounds  
5 agreed to by Counsel on November 18, 2009 and presently intend to rely upon,  
6 among other things, the text of the statute, the legislative history, and any other  
7 basis that Congress “rationally *could have believed*” supported the objectives of  
8 the statute. Western and Southern Life Ins. Co., 451 U.S. at 671-72 (1981)  
9 (emphasis in original).

10 The text and legislative history of the statute are publically available and  
11 will not be produced by Defendants. Defendants have, however, conducted a  
12 reasonable search and will, subject to the specific and general objections set forth  
13 above, produce studies housed at the Pentagon that relate to the findings  
14 referenced in Plaintiff’s request.

15 Defendants note, moreover, that this request rests on a fundamental  
16 misunderstanding of the statute and applicable regulations. The statute sets forth a  
17 conduct-based policy focused on the conduct of members of the Armed Forces,  
18 not “the presence in the United States Armed Forces of gay or lesbian  
19 servicemembers.”

20 **DOCUMENT REQUEST NO. 21:**

21 All Documents (dating from January 1, 2003 to the present) relating to any  
22 effect or lack of effect on readiness to fight caused by, resulting from, associated  
23 with, or accompanying the presence in the United States Armed Forces of gay or  
24 lesbian servicemembers.

25 **RESPONSE:**

26 During a meeting on November 18, 2009, Plaintiff’s counsel agreed to  
27 narrow their request to documents that Defendants intend to rely upon to support  
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1 the findings referenced above, in a manner consistent with request nos. 1, 6,  
2 and 11-22. In addition, Plaintiff's counsel emphasized that this request did not call  
3 for the production of documents relating to individual service members. Plaintiff  
4 has since reneged on its agreement and has chosen instead to stand on the request  
5 as written.

6 Defendants have proceeded to search for documents within the bounds  
7 agreed to by Counsel on November 18, 2009 and presently intend to rely upon,  
8 among other things, the text of the statute, the legislative history, and any other  
9 basis that Congress "rationally *could have believed*" supported the objectives of  
10 the statute. Western and Southern Life Ins. Co., 451 U.S. at 671-72 (1981)  
11 (emphasis in original).

12 The text and legislative history of the statute are publically available and  
13 will not be produced by Defendants. Defendants have, however, conducted a  
14 reasonable search and will, subject to the specific and general objections set forth  
15 above, produce studies housed at the Pentagon that relate to the findings  
16 referenced in Plaintiff's request.

17 Defendants note, moreover, that this request rests on a fundamental  
18 misunderstanding of the statute and applicable regulations. The statute sets forth a  
19 conduct-based policy focused on the conduct of members of the Armed Forces,  
20 not "the presence in the United States Armed Forces of gay or lesbian  
21 servicemembers."

22 **DOCUMENT REQUEST NO. 22:**

23 All Documents (dating from January 1, 2003 to the present) relating to any  
24 effect or lack of effect on readiness to fight caused by, resulting from, associated  
25 with, or accompanying the presence in the United States Armed Forces of  
26 servicemembers who engaged in or have engaged in homosexual conduct.

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1 **RESPONSE:**

2 During a meeting on November 18, 2009, Plaintiff's counsel agreed to  
3 narrow their request to documents that Defendants intend to rely upon to support  
4 the findings referenced above, in a manner consistent with request nos. 1, 6,  
5 and 11-22. In addition, Plaintiff's counsel emphasized that this request did not call  
6 for the production of documents relating to individual service members. Plaintiff  
7 has since reneged on its agreement and has chosen instead to stand on the request  
8 as written.

9 Defendants have proceeded to search for documents within the bounds  
10 agreed to by Counsel on November 18, 2009 and presently intend to rely upon,  
11 among other things, the text of the statute, the legislative history, and any other  
12 basis that Congress "*rationally could have believed*" supported the objectives of  
13 the statute. Western and Southern Life Ins. Co., 451 U.S. at 671-72 (1981)  
14 (emphasis in original).

15 The text and legislative history of the statute are publically available and  
16 will not be produced by Defendants. Defendants have, however, conducted a  
17 reasonable search and will, subject to the specific and general objections set forth  
18 above, produce studies housed at the Pentagon that relate to the findings  
19 referenced in Plaintiff's request.

20 **DOCUMENT REQUEST NO. 23:**

21 The Implementation Memorandum and all drafts or prior versions of the  
22 Memorandum.

23 **RESPONSE:**

24 The parties have met and conferred, and Plaintiff has agreed to limit this  
25 request to drafts and implemented iterations of the Implementation Memorandum.

26 Defendants object to this request to the extent it calls for drafts, which are  
27 inherently deliberative and thus privileged.

1 Subject to the specific and general objections set forth above, Defendants  
2 will produce the Implementation Memorandum and versions of the  
3 Implementation Memorandum that were implemented and are housed at the  
4 Pentagon.

5 **DOCUMENT REQUEST NO. 24:**

6 The Policy Memorandum and all drafts or prior versions of that  
7 Memorandum.

8 **RESPONSE:**

9 The parties have met and conferred, and Plaintiff has agreed to limit its  
10 request to drafts and implemented iterations of the Policy Memorandum.

11 Defendants object to this request to the extent it calls for drafts, which are  
12 inherently deliberative and thus privileged. The requested document, moreover,  
13 appears to be within Plaintiff's possession and will not be produced again by  
14 Defendants. In addition, the requested document is publically available and can  
15 be found at: <http://dont.stanford.edu/regulations/lesaspinmemo.pdf>.

16 Subject to the specific and general objections set forth above, Defendants  
17 will produce versions of the Policy Memorandum that were implemented and are  
18 housed at the Pentagon.

19 **DOCUMENT REQUEST NO. 25:**

20 DOD Directive 1304.26 and all drafts or prior versions of that Directive.

21 **RESPONSE:**

22 The parties have met and conferred, and Plaintiff has agreed to limit its  
23 request to drafts and promulgated iterations of DOD Directive 1304.26.

24 Defendants object to this request to the extent it calls for drafts, which are  
25 inherently deliberative and thus privileged. The requested document, moreover,  
26 appears to be within Plaintiff's possession and will not be produced again by  
27 Defendants. In addition, the requested document is publically available and can  
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1 be found at: <http://www.dtic.mil/whs/directives/corres/pdf/130426p.pdf>.

2 Subject to the specific and general objections set forth above, Defendants  
3 will produce versions of the Directive that were promulgated and are housed at the  
4 Pentagon.

5 **DOCUMENT REQUEST NO. 26:**

6 The Briefing Memorandum and all drafts or prior versions of that  
7 Memorandum.

8 **RESPONSE:**

9 The parties have met and conferred, and Plaintiff has agreed to limit its  
10 request to drafts and implemented iterations of the Briefing Memorandum.

11 Defendants object to this request to the extent it calls for drafts, which are  
12 inherently deliberative and thus privileged. The requested document, moreover,  
13 appears to be within Plaintiff's possession and will not be produced again by  
14 Defendants. In addition, the requested document is publically available and can  
15 be found at: <http://dont.stanford.edu/regulations/dornmemo2.pdf>.

16 Subject to the specific and general objections set forth above, Defendants  
17 will produce versions of the Briefing Memorandum that were implemented and are  
18 housed at the Pentagon.

19 **DOCUMENT REQUEST NO. 27:**

20 DOD Directive 1332.14 and all drafts or prior versions of that Directive.

21 **RESPONSE:**

22 The parties have met and conferred, and Plaintiff has agreed to limit its  
23 request to drafts and promulgated iterations of DOD Directive 1332.14.

24 Defendants object to this request to the extent it calls for drafts, which are  
25 inherently deliberative and thus privileged. The requested document, moreover,  
26 appears to be within Plaintiff's possession and will not be produced again by  
27 Defendants. In addition, the requested document is publically available and can  
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1 be found at: <http://www.dtic.mil/whs/directives/corres/pdf/133214p.pdf>.

2 Subject to the specific and general objections set forth above, Defendants  
3 will produce versions of the Directive that were promulgated and are housed at the  
4 Pentagon.

5 **DOCUMENT REQUEST NO. 28:**

6 DOD Directive 1332.30 and all drafts or prior versions of that Directive.

7 **RESPONSE:**

8 The parties have met and conferred, and Plaintiff has agreed to limit its  
9 request to drafts and promulgated iterations of DOD Directive 1332.30.  
10 Defendants object to this request to the extent it calls for drafts, which are  
11 inherently deliberative and thus privileged. The requested document, moreover,  
12 appears to be within Plaintiff's possession and will not be produced again by  
13 Defendants. In addition, the requested document is publically available and can  
14 be found at: <http://www.dtic.mil/whs/directives/corres/pdf/133230p.pdf>.

15 Subject to the specific and general objections set forth above, Defendants  
16 will produce versions of the directive that were promulgated and are housed at the  
17 Pentagon.

18 **DOCUMENT REQUEST NO. 29:**

19 DOD Instruction 5505.8 and all drafts or prior versions of that Instruction.

20 **RESPONSE:**

21 The parties have met and conferred, and Plaintiff has agreed to limit its  
22 request to drafts and promulgated iterations of DOD Instruction 5505.8.

23 Defendants object to this request to the extent it calls for drafts, which are  
24 inherently deliberative and thus privileged. The requested document, moreover,  
25 appears to be within Plaintiff's possession and will not be produced again by  
26 Defendants. In addition, the requested document is publically available and can  
27 be found at: <http://www.dtic.mil/whs/directives/corres/pdf/550508p.pdf>.

1 Subject to the specific and general objections set forth above, Defendants  
2 will produce versions of the Instruction that were promulgated and are housed at  
3 the Pentagon.

4 **DOCUMENT REQUEST NO. 30:**

5 The Investigation and Adjudication Memorandum and all drafts or prior  
6 versions of that Memorandum.

7 **RESPONSE:**

8 The parties have met and conferred, and Plaintiff has agreed to limit its  
9 request to drafts and implemented iterations of the Investigation and Adjudication  
10 Memorandum.

11 Defendants object to this request to the extent it calls for drafts, which are  
12 inherently deliberative and thus privileged.

13 Subject to the specific and general objections set forth above, Defendants  
14 will produce versions of the Investigation and Adjudication Memorandum that  
15 were implemented and are housed at the Pentagon.

16 **DOCUMENT REQUEST NO. 31:**

17 The Training Plan Memorandum and all drafts or prior versions of that  
18 Memorandum.

19 **RESPONSE:**

20 The parties have met and conferred, and Plaintiff has agreed to limit its  
21 request to drafts and implemented iterations of the Training Plan Memorandum.

22 Defendants object to this request to the extent it calls for drafts, which are  
23 inherently deliberative and thus privileged. The requested document, moreover,  
24 appears to be within Plaintiff's possession and will not be produced again by  
25 Defendants. In addition, the requested document is publically available and can  
26 be found at: <http://dont.stanford.edu/regulations/dornmemo.pdf>.

27 Subject to the specific and general objections set forth above, Defendants  
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1 will produce versions of the Training Plan Memorandum that were implemented  
2 and are housed at the Pentagon.

3 **DOCUMENT REQUEST NO. 32:**

4 All studies, reports, or other documents relied upon, presented to or  
5 considered, consulted or reviewed by Defendants in connection with the formation  
6 of the rules, policies, and guidelines set forth in the Act and the DOD Regulations.

7 **RESPONSE:**

8 Defendants object to this request, as it is currently drafted, as overly broad  
9 and unduly burdensome. Accordingly, the parties have met and conferred and  
10 Plaintiff has agreed to limit its request to documents housed at the Pentagon that  
11 were consulted during the formation of the rules, policies, and guidelines set forth  
12 in the Act and the DOD Regulations.

13 Defendants object to this request to the extent that it calls for documents  
14 that are deliberative and thus privileged.

15 Subject to the specific and general objections set forth above, Defendants  
16 will produce documents responsive to Plaintiff's narrowed request that are housed  
17 at the Pentagon.

18 **DOCUMENT REQUEST NO. 33:**

19 All studies, reports or recommendations of the "working group of senior  
20 officers in the Department of Defense" referred to in the Policy Memorandum,  
21 including drafts of each study, report, or recommendation and each document  
22 concerning any such study report, or recommendation.

23 **RESPONSE:**

24 Defendants object to this request, as it is currently drafted, as overly broad  
25 and unduly burdensome. Accordingly, the parties have met and conferred and  
26 Plaintiff has agreed to limit its request to documents created by the "working  
27 group of senior offices in the Department of Defense," referred to in the Policy  
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1 Memorandum, during the formation of the Act or regulations.

2 Defendants object to this request to the extent it calls for drafts, which are  
3 inherently deliberative and thus privileged.

4 Subject to the specific and general objections set forth above, Defendants  
5 will produce documents responsive to Plaintiff's narrowed request that are housed  
6 at the Pentagon.

7 **DOCUMENT REQUEST NO. 34:**

8 All studies, report, or recommendations of the DOD staff working group  
9 responsible for drafting the DOD Regulations.

10 **RESPONSE:**

11 Defendants object to this request, as it is currently drafted, as overly broad  
12 and unduly burdensome. Accordingly, the parties have met and conferred and  
13 Plaintiff has agreed to limit its request to documents created by the DOD staff  
14 working group responsible for drafting the DOD regulations, during the formation  
15 of the regulations.

16 Defendants object to this request to the extent it calls for drafts, which are  
17 inherently deliberative and thus privileged.

18 Subject to the specific and general objections set forth above, Defendants  
19 will produce documents responsive to Plaintiff's narrowed request that are housed  
20 at the Pentagon.

21 **DOCUMENT REQUEST NO. 35:**

22 All Documents concerning the "personnel policies" referred to in the Policy  
23 Memorandum.

24 **RESPONSE:**

25 Defendants object to this request as overly broad, unduly burdensome, and  
26 vague. The referenced document does not refer to "personnel policies." The  
27 parties have met and conferred but have been unable to reach a compromise as to  
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1 the scope of this request. Defendants cannot produce documents until this is  
2 request is clarified and narrowed.

3 **DOCUMENT REQUEST NO. 36:**

4 All studies, reports, or other documents (dating from January 1, 2003 to the  
5 present) concerning United States Armed Forces service and homosexual conduct  
6 or homosexual orientation, other than documents solely concerning specific  
7 servicemembers.

8 **RESPONSE:**

9 Defendants object to this request, as it is currently drafted, as overly broad  
10 and unduly burdensome. Accordingly, the parties have met and conferred and  
11 Plaintiff has agreed to limit its request to documents housed at the Pentagon that  
12 contain studies or analysis concerning service in the United States Armed Forces  
13 and homosexual conduct or homosexual orientation.

14 Defendants object to this request, even in its narrowed form, as overly broad  
15 and unduly burdensome. Moreover, Plaintiff appears to be asking for documents  
16 that are not related to the Policy and are not relevant to Plaintiff's claims. Finally,  
17 Defendants also object to this request to the extent that it calls for drafts, which are  
18 inherently deliberative and thus privileged.

19 Subject to the specific and general objections set forth above, Defendants  
20 will produce documents housed at the Pentagon that contain studies or analysis  
21 concerning service in the United States Armed Forces and homosexual conduct or  
22 homosexual orientation.

23 **DOCUMENT REQUEST NO. 37:**

24 All studies, reports, or other documents relied upon, presented to, in the  
25 files of or considered, consulted, or reviewed by Defendants (dating from January  
26 1, 2003 to the present) concerning the presence in the United States Armed Forces  
27 of gay or lesbian servicemembers, servicemembers with a homosexual orientation  
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1 or servicemembers who engage in or have engaged in homosexual conduct.

2 **RESPONSE:**

3 Defendants object to this request, as it is currently drafted, as overly broad  
4 and unduly burdensome. Accordingly, the parties have met and conferred and  
5 Plaintiff has acknowledged that this request is likely subsumed by previous  
6 document requests. This request, therefore, does not require the production of  
7 additional documents.

8 As noted above, neither the statute nor the regulations prohibit the  
9 “presence in the United States Armed Forces of gay or lesbian servicemembers” or  
10 “servicemembers with a homosexual orientation.” The statute is, instead, focused  
11 on the conduct of members of the Armed Forces.

12 **DOCUMENT REQUEST NO. 38:**

13 The Defensibility Memorandum and all drafts or prior version of that  
14 Memorandum.

15 **RESPONSE:**

16 The parties have met and conferred, and Plaintiff has agreed to limit this  
17 request to drafts and implemented iterations of the Defensibility Memorandum.

18 Defendants object to this request to the extent it calls for drafts, which are  
19 inherently deliberative and thus privileged. The requested document, moreover,  
20 appears to be within Plaintiff’s possession and will not be produced again by  
21 Defendants. The referenced document can be found at:

22 <http://dont.stanford.edu/regulations/RenoMemo.htm>.

23 Subject to the specific and general objections set forth above, Defendants  
24 will produce versions of the Defensibility Memorandum that were implemented  
25 and are housed at the Pentagon.

26 **DOCUMENT REQUEST NO. 39:**

27 All Documents prepared by the Attorney General of the United States, any  
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1 attorney or any other employee of the DOD or the Department of Justice, or any  
2 attorney for Defendants concerning United States Armed Forces personnel and  
3 homosexual conduct or homosexual orientation, other than documents solely  
4 concerning specific servicemembers.

5 **RESPONSE:**

6 Defendants object to this request, as it is currently drafted, as overly broad  
7 and unduly burdensome. Accordingly, the parties have met and conferred but  
8 Plaintiff has refused to narrow its request.

9 Defendants object to this request as overly broad and unduly burdensome.  
10 In addition, it inappropriately calls for the production of documents subject to the  
11 attorney-client privilege and attorney work-product doctrine.

12 Defendants also object to this request to the extent that it calls for  
13 documents prepared by the Attorney General or from the Department of Justice.  
14 Rule 34 does not require us to search for or produce documents from outside of  
15 the Department of Defense. By its terms, Fed. R. Civ. P. 34 applies only to  
16 parties—not non-parties, and thus "may [not] be used to discover matters from a  
17 nonparty." Hatch v. Reliance Ins. Co., 758 F.2d 409, 415 (9th Cir. 1985); see also  
18 Viera v. Woodford, 258 Fed. Appx. 924, 2007 WL 4357761 at \*1 (9th Cir. 2007).  
19 While the United States may be named as a party to this action under section 702  
20 Administrative Procedure Act ("APA"), any action under that section must result  
21 from "agency action" and any injunctive relief sought may only be issued against  
22 the "Federal Officer or officers" responsible for compliance. Because the  
23 Department of Defense, not Congress or any other governmental agency, is  
24 charged with administering 10 U.S.C. § 654 and the applicable regulations,  
25 discovery obligations do not reach beyond that Department.

26 Subject to the specific and general objections set forth above, Defendants  
27 will produce documents housed at the Pentagon concerning United States Armed  
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1 Forces personnel and homosexual conduct or homosexual orientation, other than  
2 documents solely concerning specific servicemembers.

3 **DOCUMENT REQUEST NO. 40:**

4 All Documents relating to Lawrence v. Texas, 593 U.S. 558 (2003) and its  
5 effect or lack of effect on the Policy, the implementation of the Policy, or the  
6 legality of the Policy.

7 **RESPONSE:**

8 Defendants object to this request, as it is currently drafted, as overly broad  
9 and unduly burdensome. In addition, this request inappropriately calls for the  
10 production of documents subject to the attorney-client privilege and attorney  
11 work-product doctrine.

12 Defendants also object to this request to the extent that it calls for  
13 documents that are not in the possession of the Department of Defense. Rule 34  
14 does not require us to search for or produce documents from outside of the  
15 Department of Defense. By its terms, Fed. R. Civ. P. 34 applies only to  
16 parties—not non-parties, and thus "may [not] be used to discover matters from a  
17 nonparty." Hatch v. Reliance Ins. Co., 758 F.2d 409, 415 (9th Cir. 1985); see also  
18 Viera v. Woodford, 258 Fed. Appx. 924, 2007 WL 4357761 at \*1 (9th Cir. 2007).  
19 And while the United States may be named as a party to this action under section  
20 702 Administrative Procedure Act ("APA"), any action under that section must  
21 result from "agency action" and any injunctive relief sought may only be issued  
22 against the "Federal Officer or officers" responsible for compliance. Because the  
23 Department of Defense, not Congress or any other governmental agency, is  
24 charged with administering 10 U.S.C. § 654 and the applicable regulations,  
25 discovery obligations do not reach beyond that Department.

26 In light of these objections, the parties met and conferred and Plaintiff  
27 agreed to reexamine this request and provide Defendants with clarification at a  
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1 later date. Plaintiff has since informed Defendants that it is unwilling to clarify or  
2 narrow its request.

3 Subject to the specific and general objections set forth above, Defendants  
4 will produced non-privileged, responsive documents housed at the Pentagon.

5 **DOCUMENT REQUEST NO. 41:**

6 All Documents that concern United States Armed Forces personnel and  
7 homosexual conduct or homosexual conduct or homosexual orientation prepared  
8 by or under the direction of Defendants (dating from January 1, 2003 to the  
9 present), including but not limited to position papers, policy reports, and drafts of  
10 legislation.

11 **RESPONSE:**

12 Defendants object to this request, as it is currently drafted, as overly broad  
13 and unduly burdensome. Accordingly, the parties have met and conferred and  
14 Plaintiff has agreed to limit its request to position papers, policy reports, and drafts  
15 of legislation housed at the Pentagon.

16 Even as narrowed, Defendants object to this request to the extent that it calls  
17 for the production of documents that are deliberative or otherwise privileged.

18 Subject to the specific and general objections set forth above, Defendants  
19 will produce documents responsive to Plaintiff's narrowed request that are housed  
20 at the Pentagon. As noted, however, the statute is conduct-based and is not  
21 addressed to "homosexual orientation."

22 **DOCUMENT REQUEST NO. 42:**

23 All rules, regulations, policies, directives, instructions, manuals, guidelines,  
24 memoranda, administrative decisions, handbooks, or reports concerning sexual  
25 conduct, sexual behavior or sexual orientation of servicemembers.

26 **RESPONSE:**

27 Defendants object to this request, as it is currently drafted, as overly broad  
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1 and unduly burdensome. Accordingly, the parties have met and conferred and  
2 Plaintiff has agreed to narrow its request to documents that are housed at the  
3 Pentagon and concern sexual conduct, sexual behavior, or sexual orientation of  
4 servicemembers. In addition, Plaintiff clarified that its request does not call for  
5 the production of documents concerning individual service members.

6 Even as narrowed, Defendants object to this request to the extent it calls for  
7 drafts, which are inherently deliberative and thus privileged. The request is also  
8 vague in that Plaintiff fails to explain what “concerning sexual conduct, sexual  
9 behavior or sexual orientation of servicemembers” is intended to mean in the  
10 context of this request.

11 Subject to the specific and general objections set forth above, Defendants  
12 will produce documents that may be responsive to Plaintiff’s narrowed request  
13 that are housed at the Pentagon.

14 **DOCUMENT REQUEST NO. 43:**

15 All reports, interim reports, and drafts or summaries of reports prepared by  
16 the United States GAO concerning United States Armed Forces personnel and  
17 homosexual conduct or homosexual orientation, including but not limited to the  
18 reports entitled “Homosexuals in the Military: Policies and Practices of Foreign  
19 Countries,” “Defense Force Management: DOD’s Policy on Homosexuality,” and  
20 “Financial Costs and Loss of Critical Skills Due to DOD’s Homosexual Conduct  
21 Policy Cannot be Completely Estimated. The referenced documents can be found  
22 at: <http://archive.gao.gov/t2pbat5/149440.pdf>,  
23 <http://archive.gao.gov/d33t10/146980.pdf>, and  
24 <http://www.gao.gov/new.items/d05299.pdf>.

25 **RESPONSE:**

26 Defendants object to this request, as it is currently drafted, as overly broad  
27 and unduly burdensome. Defendants also object to this request to the extent that it  
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1 calls for drafts and other deliberative materials. In addition, Defendants object to  
2 this request to the extent that it call for documents that are in the possession of the  
3 Government Accountability Office, which is an investigative arm of Congress.  
4 Rule 34 does not require us to search for produce documents from outside of the  
5 Department of Defense. By its terms, Fed. R. Civ. P. 34 applies only to  
6 parties—not non-parties, and thus "may [not] be used to discover matters from a  
7 nonparty." Hatch v. Reliance Ins. Co., 758 F.2d 409, 415 (9th Cir. 1985); see also  
8 Viera v. Woodford, 258 Fed. Appx. 924, 2007 WL 4357761 at \*1 (9th Cir. 2007).  
9 While the United States may be named as a party to this action under section 702  
10 Administrative Procedure Act ("APA"), any action under that section must result  
11 from "agency action" and any injunctive relief sought may only be issued against  
12 the "Federal Officer or officers" responsible for compliance. Because the  
13 Department of Defense, not Congress or any other governmental agency or  
14 instrumentality, is charged with administering 10 U.S.C. § 654 and the applicable  
15 regulations, discovery obligations do not reach beyond that Department.

16 In light of these objections, the parties met and conferred, and Plaintiff  
17 agreed to reexamine this request and provide Defendants with clarification at a  
18 later date. Plaintiff has since informed Defendants that it is unwilling to clarify or  
19 narrow its request.

20 Subject to the specific and general objections set forth above, Defendants  
21 will produce documents housed at the Pentagon that contain analysis or studies of  
22 reports prepared by the United States GAO concerning United States Armed  
23 Forces personnel and homosexual conduct or homosexual orientation.

24 **DOCUMENT REQUEST NO. 44:**

25 All reports, interim reports, and drafts or summaries of reports prepared by  
26 the RAND Corporation's (RAND") National Defense Research Institute  
27 concerning United States Armed Forces personnel and homosexual conduct or  
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1 homosexual orientation, including but not limited to a report entitled "Sexual  
2 Orientation and U.S. Military Personnel Policy: Options and Assessment."

3 **RESPONSE:**

4 Defendants object to this request, as it is currently drafted, as overly broad  
5 and unduly burdensome. Accordingly, the parties have met and conferred and  
6 Plaintiff has agreed to limit its request to the RAND reports, drafts of the RAND  
7 reports, and documents that contain analysis or studies of the RAND reports.

8 Defendants object to this request to the extent it calls for drafts, which are  
9 inherently deliberative and thus privileged. The RAND reports, moreover, appear  
10 to be within Plaintiff's possession and will not be produced again by Defendants.

11 The referenced document can be found, in parts, at:

12 [http://www.rand.org/pubs/monograph\\_reports/2009/MR323part1.pdf](http://www.rand.org/pubs/monograph_reports/2009/MR323part1.pdf),

13 [http://www.rand.org/pubs/monograph\\_reports/2009/MR323part2.pdf](http://www.rand.org/pubs/monograph_reports/2009/MR323part2.pdf), and

14 [http://www.rand.org/pubs/monograph\\_reports/2009/MR323part3.pdf](http://www.rand.org/pubs/monograph_reports/2009/MR323part3.pdf).

15 Subject to the specific and general objections set forth above, Defendants  
16 will produce documents housed at the Pentagon that contain analysis or studies of  
17 the RAND reports concerning United States Armed Forces personnel and  
18 homosexual conduct or homosexual orientation.

19 **DOCUMENT REQUEST NO. 45:**

20 All Documents concerning reports, interim reports, and drafts or summaries  
21 of reports prepared by RAND's National Defense Research Institute, including but  
22 not limited to, all correspondence and communications between RAND and  
23 Defendants regarding the nature, scope and focus of "Sexual Orientation and U.S.  
24 Military Personnel Policy," "Individual Characteristics and Unit Performance: A  
25 Review of Research and Methods," and all other reports prepared by RAND.

26 **RESPONSE:**

27 Defendants object to this request, as it is currently drafted, as overly broad  
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1 and unduly burdensome. Accordingly, the parties have met and conferred and  
2 Plaintiff has agreed to limit its request to communications between RAND's  
3 National Defense Research Institute and the Department of Defense regarding the  
4 reports listed in the request.

5 Defendants object to this request to the extent it calls for interim reports,  
6 drafts, or summaries which are deliberative and thus privileged.

7 Subject to the specific and general objections set forth above, Defendants  
8 will produce correspondence housed at the Pentagon between RAND and the  
9 Department of Defense concerning the reports listed in the request.

10 **DOCUMENT REQUEST NO. 46:**

11 All reports, interim reports, and drafts or summaries of reports produced by  
12 or in countries other than the United States that were commissioned, requested, or  
13 consulted by the United States Army Research Office and that concern  
14 homosexual conduct or homosexual orientation within the armed forces of such  
15 countries, including but not limited to the report entitled "Homosexuality and  
16 Armed Forces in the Netherlands" produced by the Dutch Foundation on Armed  
17 Forces and commissioned by the European Research Office of the United States  
18 Army. The referenced document can be found at:  
19 <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA350707&Location=U2&doc=GetTRDoc.pdf>  
20 on pages 34-53.

21 **RESPONSE:**

22 Defendants object to this request, as it is currently drafted, as overly broad  
23 and unduly burdensome. Accordingly, the parties have met and conferred and  
24 Plaintiff has agreed to limit its request to responsive documents housed at the  
25 Pentagon.

26 Defendants object to this request to the extent it calls for interim reports,  
27 drafts, or summaries which are deliberative and thus privileged.

28

1 Subject to the specific and general objections set forth above, Defendants  
2 will produce documents responsive to Plaintiff's narrowed request that are housed  
3 at the Pentagon.

4 **DOCUMENT REQUEST NO. 47:**

5 All reports, interim reports, and drafts or summaries of reports relating to  
6 countries other than the United States' experience with, consideration of, or  
7 evaluation of military service by individuals with a homosexual orientation or by  
8 individuals who engage in homosexual conduct.

9 **RESPONSE:**

10 Defendants object to this request, as it is currently drafted, as overly broad  
11 and unduly burdensome. Accordingly, the parties met and conferred, and Plaintiff  
12 agreed to limit its request to responsive documents housed at the Pentagon.  
13 Plaintiff has since reneged on its agreement and has informed Plaintiff that it is no  
14 longer willing to limit its request to documents in the possession of the  
15 Department of Defense.

16 Defendants object to this request to the extent it calls for interim reports,  
17 drafts, or summaries which are deliberative and thus privileged. Defendants also  
18 object to this request to the extent that it call for documents that are not in the  
19 possession of the Department of Defense. Rule 34 does not require us to search  
20 for or produce documents from outside of the Department of Defense. By its  
21 terms, Fed. R. Civ. P. 34 applies only to parties—not non-parties, and thus "may  
22 [not] be used to discover matters from a nonparty." Hatch v. Reliance Ins. Co.,  
23 758 F.2d 409, 415 (9th Cir. 1985); see also Viera v. Woodford, 258 Fed. Appx.  
24 924, 2007 WL 4357761 at \*1 (9th Cir. 2007). While the United States may be  
25 named as a party to this action under section 702 Administrative Procedure Act  
26 ("APA"), any action under that section must result from "agency action" and any  
27 injunctive relief sought may only be issued against the "Federal Officer or  
28

1 officers" responsible for compliance. Because the Department of Defense, not  
2 Congress or any other governmental agency, is charged with administering 10  
3 U.S.C. § 654 and the applicable regulations, discovery obligations do not reach  
4 beyond that Department.

5 Subject to the specific and general objections set forth above, Defendants  
6 will produce certain documents housed at the Pentagon that relate to countries  
7 other than the United States' experience with, consideration of, or evaluation of  
8 military service by individuals with a homosexual orientation or by individuals  
9 who engage in homosexual conduct.

10 **DOCUMENT REQUEST NO. 48:**

11 All reports, interim reports, and drafts or summaries or reports prepared by  
12 the Walter Reed Army Institute of Research concerning United States Armed  
13 Forces personnel and homosexual conduct or homosexual orientation, including  
14 but not limited to a report entitled "Evaluating the Unit Manning System: Lessons  
15 Learned to Date" and "'Unit Reconstitution in a Wartime Scenario,' in David  
16 Marlow, ed., Unit Manning System Field Evaluation: Technical Report 4" by the  
17 Department of Military Psychiatry, "Unit Manning System Field Evaluation:  
18 Technical Report No. 5" edited by Faris Kirkland and Linett Sparzcino, and all  
19 correspondence and communications between the Walter Reed Army Institute of  
20 Research and Defendants regarding the nature, scope, and focus of the above  
21 reports and all other reports prepared by the Walter Reed Army Institute of  
22 Research.

23 **RESPONSE:**

24 Defendants object to this request as overly broad and unduly burdensome.  
25 Accordingly, the parties have met and conferred but have been unable to reach a  
26 compromise as to the scope of this request.

27 Defendants also object to this request to the extent it calls for interim  
28

1 reports, drafts, or summaries which are deliberative and thus privileged. The  
2 reports listed in the request appear to be in Plaintiff's possession and will not be  
3 produced again. In addition, the reports can be found at:  
4 <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA187892&Location=U2&doc=GetTRDoc.pdf>,  
5 <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA207026&Location=U2&doc=GetTRDoc.pdf> on pages47-59, and  
6 <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA207193&Location=U2&doc=GetTRDoc.pdf>.  
7  
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10 Subject to the specific and general objections set forth above, Defendants  
11 will produce reports from the Walter Reed Army Institute of Research that are not  
12 listed in the request and concern United States Armed Forces personnel and  
13 homosexual conduct or homosexual orientation. Defendants will also produce,  
14 subject to the specific and general objections set forth above, correspondence  
15 between the Walter Reed Army Institute of Research and Defendants regarding the  
16 reports.

17 **DOCUMENT REQUEST NO. 49:**

18 All reports, interim reports and drafts or summaries of reports prepared by  
19 the Army Research Institute concerning United States Armed Forces personnel  
20 and homosexual conduct or homosexual conduct or homosexual orientation.

21 **RESPONSE:**

22 Defendants object to this request as overly broad and unduly burdensome.  
23 Accordingly, the parties have met and conferred but have been unable to reach a  
24 compromise as to the scope of this request.

25 Defendants also object to this request to the extent it calls for interim  
26 reports, drafts, or summaries which are deliberative and thus privileged.

27 Subject to the specific and general objections set forth above, Defendants  
28

1 will produce reports prepared by the Army Research Institute concerning United  
2 States Armed Forces personnel and homosexual conduct or homosexual conduct  
3 or homosexual orientation.

4 **DOCUMENT REQUEST NO. 50:**

5 All rules, regulations, policies, directives, instructions, manuals, guidelines,  
6 memoranda, administrative decisions, handbooks or reports formulated, prepared  
7 for or on behalf of the Bureau or Naval Personnel concerning homosexual  
8 orientation and homosexual conduct in the Navy, including but not limited to  
9 those Documents prepared for or on behalf of the office of the Chief of Naval  
10 Personnel for Personal Readiness and Community Support.

11 **RESPONSE:**

12 Defendants object to this request as overly broad and unduly burdensome.  
13 Accordingly, the parties have met and conferred but have been unable to reach a  
14 compromise as to the scope of this request.

15 Defendants also object to this request to the extent it calls for interim  
16 reports, drafts, or summaries which are deliberative and thus privileged.

17 Subject to the specific and general objections set forth above, Defendants  
18 will produce documents prepared for or on behalf of the Bureau or Naval  
19 Personnel concerning homosexual orientation and homosexual conduct in the  
20 Navy that are housed at the Pentagon.

21 **DOCUMENT REQUEST NO. 51:**

22 All rules, regulations, policies, directives, instructions, manuals, guidelines,  
23 memoranda, administrative decisions, handbooks, or reports concerning the  
24 United States Armed Forces' treatment of servicemembers who discriminate  
25 against others or whose conduct is motivated by a prejudice based on another's  
26 race, gender, or religion, including but not limited the anti-prejudice programs and  
27 procedures through which servicemembers are trained to act in a non-

1 discriminatory manner and the formal procedures through which discriminatory  
2 behavior by servicemembers is addressed.

3 **RESPONSE:**

4 Defendants object to this request as overly broad and unduly burdensome.  
5 Defendants also object to this request to the extent it calls for interim reports,  
6 drafts, or summaries which are deliberative and thus privileged. Finally,  
7 Defendants object to this request because it is vague; it is unclear what Plaintiff  
8 means when it requests documents that concern “United States Armed Forces’  
9 treatment of servicemembers who discriminate against others or whose conduct is  
10 motivated by a prejudice based on another’s race, gender, or religion, including  
11 but not limited to the anti-prejudice programs and procedures through which  
12 servicemembers are trained to act in a non-discriminatory manner and the formal  
13 procedures through which discriminatory behavior by servicemembers.”

14 Pursuant to Plaintiff’s Counsel’s letter to Defense Counsel, dated December  
15 15, 2009, Defendants understand that Plaintiff has withdrawn this request for  
16 review. Defendants will thus not produce documents pursuant to this request.

17 **DOCUMENT REQUEST NO. 52:**

18 All rules, regulations, policies, directives, instructions, manuals, guidelines,  
19 memoranda, administrative decisions, handbooks, or reports concerning the  
20 United States Armed Forces’ implementation of the Policy or the Act, including,  
21 but not limited to, the Navy Manpower Analysis Center, “Homosexual  
22 Administrative Discharge Board/Show Cause Hearings.” Memorandum of  
23 Department of the Navy, June 1994, Judith Miller, General Counsel of the  
24 Department of Defense, “Memorandum for the General Counsels of the Military  
25 Departments, the Judge Advocate General of the Army, the Judge Advocate  
26 General of the Navy, the Judge Advocate General of the Air Force, the Staff  
27 Advocated to the Commandant to the Marine Corps: Policy on Homosexual  
28



1 Conduct in the Armed Forces,” August 18, 1995, and Regulation 500-3-3. vol. 3,  
2 “Reserve Component Unit Commanders Handbook,” U.S. Army, 1999, Table 2.1:  
3 “Personnel Actions During the Mobilization Process.”

4 **RESPONSE:**

5 Defendants object to this request as overly broad and unduly burdensome.  
6 Defendants also object to this request to the extent it calls for interim reports,  
7 drafts, or summaries which are deliberative and thus privileged. Finally, the  
8 referenced documents appear to be in Plaintiff’s possession and will not be  
9 produced again. Moreover, the documents are publically available at:  
10 <http://dont.stanford.edu/regulations/hadbsch149.pdf>,  
11 <http://dont.stanford.edu/regulations/memo18aug1995.pdf>, and  
12 <http://88.80.13.160.nyud.net/leak/formdeps-handbook-1999.pdf> on pages 27-37.

13 In light of these objections, the parties have met and conferred, and Plaintiff  
14 has acknowledged that this request is likely subsumed by previous requests.  
15 Defendants will thus not produce documents pursuant to this request.

16 **DOCUMENT REQUEST NO. 53:**

17 All editions of the Pentagon’s “Early Bird” in which articles concerning  
18 United States Armed Forces personnel and homosexual conduct or homosexual  
19 orientation were published.

20 **RESPONSE:**

21 Defendants object to this request as overly broad and unduly burdensome.  
22 Defendants also object to the extent that the documents requested are publically  
23 available and can be found at: <http://www.defenselink.mil/news/archive.aspx>.

24 Pursuant to Plaintiff’s Counsel’s letter to Defense Counsel, dated December  
25 15, 2009, Defendants understand that Plaintiff has withdrawn this request for  
26 review. Defendants will thus not produce documents pursuant to this request.

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1 **DOCUMENT REQUEST NO. 54:**

2 The "Report of the Board Appointed to Prepare and Submit  
3 Recommendation to the Secretary of the Navy for the Revision of Policies,  
4 Procedures and Directive Dealing with Homosexuals" (the "Crittenden Report"),  
5 any drafts of the Crittenden Report, and any Documents concerning the Crittenden  
6 Report.

7 **RESPONSE:**

8 Defendants object to this request as overly broad and unduly burdensome.  
9 Accordingly, the parties have met and conferred, and Plaintiff has agreed to limit  
10 its request to documents housed at the Pentagon that contain studies or analysis of  
11 the Crittenden report.

12 Defendants object to this request to the extent it calls for drafts, which are  
13 inherently deliberative and thus privileged. The requested document, moreover,  
14 appears to be within Plaintiff's possession and will not be produced again by  
15 Defendants. The referenced document can be found at:  
16 [http://www.lonelygods.com/res/crittenden\\_report.pdf](http://www.lonelygods.com/res/crittenden_report.pdf).

17 Subject to the specific and general objections set forth above, Defendants  
18 will produce documents housed at the Pentagon that contain studies or analysis of  
19 the Crittenden report.

20 **DOCUMENT REQUEST NO. 55:**

21 All reports, research, or analyses prepared or undertaken by the Defense  
22 Personnel Security Research and Education Center that concern United States  
23 Forces personnel and homosexual conduct or homosexual orientation, and drafts  
24 of such reports, research or analyses, and any Documents concerning such reports,  
25 research or analyses.

26 **RESPONSE:**

27 Defendants object to this request as overly broad and unduly burdensome.  
28

1 Accordingly, the parties have met and conferred but have been unable to reach a  
2 compromise as to the scope of this request.

3 Defendants also object to this request to the extent it calls for interim  
4 reports, drafts, or summaries, which are deliberative and thus privileged.

5 Subject to the specific and general objections set forth above, Defendants  
6 will produce certain documents that contain reports, research, or analyses prepared  
7 or undertaken by the Defense Personnel Security Research and Education Center  
8 that concern United States Forces personnel and homosexual conduct or  
9 homosexual orientation.

10 **DOCUMENT REQUEST NO. 56:**

11 All reports, research, or analyses prepared or undertaken by the office of the  
12 Surgeon General that concern United States Armed Forces personnel and  
13 homosexual conduct or homosexual orientation.

14 **RESPONSE:**

15 Defendants object to this request to the extent that it call for documents that  
16 are in the possession of the Office of the Surgeon General, which is part of the  
17 Department of Health and Human Services. Rule 34 does not require us to search  
18 for or produce documents from outside of the Department of Defense. By its  
19 terms, Fed. R. Civ. P. 34 applies only to parties—not non-parties, and thus "may  
20 [not] be used to discover matters from a nonparty." Hatch v. Reliance Ins. Co.,  
21 758 F.2d 409, 415 (9th Cir. 1985); see also Viera v. Woodford, 258 Fed. Appx.  
22 924, 2007 WL 4357761 at \*1 (9th Cir. 2007). While the United States may be  
23 named as a party to this action under section 702 Administrative Procedure Act  
24 ("APA"), any action under that section must result from "agency action" and any  
25 injunctive relief sought may only be issued against the "Federal Officer or  
26 officers" responsible for compliance. Because the Department of Defense, not  
27 Congress or any other governmental agency, is charged with administering 10  
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1 U.S.C. § 654 and the applicable regulation, discovery obligations do not extend  
2 beyond that Department.

3 In light of these objections, the parties met and conferred, and Plaintiff  
4 agreed to reexamine this request and provide Defendants with clarification at a  
5 later date. Plaintiff has since informed Defendants that it is unwilling to clarify or  
6 narrow its request.

7 Subject to the specific and general objections set forth above, Defendants  
8 will produce documents housed at the Pentagon that contain reports, research, or  
9 analyses prepared or undertaken by the office of the Surgeon General that concern  
10 United States Armed Forces personnel and homosexual conduct or homosexual  
11 orientation.

12 **DOCUMENT REQUEST NO. 57:**

13 All reports, research, or analysis concerning United States Armed Forces  
14 personnel and homosexual conduct or homosexual orientation commissioned,  
15 requested, or received by Defendants from any person or organization, including,  
16 but not limited to, the Family Research Council, the Defense Readiness Council,  
17 the Center for Military Readiness, TROA, the American Security Council  
18 Foundation, the Conservative Resources Center, Exodus International,  
19 Regeneration, the Jackson Institute, and the Homosexual Study Group.

20 **RESPONSE:**

21 Defendants object to this request, as it is currently drafted, as overly broad  
22 and unduly burdensome. Accordingly, the parties have met and conferred and  
23 Plaintiff has agreed to limit its request to documents housed at the Pentagon.

24 Subject to the specific and general objections set forth above, Defendants  
25 will produce documents responsive to Plaintiff's narrowed request.

26 **DOCUMENT REQUEST NO. 58:**

27 All public statements made by the Defendants (dating from January 1, 2003  
28

1 to the present), including but not limited to speeches, presentations, reports, and  
2 press releases, on the subject of United States Armed Forces personnel and  
3 homosexual conduct or homosexual orientation, and all drafts or prior version of  
4 those public statements.

5 **RESPONSE:**

6 Defendants object to this request, as it is currently drafted, as overly broad  
7 and unduly burdensome. Defendants object to this request to the extent that it call  
8 for documents that are not in the possession of the Department of Defense. Rule  
9 34 does not require us to reach outside of the Department of Defense – to  
10 Congress, or to other agencies such as the Departments of Justice and Health and  
11 Human Services, that are not parties to this action – for responsive documents. By  
12 its terms, Fed. R. Civ. P. 34 applies only to parties—not non-parties, and thus "may  
13 [not] be used to discover matters from a nonparty." Hatch v. Reliance Ins. Co.,  
14 758 F.2d 409, 415 (9th Cir. 1985); see also Viera v. Woodford, 258 Fed. Appx.  
15 924, 2007 WL 4357761 at \*1 (9th Cir. 2007). While the United States may be  
16 named as a party to this action under section 702 Administrative Procedure Act  
17 ("APA"), any action under that section must result from "agency action" and any  
18 injunctive relief sought may only be issued against the "Federal Officer or  
19 officers" responsible for compliance. Because the Department of Defense, not  
20 Congress or any other governmental agency, is charged with administering 10  
21 U.S.C. § 654 or applicable regulation, discovery obligations do not reach beyond  
22 that Department.

23 In light of these objections, the parties met and conferred, and Plaintiff  
24 agreed to reexamine this request and provide Defendants with clarification at a  
25 later date. Plaintiff has since informed Defendants that it is unwilling to clarify or  
26 narrow this request.

27 Defendants will not produce documents pursuant to this request absent  
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1 clarification and narrowing. Defendants also note that “public statements” are  
2 publically available and can be readily accessed by Plaintiff.

3 **DOCUMENT REQUEST NO. 59:**

4 All Documents upon which the Defendants intend to rely to support their  
5 position that the Act, the DOD Regulations, and the DOD Act Regulations are  
6 rationally related to a legitimate purpose.

7 **RESPONSE:**

8 Defendants object to this request as premature and subject to the general  
9 objections set forth above. Notwithstanding these objections, Defendants  
10 presently intend to rely upon, among other things, the text of the statute, the  
11 legislative history, and any other basis that Congress “rationally *could have*  
12 *believed*” supported the objective of the statute in defense. Western and Southern  
13 Life Ins. Co., 451 U.S. at 671-72 (1981) (emphasis in original).

14 The text and legislative history of the statute are publically available and  
15 will not be produced by Defendants. Subject to the general and specific objections  
16 set forth above, Defendants will produce documents they intend to rely on to  
17 support the position stated in Plaintiff’s request and will supplement their response  
18 as necessary.

19 **DOCUMENT REQUEST NO. 60:**

20 All Documents related to the GAO report entitled “Defense Force  
21 Management : DOD’s Policy on Homosexuality,” including but not limited to a  
22 draft report dated March 9, 1992. The referenced document can be found at  
23 <http://archive.gao.gov/d33t10/146980.pdf>.

24 **RESPONSE:**

25 Defendants object to this request as overly broad and unduly burdensome.  
26 Accordingly, the parties have met and conferred, and Plaintiff has agreed to limit  
27 its request to documents housed at the Pentagon.

1 Subject to the specific and general objections set forth above, Defendants  
2 will produce documents responsive to Plaintiff's narrowed request.

3 **DOCUMENT REQUEST NO. 61:**

4 All correspondence and other documents transmitted between defendants  
5 and Congress related to GAO studies or reports related to DOD's policy on the  
6 service of gay and lesbians in the United States Armed Forces.

7 **RESPONSE:**

8 Defendants object to this request as overly broad and unduly burdensome.  
9 Accordingly, the parties have met and conferred, and Plaintiff has agreed to  
10 narrow its request to documents housed at the Pentagon.

11 Defendants object to this request to the extent that it calls for privileged  
12 documents.

13 Subject specific and general objections set forth above, Defendants will  
14 produce documents responsive to Plaintiff's narrowed request that are housed in  
15 the Pentagon. To the extent requested documents belong to Congress, or any other  
16 agency or instrumentality outside of the Department of Defense, they will not be  
17 produced absent consent of Congress or the originating agency or instrumentality.

18 **DOCUMENT REQUEST NO. 62:**

19 The PERSEREC report entitled "Nonconforming Sexual Orientations and  
20 Military Suitability," prepared by Theodore R. Sarbin and Kenneth E. Karols,  
21 dated December 1988 and all Documents relating thereto.

22 **RESPONSE:**

23 The requested document appears to be within Plaintiff's possession and will  
24 not be produced again by Defendants. The referenced document can be found at:  
25 [http://www.dod.mil/pubs/foi/reading\\_room/229.pdf](http://www.dod.mil/pubs/foi/reading_room/229.pdf).

26 Subject to the general objections set forth above, Defendants will produce  
27 documents housed at the Pentagon that contain analysis or studies of the  
28

1 PERSEREC report entitled "Nonconforming Sexual Orientations and Military  
2 Suitability," prepared by Theodore R. Sarbin and Kenneth E. Karols, dated  
3 December 1988.

4 **DOCUMENT REQUEST NO. 63:**

5 The PERSEREC report entitled "Preservice Adjustment of Homosexual and  
6 Heterosexual Military Accessions: Implications for Security Clearance  
7 Suitability," prepared by Michael McDaniel, dated January 1989 and all  
8 Documents relating thereto.

9 **RESPONSE:**

10 The requested document appears to be within Plaintiff's possession and will  
11 not be produced again by Defendants. The referenced document can be found at:  
12 [http://www.dod.mil/pubs/foi/reading\\_room/228.pdf](http://www.dod.mil/pubs/foi/reading_room/228.pdf).

13 Subject to the general objections set forth above, Defendants will produce  
14 documents housed at the Pentagon that contain analysis or studies of the  
15 PERSEREC report entitled "Preservice Adjustment of Homosexual and  
16 Heterosexual Military Accessions: Implications for Security Clearance  
17 Suitability," prepared by Michael McDaniel, dated January 1989.

18 **DOCUMENT REQUEST NO. 64:**

19 All Documents related to PERSEREC studies concerning the service of gay  
20 and lesbian servicemembers in the United States Armed Forces.

21 **RESPONSE:**

22 Defendants object to this request as overly broad and unduly burdensome  
23 and subject to the general objections set forth above. Accordingly, the parties have  
24 met and conferred but were unable to reach a compromise as to the scope of this  
25 request.

26 Subject to the specific and general objections set forth above, Defendants  
27 will produce certain documents housed at the Pentagon that contain PERSEREC  
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1 studies concerning the service of gay and lesbian servicemembers in the United  
2 States Armed Forces or analysis of those studies.

3 **DOCUMENT REQUEST NO. 65:**

4 All correspondence and other documents transmitted between Defendants  
5 and Congress related to PERSEREC studies and reports related to DOD's policy  
6 on the service of gay and lesbian servicemembers in the United States Armed  
7 Forces.

8 **RESPONSE:**

9 Defendants object to this request as overly broad and unduly burdensome  
10 and subject to the general objections set forth above. Accordingly, the parties  
11 have met and conferred but were unable to reach a compromise as to the scope of  
12 this request.

13 In addition, Defendants object to this request to the extent that it calls for  
14 privileged documents.

15 Subject to the specific and general objections set forth above, Defendants  
16 will produce correspondence and other documents that are housed at the Pentagon  
17 and that were transmitted between Defendants and Congress related to  
18 PERSEREC studies and reports related to DOD's policy on the service of gay and  
19 lesbian servicemembers in the United States Armed Forces. To the extent  
20 requested documents belong to Congress, or any other agency or instrumentality  
21 outside of the Department of Defense, they will not be produced absent consent of  
22 Congress or the originating agency or instrumentality.

23 **DOCUMENT REQUEST NO. 66:**

24 All documents related to the policies, procedures, handbooks, rules,  
25 guidelines, or communications relating to deployment of known or suspected gay  
26 or lesbian servicemembers from the year 2001 to the present.

27

28

1 **RESPONSE:**

2 Defendants object to this request as unduly burdensome and vague. The  
3 request fails to define the universe of documents sought; to the extent it calls for  
4 the production of individual servicemembers' files, such documents will not be  
5 produced subject to Plaintiff's agreement. The request also fails to define "known  
6 or suspected gay or lesbian servicemembers."

7 Subject to the specific and general objections set forth above, Defendants  
8 will produce documents housed at the Pentagon that relate to the policies,  
9 procedures, handbooks, rules, guidelines, or communications relating to  
10 deployment of known or suspected gay or lesbian servicemembers from the year  
11 2001 to the present, if any exist.

12 **DOCUMENT REQUEST NO. 67:**

13 All documents related to the deployment of gay or lesbian servicemembers  
14 in the process of discharge proceedings for homosexual conduct from the year  
15 2001 to the present.

16 **RESPONSE:**

17 Defendants object to this request as overly broad and unduly burdensome.

18 Subject to the specific and general objections set forth above, Defendants  
19 will produce documents housed at the Pentagon that relate to the deployment of  
20 gay or lesbian servicemembers in the process of discharge proceedings for  
21 homosexual conduct from the year 2001 to the present.

22 **DOCUMENT REQUEST NO. 68:**

23 All Documents related to any restriction on polling of service members on  
24 the subject of the service of gay men and lesbian (as described in RAND National  
25 Defense Research Institute, "Sexual Orientation and U.S. Military Personnel  
26 Policy; Option and Assessments," at 209 n.2 (1993)), during the period from  
27 January 1992 to the present.

28

1 **RESPONSE:**

2 Defendants object to this request as overly broad and unduly burdensome.  
3 Accordingly, the parties have met and conferred, and the Plaintiff has agreed to  
4 narrow its request to documents housed at the Pentagon.

5 Subject to the specific and general objections set forth above, Defendants  
6 will produce documents responsive to Plaintiff's narrowed request.

7 **DOCUMENT REQUEST NO. 69:**

8 All Documents and communications referring or relating to the total number  
9 of enlisted members of the United States Armed Force who were discharged from  
10 1994 through the present pursuant to the Policy and DOD Regulations.

11 **RESPONSE:**

12 Defendants object to this request as overly broad and unduly burdensome.  
13 Accordingly, the parties have met and conferred, and Plaintiff has agreed to limit  
14 its request to responsive statistical data housed at the Pentagon.

15 Subject to the specific and general objections set forth above, Defendants  
16 will produce documents responsive to Plaintiff's narrowed request.

17 **DOCUMENT REQUEST NO. 70:**

18 All Documents and communications referring or relating to the number of  
19 officers of the United States Armed Forces that were discharged from 1994  
20 through the present pursuant to the Policy, DOD Regulations, and DOD Act  
21 Regulations.

22 **RESPONSE:**

23 Defendants object to this request as overly broad and unduly burdensome.  
24 Accordingly, the parties have met and conferred, and Plaintiff has agreed to limit  
25 its request to responsive statistical data housed at the Pentagon.

26 Subject to the specific and general objections set forth above, Defendants  
27 will produce documents responsive to Plaintiff's narrowed request that are housed  
28

1 at the Pentagon.

2 **DOCUMENT REQUEST NO. 71:**

3 All Documents and communications referring or relating to the number of  
4 persons of the United States Armed Forces that were discharged from 1994  
5 through the present pursuant to the Policy and DOD Regulations that contested  
6 their discharge.

7 **RESPONSE:**

8 Defendants object to this request as overly broad and unduly burdensome.  
9 Accordingly, the parties have met and conferred, and Plaintiff has agreed to limit  
10 its request to responsive statistical data housed at the Pentagon.

11 Subject to the specific and general objections set forth above, Defendants  
12 will produce documents responsive to Plaintiff's narrowed request that are housed  
13 at the Pentagon.

14 **DOCUMENT REQUEST NO. 72:**

15 All Documents and communications referring or relating to the  
16 Administrative Separation Board and/or Board of Inquiries' policies, guidelines,  
17 directive, handbooks, or other Documents as to the separation of servicemembers  
18 under the Policy or DOD Regulation.

19 **RESPONSE:**

20 Defendants object to this request as overly broad and unduly burdensome.  
21 Accordingly, the parties have met and conferred and Plaintiff has agreed to limit  
22 its request to responsive documents housed at the Pentagon.

23 Subject to the specific and general objections set forth above, Defendants  
24 will produce certain documents housed at the Pentagon relating to the  
25 Administrative Separation Board and/or Board of Inquiries' policies, guidelines,  
26 directive, handbooks, or other Documents as to the separation of servicemembers  
27 under the Policy or DOD Regulation.

28

1 **DOCUMENT REQUEST NO. 73:**

2 All Document relating to any servicemembers' having demonstrated during  
3 a discharge proceeding all of the elements listed in 10 U.S.C. § 654(b)(1)(A)-(E).

4 **RESPONSE:**

5 Defendants object to this request as overly broad, unduly burdensome and,  
6 to the extent it calls for the production of individual servicemembers' files, subject  
7 to the Privacy Act. Accordingly, the parties have met and conferred but have been  
8 unable to reach an agreement as to the scope of this request.

9 Subject to the specific and general objections set forth above, Defendants  
10 will produce, to the extent reasonably possible, documents relating to any  
11 servicemembers' having demonstrated during a discharge proceeding all of the  
12 elements listed in 10 U.S.C. § 654(b)(1)(A)-(E) and upon the entry of an  
13 appropriate Privacy Act protective order.

14 **DOCUMENT REQUEST NO. 74:**

15 All Documents and communications referring or relating to the number of  
16 persons of the United States Armed Forces that were subject to discharge  
17 proceeding, contested their discharge, and ultimately were not discharged from  
18 1994 through the present pursuant to the Policy and DOD Regulations.

19 **RESPONSE:**

20 Defendants object to this request as overly broad and unduly burdensome.  
21 Accordingly, the parties have met and conferred, and Plaintiff has agreed to limit  
22 its request to responsive statistical data housed at the Pentagon.

23 Subject to the specific and general objections set forth above, Defendants  
24 will produce documents responsive to Plaintiff's narrowed request.

25 **DOCUMENT REQUEST NO. 75:**

26 All Documents and communications referring or relating to all studies and  
27 assessments concerning service by gay and lesbian servicemembers in the United  
28

1 States Armed Forces.

2 **RESPONSE:**

3 Defendants object to this request as overly broad and unduly burdensome.  
4 Accordingly, the parties have met and conferred, and Plaintiff has agreed to  
5 narrow its request to responsive studies housed at the Pentagon.

6 Subject to the specific and general objections set forth above, Defendants  
7 will produce documents responsive to Plaintiff's narrowed request.

8 **DOCUMENT REQUEST NO. 76:**

9 All Documents and communications referring or relating to all public  
10 opinion polls issued concerning service by gay and lesbian servicemembers in the  
11 United States Armed Forces.

12 **RESPONSE:**

13 Defendants object to this request as overly broad and unduly burdensome.  
14 Accordingly, the parties have met and conferred, and Plaintiff has agreed to limit  
15 its request to responsive documents housed at the Pentagon.

16 Subject to the specific and general objections set forth above, Defendants  
17 will produce documents responsive to Plaintiff's narrowed request.

18 **DOCUMENT REQUEST NO. 77:**

19 All documents received by Congress from 1992 through December 31, 1993  
20 concerning the service of gay and lesbian servicemembers in the United States  
21 Armed Forces.

22 **RESPONSE:**

23 Defendants object to this request as overly broad and unduly burdensome.  
24 Accordingly, the parties have met and conferred, and Plaintiff has agreed to limit  
25 its request to documents housed at the Pentagon that the Department of Defense  
26 sent to Congress concerning the service of gay and lesbian servicemembers in the  
27 United States Armed Forces while the statute in question was under consideration.  
28

1 Defendants object to this request, even in its narrowed form, to the extent  
2 that it call for the production of privileged documents.

3 Subject to specific and general objections set forth above, Defendants will  
4 produce documents responsive to Plaintiff's narrowed request. To the extent  
5 requested documents belong to Congress, or any other agency or instrumentality  
6 outside of the Department of Defense, they will not be produced absent consent of  
7 Congress or the originating agency or instrumentality.

8 **DOCUMENT REQUEST NO. 78:**

9 All Documents referring or relating to the section entitled "Personnel  
10 Actions During the Mobilizations Process," Regulation 500-3-3. vol. 3, "Reserve  
11 Component United Commanders Handbook," U.S. Army, 1999, Table 2.1.

12 **RESPONSE:**

13 Defendants object to this request as overly broad and unduly burdensome.  
14 Accordingly, the parties have met and conferred, and Plaintiff has agreed to limit  
15 its request to documents housed at the Pentagon that contain analysis or studies of  
16 the section entitled "Personnel Actions During the Mobilizations Process,"  
17 Regulation 500-3-3. vol. 3, "Reserve Component United Commanders  
18 Handbook," U.S. Army, 1999, Table 2.1.

19 Subject to the specific and general objections set forth above, Defendants  
20 will produce documents responsive to Plaintiff's narrowed request.

21 **DOCUMENT REQUEST NO. 79:**

22 The Reserve Component Unit Commanders Handbook, U.S. Army, 1999.

23 **RESPONSE:**

24 The requested information appears to be within Plaintiff's possession and  
25 will not be produced again by Defendants. The request is also subject to the  
26 general objections set forth above. The referenced document can be found at:  
27 <http://www.transchool.eustis.army.mil/LIC/DISS1/Documents/fr500-3-31.pdf>.

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Dated: January 12, 2010

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Log Cabin Republicans v. United States, Civil Action No. 04-8425 (VAP) (EX)  
 Privilege Log

DMDC								
135	DMDC*	DMDC	Email	October 2009 email discussing proposed polling question to gauge attitudes of service members if DADT is changed	13-Oct-09	Unclassified	Deliberative Process	
137-157	DMDC	DMDC	Email	2009 Email discussion concerning student proposed DADT questions for the Service Academy Gender Relations Survey	6-Nov-09	Unclassified	Deliberative Process	
not stamped	Army Litigation Division	DMDC	Email	Request to confirm numbers in LCR's amended complaint	23-Jun-09	Unclassified	Attorney Client, Work Product, and RCFC 26(b)(3)	
517-552	OSD P&R	DMDC	Email	Email chain discussing survey review and impact of DADT on National Partner Sexual Violence Surveillance System	23-Oct-09	Unclassified	Deliberative Process	
553-561	DMDC	DMDC	Email	2009 Email discussion concerning student proposed DADT questions for the Service Academy Gender Relations Survey	6-Nov-09	Unclassified	Deliberative Process	
597-599	DMDCCEST	DMDCCEST	Email	Email chain discussing DOD IG 1999 survey on evaluation and implementation of DADT	21-Dec-99	Unclassified	Deliberative Process	
600	DMDCCEST	DMDCCEST	Email	Email chain deciding whether to delete survey question concerning sexual harassment, racial/ethnic discrimination, fraternization, homosexual conduct in the military	1-Mar-00	Unclassified	Deliberative Process	
601-624	DMDCCEST	DMDCCEST	Email	Email discussing development and review of survey for the Scientific Review of Understanding Domestic Violence in the Military	19-Jul-05	Unclassified	Deliberative Process	

\* Pursuant to the Privacy Act, the names of the author and addressee contained in the documents in bates range 1-821 are redacted and protected.

Log Cabin Republicans v. United States, Civil Action No. 04-8425 (VAP) (EX)  
 Privilege Log

652-661	DMDC	ARI	Email	2008 Email chain discussing whether Army G-1, Army Research Institute, can included questions on DADT in a survey	6-Aug-08	Unclassified	Deliberative Process
666-676	DMDC	ARI	Email	2008 Email chain discussing whether Army G-1, Army Research Institute, can included questions on DADT in a survey	6-Aug-08	Unclassified	Deliberative Process
692	DMDC	DMDC	Email	Request update on status of Army G-1 ARI survey questions on DADT	28-Aug-08	Unclassified	Deliberative Process
693-694	DMDC	DMDC	Email	Oct 2009 email chain discussing impact of DADT on the workplace and gender relations survey	29-Oct-09	Unclassified	Deliberative Process
701-706	DMDC	DMDC	Email	Email chain discussing whether Army G-1, Army Research Institute, can included questions on DADT in a survey	July 08-Nov 09	Unclassified	Deliberative Process
not stamped	DHRA	Army Litigation Division and DMDC	Email	Communications regarding handling of discovery in Log Cabin Republicans v. U.S.	18-Nov-09	Unclassified	Attorney Client, Work Product, and RCFC 26(b)(3)
737-751	ARI	ARI		Email chain discussing whether Army G-1, Army Research Institute, can included questions on DADT in a survey	28-Aug-08	Unclassified	Deliberative Process

\* Pursuant to the Privacy Act, the names of the author and addressee contained in the documents in bates range 1-821 are redacted and protected.

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11 **UNITED STATES DISTRICT COURT**  
12 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
**EASTERN DIVISION**

13 LOG CABIN REPUBLICANS,  
14 Plaintiff,  
15 v.  
16 UNITED STATES OF AMERICA AND  
ROBERT GATES, Secretary of Defense,  
17 Defendants.  
18  
19  
20

No. CV04-8425 (VAP) (Ex)  
DEFENDANTS' OBJECTIONS  
AND RESPONSES TO  
PLAINTIFF'S FIRST SET OF  
REQUESTS FOR ADMISSION

1 Pursuant to Federal Rules of Civil Procedure 26 and 36, and subject to the  
2 objections stated below, Defendants United States and Secretary Gates hereby  
3 respond to Plaintiff's First Set of Requests for Admission for purposes of Merits  
4 Discovery.

5 **GENERAL OBJECTIONS**

6 1. Defendants object to the Requests to the extent that Plaintiff seeks discovery  
7 to probe the motivations of the Legislative and Executive Branches in passing  
8 statutes and promulgating regulations implementing the law. Well-established  
9 Supreme Court precedent squarely provides that inquiry into the subjective  
10 motives of members of Congress is a "hazardous matter" and that courts will not  
11 strike down an otherwise constitutional statute on the basis of an alleged illicit  
12 motive." United States v. O'Brien, 391 U.S. 367, 383-84 (1968); Board of Educ.  
13 of the Westside Community Schools v. Mergens, 496 U.S. 226, 249 (1990) (in  
14 evaluating constitutionality of statute, "what is relevant is the legislative *purpose*  
15 of the statute, not the possibly religious *motives* of the legislators who enacted the  
16 law") (emphasis in original); Las Vegas v. Foley, 747 F.2d 1294, 1298 (9<sup>th</sup> Cir.  
17 1984) (same). The same is true of attempts to probe the motivations of the  
18 Executive Branch. See e.g., Village of Arlington Heights v. Metropolitan Hous.  
19 Dev. Corp., 429 U.S. 252, 268 n.18 (1977) ("judicial inquiries into legislative or  
20 executive motivation represent a substantial intrusion into the workings of other  
21 branches of government").

22 2. Defendants object to the Requests to the extent that they are not reasonably  
23 calculated to lead to the discovery of admissible evidence. The Court has ruled  
24 that Plaintiff's challenge is governed by the rational basis standard of review. It  
25 is well understood that a legislative choice subject to the rational basis test "is not  
26 subject to courtroom fact-finding." Federal Communications Comm'n v. Beach  
27 Communications, 508 U.S. 307, 315 (1993) (quoting Lehnhausen v. Lake Shore

1 Auto Parts Co., 410 U.S. 356, 364 (1973)). Defendants accordingly have “no  
2 obligation to produce evidence to sustain the rationality of a statutory  
3 classification.” Heller v. Doe, 509 U.S. 312, 320 (1993). The analysis instead  
4 asks whether the legislature “rationally *could have believed*” that the conditions of  
5 the statute would promote its objective. Western and Southern Life Insurance Co.  
6 v. State Bd. of Equalization of California, 451 U.S. 654, 671-72 (1981) (emphasis  
7 in original).

8 Rational basis review, moreover, “is not a license for courts to judge the  
9 wisdom, fairness, or logic of legislative choices.” Beach Communications, 508  
10 U.S. at 313. Rather, “those challenging the legislative judgment must convince  
11 the court that the legislative facts on which the classification is apparently based  
12 could not reasonably be conceived to be true by the governmental decisionmaker.”  
13 Vance v. Bradley, 440 U.S. 93, 111 (1979). While we understand that the Court  
14 has permitted Plaintiff to attempt to engage in discovery, the congressional  
15 findings and legislative history underlying the statute are “legislative fact[s]”  
16 subject to judicial notice and are not appropriate subjects for fact-finding or  
17 discovery.

18 3. Defendants object to the Requests to the extent that they attempt to discover  
19 information concerning the “continued rationality” of the statute. Classifications  
20 subject to rational-basis review are not subject to challenge on the ground of  
21 changed circumstances. See, e.g., Montalvo-Huertas v. Rivera-Cruz, 885 F.2d  
22 971, 977 (1st Cir. 1989) (“[E]valuating the continued need for, and suitability of,  
23 legislation of this genre is exactly the kind of policy judgment that the rational  
24 basis test was designed to preclude.”). Indeed, courts have found that even where  
25 Congress has determined that a previous enactment is no longer necessary, that  
26 finding does not render the statute unconstitutional. See Smart v. Ashcroft, 401  
27 F.3d 119, 123 (2d Cir. 2005) (“A congressional decision that a statute is unfair,  
28

1 outdated, and in need of improvement does not mean that the statute when enacted  
2 was wholly irrational or, for purposes of rational basis review, unconstitutional.”);  
3 Howard v. U.S. Dept. of Defense, 354 F.3d 1358, 1361-62 (Fed. Cir. 2004)  
4 (“Congress acts based on judgments as to preferable policy; the fact that Congress  
5 repeals or modifies particular legislation does not reflect a judgment that the  
6 legislation, in its pre-amendment form, lacked rational support.”). Were it  
7 otherwise, all legislation subject to rational basis review – even legislation  
8 authoritatively sustained as constitutional by the Supreme Court – could  
9 potentially be subject to periodic judicial review on the basis of changed  
10 circumstances, a prospect incompatible with these principles and the Supreme  
11 Court’s well known and repeated admonition that “a legislative choice is not  
12 subject to courtroom factfinding and may be based on rational speculation  
13 unsupported by evidence or empirical data.” Heller, 509 U.S. at 320.

14 4. Defendants object to any response that calls for information outside of the  
15 Department of Defense. This action is subject to review under the Administrative  
16 Procedure Act, which limits review to “[a]gency action.” See 5 U.S.C. § 702.  
17 Defendants will thus make reasonable inquiry within the agency charged with  
18 administering 10 U.S.C. § 654—the United States Department of Defense.

19 5. Defendants object to the sheer volume and scope of these and subsequent  
20 Requests, which impose an undue burden. It is not Defendants’ obligation to  
21 undertake such an expansive inquiry in response to discovery. Defendants have  
22 conducted a reasonable inquiry and responded with information known or readily  
23 obtainable.

24 6. Defendants reserve the right to amend, supplement, or alter these objections  
25 and responses to the Requests at any time. The following responses are based  
26 upon information currently known to Defendants, and Defendants reserve the right  
27 to supplement or amend its responses should additional or different information  
28

1 become available.

2 7. The foregoing General Objections shall be considered as made, to the extent  
3 applicable, in response to each of the Requests, as if General Objections were fully  
4 set forth in each response.

5 8. Nothing contained in the following responses constitutes a waiver of any  
6 applicable objection or privilege as to the requested discovery.

7 **INDIVIDUAL OBJECTIONS AND RESPONSES**

8 1. Admit that on June 29, 2009, President Barack Obama made a speech in  
9 front of any audience attending the Lesbian, Gay, Bisexual and Transgendered  
10 Pride Month Reception held at the White House, the text of which speech is  
11 available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-LGBT-Pride-Month-Reception/)  
12 [President-at-LGBT-Pride-Month-Reception/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-LGBT-Pride-Month-Reception/).

13 **Response:** Admit.

14 2. Admit that on June 29, 2009, during his speech in front of an audience  
15 attending the Lesbian, Gay, Bisexual and Transgendered Pride Month Reception  
16 held at the White House, President Barack Obama stated, "As I said before—I'll say  
17 it again—I believe 'don't ask, don't tell' doesn't contribute to our national security.  
18 In fact, I believe preventing patriotic Americans from serving their country  
19 weakens our national security."

20 **Response:** Admit.

21 3. Admit that DADT does not contribute to our national security.

22 **Response:** Defendants object to this request, as it does not call for facts, the  
23 application of law to fact, or an opinion about facts or the application of law to  
24 fact. See Fed. R. Civ. P. 36(a)(1)(A). Defendants further object to this request  
25 because the terms "contribute" and "national security" as used in this context are  
26 vague and ambiguous. To the extent a further response is required, Defendants  
27 note the responses to requests for admission 1 and 2 supra, but deny this request  
28 because it was rational for Congress to have concluded at the time the statute was

1 enacted in 1993 that DADT was necessary "in the unique circumstances of  
2 military service," 10 U.S.C. § 654(a)(13).

3 4. Admit that DADT weakens our national security.

4 **Response:** Defendants object to this request, as it does not call for facts, the  
5 application of law to fact, or an opinion about facts or the application of law to  
6 fact. See Fed. R. Civ. P. 36(a)(1)(A). Defendants further object to this request  
7 because the terms "weakens" and "national security" as used in this context are  
8 vague and ambiguous. To the extent a further response is required, Defendants  
9 note the responses to requests for admission 1 and 2 supra, but deny this request  
10 because it was rational for Congress to have concluded at the time the statute was  
11 enacted in 1993 that DADT was necessary "in the unique circumstances of  
12 military service," 10 U.S.C. § 654(a)(13).

13 5. Admit that discharging members pursuant to DADT weakens our national  
14 security.

15 **Response:** Defendants object to this request, as it does not call for facts, the  
16 application of law to fact, or an opinion about facts or the application of law to  
17 fact. See Fed. R. Civ. P. 36(a)(1)(A). Defendants further object to this request  
18 because the terms "weakens" and "national security" as used in this context are  
19 vague and ambiguous. To the extent a further response is required, Defendants  
20 note the responses to requests for admission 1 and 2 supra, but deny this request  
21 because it was rational for Congress to have concluded at the time the statute was  
22 enacted in 1993 that DADT was necessary "in the unique circumstances of  
23 military service," 10 U.S.C. § 654(a)(13).



1 6. Admit that on June 29, 2009, during his speech in front of an audience  
2 attending the Lesbian, Gay, Bisexual and Transgendered Pride Month  
3 Reception held at the White House, President Barack Obama stated that  
4 DADT has resulted in the discharge of “patriots who often possess critical  
5 language skills and years of training and who’ve served this country well.”

6 **Response:** Admit.

7 7. Admit that DADT has resulted in the discharge of service members who  
8 possess critical language skills.

9 **Response:** Defendants object to this request, as it does not call for facts, the  
10 application of law to fact, or an opinion about facts or the application of law to  
11 fact. See Fed. R. Civ. P. 36(a)(1)(A). Notwithstanding this objection, defendants  
12 can neither admit nor deny this Request because it does not maintain data on  
13 service members who “possess critical language skills”; the Department of  
14 Defense instead maintains data by occupation. Defendants admit that service  
15 members with language skills have been discharged under the statute.

16 8. Admit that DADT has resulted in the discharge of service members who  
17 have served this country well.

18 **Response:** Defendants object to this request, as it does not call for facts, the  
19 application of law to fact, or an opinion about facts or the application of law to  
20 fact. See Fed. R. Civ. P. 36(a)(1)(A). Notwithstanding this objection, defendants  
21 admit that service members have been honorably discharged under the statute.

22 9. Admit that on June 29, 2009, during his speech in front of an audience  
23 attending the Lesbian, Gay, Bisexual and Transgendered Pride Month  
24 Reception held at the White House, President Barack Obama stated: “What I  
25 hope is that these cases underscore the urgency of reversing this policy not  
26 just because it’s the right thing to do, but because it is essential for our  
27 national security.”

28 **Response:** Admit.

1 10. Admit that reversing DADT is essential for our national security.

2 **Response:** Defendants object to this request, as it does not call for facts, the  
3 application of law to fact, or an opinion about facts or the application of law to  
4 fact. See Fed. R. Civ. P. 36(a)(1)(A). Defendants further object to this request  
5 because the terms "essential" and "national security" as used in this context are  
6 vague and ambiguous. To the extent a further response is required, Defendants  
7 note the responses to requests for admission 9 supra, but deny this request because  
8 it was rational for Congress to have concluded at the time the statute was enacted  
9 in 1993 that DADT was necessary "in the unique circumstances of military  
10 service," 10 U.S.C. § 654(a)(13).

11 11. Admit that on June 29, 2009, President Barack Obama made a speech at the  
12 Walter E. [Washington] Convention Center for the Human Rights Campaign  
13 Dinner, the text of which is available at:

14 [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-at-](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-Human-Rights-Campaign-Dinner/)  
15 [Human-Rights-Campaign-Dinner/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-Human-Rights-Campaign-Dinner/).

16 **Response:** Admit.

17 12. Admit that on October 10, 2009, President Barack Obama made a speech at  
18 the Walter E. [Washington] Convention Center for the Human Rights  
19 Campaign Dinner stated: ["We should not be punishing patriotic  
20 Americans who have stepped forward to serve this country. We should be  
21 celebrating their willingness to show such courage and selflessness on  
22 behalf of their fellow citizens, especially when we're fighting two wars. We  
23 cannot afford to cut from our ranks people with the critical skills we need to  
24 fight any more than we can afford - for our military's integrity - to force  
25 those willing to do so into careers encumbered and compromised by having  
26 to live a lie.[""]

27 **Response:** Admit.

1 13. Admit the United States cannot afford to cut LGBT service members from  
2 the ranks of its military.

3 **Response:** Defendants object to this request, as it does not call for facts, the  
4 application of law to fact, or an opinion about facts or the application of law to  
5 fact. See Fed. R. Civ. P. 36(a)(1)(A). Defendants further object to this request  
6 because the term “cannot afford to cut LGBT service members” as used in this  
7 context is vague and ambiguous. To the extent a response is required, Defendants  
8 deny this request because DADT does not prohibit the service of LGBT service  
9 members based upon sexual orientation alone, but does permit discharge based  
10 upon certain conduct.

11 14. Admit the United States cannot afford to force LGBT service members to  
12 have their careers encumbered by DADT.

13 **Response:** Defendants object to this request, as it does not call for facts, the  
14 application of law to fact, or an opinion about facts or the application of law to  
15 fact. See Fed. R. Civ. P. 36(a)(1)(A). Defendants further object to this request  
16 because the term “cannot afford to force LGBT service members to have their  
17 careers encumbered by DADT” as used in this context is vague and ambiguous.  
18 To the extent a response is required, Defendants deny this request because DADT  
19 does not prohibit the service of LGBT service members based upon sexual  
20 orientation alone, but does permit discharge based upon certain conduct.

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1 15. Admit the United States cannot afford to force LGBT service members to  
2 live a lie.

3 **Response:** Defendants object to this request, as it does not call for facts, the  
4 application of law to fact, or an opinion about facts or the application of law to  
5 fact. See Fed. R. Civ. P. 36(a)(1)(A). Defendants further object to this request  
6 because the term “cannot afford to force LGBT service members to live a lie” as  
7 used in this context is vague and ambiguous. To the extent a response is required,  
8 Defendants deny this request because DADT does not prohibit the service of  
9 LGBT service members based upon sexual orientation alone, but does permit  
10 discharge based upon certain conduct.

11 16. Admit that since President Barack Obama’s speech on June 29, 2009, there  
12 has been no stay in the application or enforcement of DADT.

13 **Response:** Admit.

14 17. Admit that since President Barack Obama’s speech on June 29, 2009, there  
15 has been no stay of separation proceedings initiated pursuant to DADT.

16 **Response:** Admit.

17 18. Admit that since President Barack Obama’s speech on June 29, 2009, there  
18 has been no stay of investigations pursuant to DADT.

19 **Response:** Admit.

20 19. Admit that no timeline to repeal DADT has been publicly proposed by  
21 President Barack Obama.

22 **Response:** Denied. The President has publicly stated that he intends to seek the  
23 repeal of the statute during his Administration.

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1 20. Admit that in or around February 2005 the Government Accountability  
2 Office issued a report (the GAO Report) to Congress entitled "Military  
3 Personnel: Financial Costs and Loss of Critical Skills Due to DOD's  
4 Homosexual Conduct Policy Cannot Be Completely Estimated," the text of  
5 which is available online at <http://www.gao.gov/new.items/d05299.pdf>.

6 **Response:** Admit.

7 21. Admit that the Government Accountability Office's Report issued in or  
8 around February 2005 and entitled "Military Personnel: Financial Costs and  
9 Loss of Critical Skills Due to DOD's Homosexual Conduct Policy Cannot  
10 Be Completely Estimated" states: [""]The total cost of DOD's homosexual  
11 conduct policy cannot be estimated because DOD does not collect relevant  
12 cost data on inquiries and investigations, counseling and pastoral care,  
13 separation functions, and discharge reviews. However, DOD does collect  
14 data on recruitment and training costs for the force overall. Using these  
15 data, GAO estimated that, over the 10-year period, it could have cost the  
16 DOD about \$95 million in constant fiscal year 2004 dollars to recruit  
17 replacements for service members separated under the policy. Also, the  
18 Navy, Air Force, and Army estimated that the cost to train replacements for  
19 separated service members by occupation was approximately \$48.8 million,  
20 \$16.6 million, and \$29.7 million, respectively.[""]

21 **Response:** Admit that the report contains the referenced statement.

22 22. Admit the Government Accountability Office's Report issued in or around  
23 February 2005 and entitled "Military Personnel: Financial Costs and Loss of  
24 Critical Skills Due to DOD's Homosexual Conduct Policy Cannot Be  
25 Completely Estimated" found that between 1994 and 2003, 9,488 service  
26 members were separated from the United States Armed Forces for  
27 homosexual conduct pursuant to DADT.

28 **Response:** Admit that the report contains the referenced estimate.

1 23. Admit the Government Accountability Office's Report issued in or around  
2 February 2005 and entitled "Military Personnel: Financial Costs and Loss of  
3 Critical Skills Due to DOD's Homosexual Conduct Policy Cannot Be  
4 Completely Estimated" found that 757 of the service members separated  
5 from the United States Armed Forces between 1994 and 2003 held "critical  
6 occupations, identified by DOD as those occupations worthy of selective  
7 reimbursement bonuses."

8 **Response:** Admit that the report contains the referenced statement.

9 24. Admit the Government Accountability Office's Report issued in or around  
10 February 2005 and entitled "Military Personnel: Financial Costs and Loss of  
11 Critical Skills Due to DOD's Homosexual Conduct Policy Cannot Be  
12 Completely Estimated" found that 322 of the service members separated  
13 from the United States Armed Forces between 1994 and 2003 had "some  
14 skills in an important foreign language such as Arabic, Farsi, or Korean."

15 **Response:** Admit that the report contains the referenced estimate.

16 25. Admit that it cost DOD at least \$90 million in constant fiscal year 2004  
17 dollars to recruit replacements for service members separated under the  
18 policy in the period between 1994 and 2003.

19 **Response:** Defendants are unable to admit or deny this Request. The  
20 Department of Defense has not conducted or commissioned a study of the fiscal  
21 impact of the Policy.

22 26. Admit the accuracy of the GAO report's finding that at least 9,488 service  
23 members have been separated from the military under DADT from 1994 to  
24 2003.

25 **Response:** Defendants are unable to admit or deny this Request. The data  
26 maintained by the Department of Defense prior to fiscal year 1997 does not permit  
27 Defendants to determine with precision the number of service members who were  
28 discharged under DADT. Defendants admit that the Department of Defense

1 separated 7,270 service members pursuant to DADT between fiscal years 1997  
2 and 2003.

3 27. Admit the accuracy of the GAO Report's finding that at least 757 of the  
4 service members separated from the military under DADT from 1994 to  
5 2003 held "critical occupations."

6 **Response:** Defendants are unable to admit or deny this Request. The Department  
7 of Defense does not code its information by "critical occupations"; the Department  
8 instead codes information by occupation. The data maintained by the Department  
9 of Defense prior to fiscal year 1997 does not permit Defendants to determine with  
10 precision the number of service members who were discharged under DADT.

11 28. Admit the accuracy of the GAO Report's finding that at least 322 service  
12 members separated from the military under DADT from 1994 to 2003 had  
13 "some important foreign language such as Arabic, Farsi, or Korean."

14 **Response:** Defendants are unable to admit or deny this Request. The  
15 Department of Defense does not code its information by language specialty; it  
16 instead codes its information by occupation. The data maintained by the  
17 Department of Defense prior to fiscal year 1997 does not permit Defendants to  
18 determine with precision the number of service members who were discharged  
19 under DADT. Defendants admit that between 1997 and 2003, the Department of  
20 Defense discharged 870 service members under DADT with foreign language  
21 skills.

22 29. Admit that at least 13,000 service members were separated from the United  
23 States Armed Forces since 1994 pursuant to DADT.

24 **Response:** Defendants are unable to admit or deny this Request. The data  
25 maintained by the Department of Defense prior to fiscal year 1997 does not permit  
26 Defendants to say with precision which service members were discharged under  
27 DADT. Defendants admits the that 10,935 service members were discharged  
28 under DADT for fiscal year 1997 through fiscal year 2009.

1 30. Admit that at least 615 service members were separated from the United  
2 States Armed Forces pursuant to DADT in 1994.

3 **Response:** Defendants are unable to admit or deny this Request. The data  
4 maintained by the Department of Defense prior to fiscal year 1997 does not permit  
5 Defendants to say with precision which service members were discharged under  
6 DADT.

7 31. Admit that at least 757 service members were separated from the United  
8 States Armed Forces pursuant to DADT in 1995.

9 **Response:** Defendants are unable to admit or deny this Request. The data  
10 maintained by the Department of Defense prior to fiscal year 1997 does not permit  
11 Defendants to say with precision which service members were discharged under  
12 DADT.

13 32. Admit that at least 858 service members were separated from the United  
14 States Armed Forces pursuant to DADT in 1996.

15 **Response:** Defendants are unable to admit or deny this Request. The data  
16 maintained by the Department of Defense prior to fiscal year 1997 does not permit  
17 Defendants to say with precision which service members were discharged under  
18 DADT.

19 33. Admit that at least 997 service members were separated from the United  
20 States Armed Forces pursuant to DADT in 1997.

21 **Response:** Admit.

22 34. Admit that at least 1,145 service members were separated from the United  
23 States Armed Forces pursuant to DADT in 1998.

24 **Response:** Admit.

25 35. Admit that at least 1,033 service members were separated from the United  
26 States Armed Forces pursuant to DADT in 1999.

27 **Response:** Admit.  
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1 36. Admit that at least 1,212 service members were separated from the United  
2 States Armed Forces pursuant to DADT in 2000.

3 **Response:** Admit.

4 37. Admit that at least 1,217 service members were separated from the United  
5 States Armed Forces pursuant to DADT in 2001.

6 **Response:** Admit.

7 38. Admit that at least 885 service members were separated from the United  
8 States Armed Forces pursuant to DADT in 2002.

9 **Response:** Admit.

10 39. Admit that at least 770 service members were separated from the United  
11 States Armed Forces pursuant to DADT in 2003.

12 **Response:** Admit.

13 40. Admit that at least 668 service members were separated from the United  
14 States Armed Forces pursuant to DADT in 2004.

15 **Response:** Denied; in 2004, 653 service members were separated pursuant to  
16 DADT.

17 41. Admit that at least 742 service members were separated from the United  
18 States Armed Forces pursuant to DADT in 2005.

19 **Response:** Denied; in 2005, 726 service members were separated pursuant to  
20 DADT.

21 42. Admit that at least 623 service members were separated from the United  
22 States Armed Forces pursuant to DADT in 2006.

23 **Response:** Denied; in 2006, 612 service members were separated pursuant to  
24 DADT.

25 43. Admit that at least 627 service members were separated from the United  
26 States Armed Forces pursuant to DADT in 2007.

27 **Response:** Admit.  
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1 44. Admit that at least 619 service members were separated from the United  
2 States Armed Forces pursuant to DADT in 2008.

3 **Response:** Admit.

4 45. Admit that at least 275 service members were separated from the United  
5 States Armed Forces pursuant to DADT in 2009.

6 **Response:** Admit.

7 46. Admit that, in 2009 alone, at least 2,000 former service members have left  
8 the United States Armed Forces voluntarily in anticipation of investigation  
9 or discharge pursuant to DADT.

10 **Response:** Defendants are unable to admit or deny this Request. The  
11 Department of Defense does not track the number of service members who leave  
12 the Armed Forces in anticipation of an investigation or discharge pursuant to  
13 DADT.

14 47. Admit that without a change in policy DOD will continue to authorize the  
15 separation of service members for homosexual acts, for statements by  
16 service members that demonstrate a propensity or intent to engage in  
17 homosexual acts, or for homosexual marriage or attempted marriage.

18 **Response:** Admit.

19 48. Admit that between 1994 and 2003, servicewomen accounted for 27% of all  
20 separations pursuant to DADT.

21 **Response:** Defendants are unable to admit or deny this Request. The data  
22 maintained by the Department of Defense prior to fiscal year 1997 does not permit  
23 Defendants to say with precision which service members were discharged under  
24 DADT. Between 1997 and 2003, 4,385 women were discharged under DADT,  
25 accounting for 40.36% of all separations under DADT.

26 49. Admit that between 1994 and 2003, servicewomen accounted for less than  
27 20% of all service members in the United States Armed Forces.

28 **Response:** Admit.

1 50. Admit that between 1994 and 2003, DADT disproportionately affected  
2 servicewomen in the United States Armed Forces.

3 **Response:** Defendants object to this request because the term “disproportionately  
4 affected” is vague and ambiguous. To the extent a response is required, it is  
5 denied because, whatever the affect for men and women, the Department of  
6 Defense applies DADT in the same manner regardless of gender.

7 51. Admit that DADT continues to disproportionately affect servicewomen in  
8 the United States Armed Forces.

9 **Response:** Defendants object to this request because the term “disproportionately  
10 affected” is vague and ambiguous. To the extent a response is required, it is  
11 denied because, whatever the affect for men and women, the Department of  
12 Defense applies DADT in the same manner regardless of gender.

13 52. Admit that known felons are currently permitted to serve in the United  
14 States Armed Forces.

15 **Response:** Defendants admit that although Congress prohibits the enlistment of  
16 persons convicted of a felony, it has authorized exceptions in meritorious cases, as  
17 provided in 10 U.S.C. § 504.

18 53. Admit that at least 824 felons enlisted in the United States Armed Forces in  
19 2003.

20 **Response:** Defendants can neither admit nor deny this Request. The information  
21 Defendants know or can readily obtain is insufficient for it to admit or deny this  
22 Request. The Department of Defense cannot accurately determine the number of  
23 enlistment waivers granted for felonies for fiscal year 2003 because, prior to fiscal  
24 year 2007, the data that would permit such a determination was not standardized  
25 according to offense category and did not distinguish between convicted felons  
26 and others who were simply charged with felony offenses and otherwise  
27 adjudicated.

1 54. Admit that at least 638 felons enlisted in the United States Armed Forces in  
2 2004.

3 **Response:** Defendants can neither admit nor deny this Request. The information  
4 Defendants know or can readily obtain is insufficient for it to admit or deny this  
5 Request. The Department of Defense cannot accurately determine the number of  
6 enlistment waivers granted for felonies for fiscal year 2003 because, prior to fiscal  
7 year 2007, the data that would permit such a determination was not standardized  
8 according to offense category and did not distinguish between convicted felons  
9 and others who were simply charged with felony offenses and otherwise  
10 adjudicated.

11 55. Admit that at least 1,163 felons enlisted in the United States Armed Forces  
12 in 2005.

13 **Response:** Defendants can neither admit nor deny this Request. The information  
14 Defendants know or can readily obtain is insufficient for it to admit or deny this  
15 Request. The Department of Defense cannot accurately determine the number of  
16 enlistment waivers granted for felonies for fiscal year 2003 because, prior to fiscal  
17 year 2007, the data that would permit such a determination was not standardized  
18 according to offense category and did not distinguish between convicted felons  
19 and others who were simply charged with felony offenses and otherwise  
20 adjudicated.

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1 56. Admit that at least 1,605 felons enlisted in the United States Armed Forces  
2 in 2006.

3 **Response:** Defendants can neither admit nor deny this Request. The information  
4 Defendants know or can readily obtain is insufficient for it to admit or deny this  
5 Request. The Department of Defense cannot accurately determine the number of  
6 enlistment waivers granted for felonies for fiscal year 2003 because, prior to fiscal  
7 year 2007, the data that would permit such a determination was not standardized  
8 according to offense category and did not distinguish between convicted felons  
9 and others who were simply charged with felony offenses and otherwise  
10 adjudicated.

11 57. Admit that from 2003 to 2006, the number of felons enlisting in the United  
12 States Armed Forces increased by at least 194%.

13 **Response:** Defendants can neither admit nor deny this Request. The information  
14 Defendants know or can readily obtain is insufficient for it to admit or deny this  
15 Request. The Department of Defense cannot accurately determine the number of  
16 enlistment waivers granted for felonies for fiscal year 2003 because, prior to fiscal  
17 year 2007, the data that would permit such a determination was not standardized  
18 according to offense category and did not distinguish between convicted felons  
19 and others who were simply charged with felony offenses and otherwise  
20 adjudicated.

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1 58. Admit that from 2003 to 2006, the United States Armed Forces allowed at  
2 least 4,320 convicted felons to enlist under the "moral waiver" program for  
3 new recruits.

4 **Response:** Defendants can neither admit nor deny this Request. The information  
5 Defendants know or can readily obtain is insufficient for it to admit or deny this  
6 Request. The Department of Defense cannot accurately determine the number of  
7 enlistment waivers granted for felonies for fiscal year 2003 because, prior to fiscal  
8 year 2007, the data that would permit such a determination was not standardized  
9 according to offense category and did not distinguish between convicted felons  
10 and others who were simply charged with felony offenses and otherwise  
11 adjudicated.

12 59. Admit that from 2003 to 2006, the United States Armed Forces allowed at  
13 least 43,977 individuals convicted of serious misdemeanors, such as assault,  
14 to enlist under the "moral waiver" program for new recruits.

15 **Response:** Defendants can neither admit nor deny this Request. The information  
16 Defendants know or can readily obtain is insufficient for it to admit or deny this  
17 Request. The Department of Defense cannot accurately determine the number of  
18 enlistment waivers granted for serious misdemeanors for fiscal year 2003 because,  
19 prior to fiscal year 2007, the data that would permit such a determination was not  
20 standardized according to offense category.

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1 60. Admit that from 2003 to 2006, the United States Armed Forces allowed at  
2 least 58,561 individuals who had abused illegal drugs to enlist under the  
3 “moral waivers” program for new recruits.

4 **Response:** Defendants can neither admit nor deny this Request. The information  
5 Defendants know or can readily obtain is insufficient for it to admit or deny this  
6 Request. The Department of Defense cannot accurately determine the number of  
7 enlistment waivers granted for illegal drug use for fiscal year 2003 because, prior  
8 to fiscal year 2007, the data that would permit such a determination was not  
9 standardized according to offense category.

10 61. Admit that the United States Army includes kidnapping among its offenses  
11 permissible under the “moral waiver” program for new recruits.

12 **Response:** Admit that an enlistment waiver can be obtained under Department of  
13 Defense promulgated Directive-Type Memorandum (DTM) 08-018, but further  
14 note that such waivers can be denied.

15 62. Admit that the United States Army includes rape among its offenses  
16 permissible under the “moral waiver” program for new recruits.

17 **Response:** Admit that an enlistment waiver can be obtained under Department of  
18 Defense promulgated Directive-Type Memorandum (DTM) 08-018, but further  
19 note that such waivers can be denied.

20 63. Admit that the United States Army includes child abuse among its offenses  
21 permissible under the “moral waiver” program for new recruits.

22 **Response:** Admit that an enlistment waiver can be obtained under Department of  
23 Defense promulgated Directive-Type Memorandum (DTM) 08-018, but further  
24 note that such waivers can be denied.

1 64. Admit that the United States Army includes making terrorist threats among  
2 its offenses permissible under the “moral waiver” program for new recruits.

3 **Response:** Admit that an enlistment waiver can be obtained under Department of  
4 Defense promulgated Directive-Type Memorandum (DTM) 08-018, but further  
5 note that such waivers can be denied.

6 65. Admit that the United States Army includes hate crimes among its offenses  
7 permissible under the “moral waiver” program for new recruits.

8 **Response:** Admit that an enlistment waiver can be obtained under Department of  
9 Defense promulgated Directive-Type Memorandum (DTM) 08-018, but further  
10 note that such waivers can be denied.

11 66. Admit that the United States Army includes murder among its offenses  
12 permissible under the “moral waiver” program for new recruits.

13 **Response:** Admit that an enlistment waiver can be obtained under Department of  
14 Defense promulgated Directive-Type Memorandum (DTM) 08-018, but further  
15 note that such waivers can be denied.

16 67. Admit that the “moral waiver” program does not permit openly gay or  
17 lesbian Americans to enlist in the United States Army.

18 **Response:** Defendants object to this Request because the term “openly gay or  
19 lesbian” are vague and ambiguous. Defendants further object to this Request on  
20 the ground that it suggests that such an enlistment waiver would be necessary.  
21 The Directive-Type Memorandum (DTM) 08-018 sets forth enlistment waivers for  
22 certain violations of law the DTM has no application to the conduct-based policy  
23 set forth in DADT.



1 68. Admit that kidnappers, rapists, child abusers, terrorists, racists, and  
2 murderers are more morally capable of serving in the United States Army  
3 than gay men and lesbians.

4 **Response:** Defendants deny this Request because the Directive-Type  
5 Memorandum (DTM) 08-018 sets forth enlistment waivers for certain violations  
6 of law; the DTM has no application to the conduct-based policy set forth in  
7 DADT.

8 69. Admit that a bill to repeal DADT has been pending in Congress since 2005.

9 **Response:** Denied, but admit that since 2005 various bills have been introduced  
10 in Congress to repeal or modify DADT.

11 70. Admit that over 100 Congress members have co-sponsored a bill to repeal  
12 DADT.

13 **Response:** Defendants object to this Request because it does not reference a  
14 specific bill. Defendants admit that H.R. 1283, the Military Readiness  
15 Enhancement Act of 2009, introduced on March 3, 2009, has 187 cosponsors.

16 71. Admit that gay and lesbian service members' constitutional liberties and  
17 right to privacy under the Due Process Clause of the Fifth Amendment  
18 encompass and protect intimate, consensual physical acts and relationships  
19 with persons of the same gender.

20 **Response:** Defendants object to this request, as it does not call for facts, the  
21 application of law to fact, or an opinion about facts or the application of law to  
22 fact. See Fed. R. Civ. P. 36(a)(1)(A). The Request is instead calls for a legal  
23 conclusion and is thus improper under Rule 36. To the extent a response is  
24 required, the Request is denied.

1 72. Admit that DADT applies to members of the armed forces regardless of  
2 whether they serve in combat or non-combat positions.

3 **Response:** Admit but note that every service member must be ready, willing, and  
4 able to serve in combat.

5 73. Admit that service members who have been separated from the United  
6 States Armed Forces under DADT include translators.

7 **Response:** Admit.

8 74. Admit that 37 linguists at the Defense Language Institute were discharged  
9 pursuant to DADT in 2002 and 2003.

10 **Response:** Defendants are unable to admit or deny this Request. The  
11 Department of Defense is unable to determine from the data it maintains whether  
12 discharged service members were serving at the Defense Language Institute. In  
13 fiscal year 2002, the Department of Defense discharged 33 linguists under DADT.  
14 In fiscal year 2003, the Department of Defense discharged 38 linguists under  
15 DADT.

16 75. Admit that service members who have been separated for United States  
17 Armed Forces under DADT include medical personnel.

18 **Response:** Admit.

19 76. Admit that service members who have been separated from the United  
20 States Armed Forces under DADT include dental care technicians.

21 **Response:** Admit.

22 77. Admit that service members who have been separated from the United  
23 States Armed Forces under DADT include ophthalmologists.

24 **Response:** Admit.

25 78. Admit that service members who have been separated from the United  
26 States Armed Forces under DADT include members of the JAG Corps.

27 **Response:** Admit.  
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1 79. Admit that discharges under DADT occur more frequently in times of peace  
2 than in times of conflict.

3 **Response:** Defendants object to the Request as vague and ambiguous. The  
4 Requests define “peace” and “conflict” according to the “scale [of] deployments”  
5 in “areas of intense conflict” but nowhere define these terms. Defendants can thus  
6 neither admit nor deny this Request because the Department of Defense does not  
7 maintain data regarding discharges according to the parameters set forth in this  
8 Request. To the extent a response is required, it is denied; although numbers of  
9 discharges have fluctuated over time, DADT has been consistently applied.

10 80. Admit that since the commencement of Operation Enduring Freedom in  
11 Afghanistan in October 2001 and Operation Iraqi Freedom in March 2003,  
12 separations of service members under DADT have decreased by over 45%  
13 from a peak of at least 1,217 separations in 2001 to at least 619 separations  
14 in 2008.

15 **Response:** Defendants deny that 1,217 service members were separated under  
16 DADT in fiscal year 2001. Defendant admits that it separated 1,227 service  
17 members in fiscal year 2001 under the DADT policy. Defendants admit that the  
18 Department of Defense separated 49% less service members under DADT in fiscal  
19 year 2008 than it separated in fiscal year 2001. Defendants admit that it separated  
20 19% less service members under the DADT policy in fiscal year 2008 than it  
21 separated in 2003.

1 81. Admit that Australia permits openly gay and lesbian service members to  
2 enlist and serve in its armed forces.

3 **Response:** Defendants object to this Request because the term “openly gay and  
4 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
5 can neither admit nor deny this request. The Department of Defense has not  
6 conducted its own independent study of the extent to which service members who  
7 engage in homosexual conduct are able to serve in the armed forces of other  
8 nations.

9 82. Admit that Austria permits openly gay and lesbian service members to enlist  
10 and serve in its armed forces.

11 **Response:** Defendants object to this Request because the term “openly gay and  
12 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
13 can neither admit nor deny this request. The Department of Defense has not  
14 conducted its own independent study of the extent to which service members who  
15 engage in homosexual conduct are able to serve in the armed forces of other  
16 nations.

17 83. Admit that Bahamas permits openly gay and lesbian service members to  
18 enlist and serve in its armed forces.

19 **Response:** Defendants object to this Request because the term “openly gay and  
20 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
21 can neither admit nor deny this request. The Department of Defense has not  
22 conducted its own independent study of the extent to which service members who  
23 engage in homosexual conduct are able to serve in the armed forces of other  
24 nations.

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1 84. Admit that Belgium permits openly gay and lesbian service members to  
2 enlist and serve in its armed forces.

3 **Response:** Defendants object to this Request because the term “openly gay and  
4 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
5 can neither admit nor deny this request. The Department of Defense has not  
6 conducted its own independent study of the extent to which service members who  
7 engage in homosexual conduct are able to serve in the armed forces of other  
8 nations.

9 85. Admit that the United Kingdom permits openly gay and lesbian service  
10 members to enlist and serve in its armed forces.

11 **Response:** Defendants object to this Request because the term “openly gay and  
12 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
13 can neither admit nor deny this request. The Department of Defense has not  
14 conducted its own independent study of the extent to which service members who  
15 engage in homosexual conduct are able to serve in the armed forces of other  
16 nations.

17 86. Admit that Canada permits openly gay and lesbian service members to enlist  
18 and serve in its armed forces.

19 **Response:** Defendants object to this Request because the term “openly gay and  
20 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
21 can neither admit nor deny this request. The Department of Defense has not  
22 conducted its own independent study of the extent to which service members who  
23 engage in homosexual conduct are able to serve in the armed forces of other  
24 nations.

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1 87. Admit that the Czech Republic permits openly gay and lesbian service  
2 members to enlist and serve in its armed forces.

3 **Response:** Defendants object to this Request because the term “openly gay and  
4 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
5 can neither admit nor deny this request. The Department of Defense has not  
6 conducted its own independent study of the extent to which service members who  
7 engage in homosexual conduct are able to serve in the armed forces of other  
8 nations.

9 88. Admit that Denmark permits openly gay and lesbian service members to  
10 enlist and serve in its armed forces.

11 **Response:** Defendants object to this Request because the term “openly gay and  
12 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
13 can neither admit nor deny this request. The Department of Defense has not  
14 conducted its own independent study of the extent to which service members who  
15 engage in homosexual conduct are able to serve in the armed forces of other  
16 nations.

17 89. Admit that Estonia permits openly gay and lesbian service members to enlist  
18 and serve in its armed forces.

19 **Response:** Defendants object to this Request because the term “openly gay and  
20 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
21 can neither admit nor deny this request. The Department of Defense has not  
22 conducted its own independent study of the extent to which service members who  
23 engage in homosexual conduct are able to serve in the armed forces of other  
24 nations.

1 90. Admit that Finland permits openly gay and lesbian service members to  
2 enlist and serve in its armed forces.

3 **Response:** Defendants object to this Request because the term “openly gay and  
4 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
5 can neither admit nor deny this request. The Department of Defense has not  
6 conducted its own independent study of the extent to which service members who  
7 engage in homosexual conduct are able to serve in the armed forces of other  
8 nations.

9 91. Admit that France permits openly gay and lesbian service members to enlist  
10 and serve in its armed forces.

11 **Response:** Defendants object to this Request because the term “openly gay and  
12 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
13 can neither admit nor deny this request. The Department of Defense has not  
14 conducted its own independent study of the extent to which service members who  
15 engage in homosexual conduct are able to serve in the armed forces of other  
16 nations.

17 92. Admit that Ireland permits openly gay and lesbian service members to enlist  
18 and serve in its armed forces.

19 **Response:** Defendants object to this Request because the term “openly gay and  
20 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
21 can neither admit nor deny this request. The Department of Defense has not  
22 conducted its own independent study of the extent to which service members who  
23 engage in homosexual conduct are able to serve in the armed forces of other  
24 nations.

1 93. Admit that Israel permits openly gay and lesbian service members to enlist  
2 and serve in its armed forces.

3 **Response:** Defendants object to this Request because the term “openly gay and  
4 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
5 can neither admit nor deny this request. The Department of Defense has not  
6 conducted its own independent study of the extent to which service members who  
7 engage in homosexual conduct are able to serve in the armed forces of other  
8 nations.

9 94. Admit that Italy permits openly gay and lesbian service members to enlist  
10 and serve in its armed forces.

11 **Response:** Defendants object to this Request because the term “openly gay and  
12 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
13 can neither admit nor deny this request. The Department of Defense has not  
14 conducted its own independent study of the extent to which service members who  
15 engage in homosexual conduct are able to serve in the armed forces of other  
16 nations.

17 95. Admit that Lithuania permits openly gay and lesbian service members to  
18 enlist and serve in its armed forces.

19 **Response:** Defendants object to this Request because the term “openly gay and  
20 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
21 can neither admit nor deny this request. The Department of Defense has not  
22 conducted its own independent study of the extent to which service members who  
23 engage in homosexual conduct are able to serve in the armed forces of other  
24 nations.



1 96. Admit that Luxembourg permits openly gay and lesbian service members to  
2 enlist and serve in its armed forces.

3 **Response:** Defendants object to this Request because the term “openly gay and  
4 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
5 can neither admit nor deny this request. The Department of Defense has not  
6 conducted its own independent study of the extent to which service members who  
7 engage in homosexual conduct are able to serve in the armed forces of other  
8 nations.

9 97. Admit that Netherlands permits openly gay and lesbian service members to  
10 enlist and serve in its armed forces.

11 **Response:** Defendants object to this Request because the term “openly gay and  
12 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
13 can neither admit nor deny this request. The Department of Defense has not  
14 conducted its own independent study of the extent to which service members who  
15 engage in homosexual conduct are able to serve in the armed forces of other  
16 nations.

17 98. Admit that New Zealand permits openly gay and lesbian service members to  
18 enlist and serve in its armed forces.

19 **Response:** Defendants object to this Request because the term “openly gay and  
20 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
21 can neither admit nor deny this request. The Department of Defense has not  
22 conducted its own independent study of the extent to which service members who  
23 engage in homosexual conduct are able to serve in the armed forces of other  
24 nations.

1 99. Admit that Norway permits openly gay and lesbian service members to  
2 enlist and serve in its armed forces.

3 **Response:** Defendants object to this Request because the term “openly gay and  
4 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
5 can neither admit nor deny this request. The Department of Defense has not  
6 conducted its own independent study of the extent to which service members who  
7 engage in homosexual conduct are able to serve in the armed forces of other  
8 nations.

9 100. Admit that Slovenia permits openly gay and lesbian service members to  
10 enlist and serve in its armed forces.

11 **Response:** Defendants object to this Request because the term “openly gay and  
12 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
13 can neither admit nor deny this request. The Department of Defense has not  
14 conducted its own independent study of the extent to which service members who  
15 engage in homosexual conduct are able to serve in the armed forces of other  
16 nations.

17 101. Admit that South Africa permits openly gay and lesbian service members to  
18 enlist and serve in its armed forces.

19 **Response:** Defendants object to this Request because the term “openly gay and  
20 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
21 can neither admit nor deny this request. The Department of Defense has not  
22 conducted its own independent study of the extent to which service members who  
23 engage in homosexual conduct are able to serve in the armed forces of other  
24 nations.

1 102. Admit that Spain permits openly gay and lesbian service members to enlist  
2 and serve in its armed forces.

3 **Response:** Defendants object to this Request because the term “openly gay and  
4 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
5 can neither admit nor deny this request. The Department of Defense has not  
6 conducted its own independent study of the extent to which service members who  
7 engage in homosexual conduct are able to serve in the armed forces of other  
8 nations.

9 103. Admit that Sweden permits openly gay and lesbian service members to  
10 enlist and serve in its armed forces.

11 **Response:** Defendants object to this Request because the term “openly gay and  
12 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
13 can neither admit nor deny this request. The Department of Defense has not  
14 conducted its own independent study of the extent to which service members who  
15 engage in homosexual conduct are able to serve in the armed forces of other  
16 nations.

17 104. Admit that Switzerland permits openly gay and lesbian service members to  
18 enlist and serve in its armed forces.

19 **Response:** Defendants object to this Request because the term “openly gay and  
20 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
21 can neither admit nor deny this request. The Department of Defense has not  
22 conducted its own independent study of the extent to which service members who  
23 engage in homosexual conduct are able to serve in the armed forces of other  
24 nations.

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1 105. Admit that at least 24 countries allow openly gay and lesbian service  
2 members of their respective armed forces to serve.

3 **Response:** Defendants object to this Request because the term “openly gay and  
4 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
5 can neither admit nor deny this request. The Department of Defense has not  
6 conducted its own independent study of the extent to which service members who  
7 engage in homosexual conduct are able to serve in the armed forces of other  
8 nations.

9 106. Admit that Australia abandoned its prohibition of military service by openly  
10 gay and lesbian service members without any documented adverse impact  
11 on unit cohesion.

12 **Response:** Defendants object to this Request because the terms “openly gay and  
13 lesbian” “prohibition,” and “documented adverse impact” are vague and  
14 ambiguous. Defendants can thus neither admit or deny this Request. To the  
15 extent a response is required, Defendants can neither admit nor deny this request.  
16 The Department of Defense has not conducted its own independent study of the  
17 extent to which service members who engage in homosexual conduct are able to  
18 serve in the armed forces of other nations or the impacts of any such service.

19 107. Admit that Australia abandoned its prohibition of military service by openly  
20 gay and lesbian service members without any documented adverse impact  
21 on troop morale.

22 **Response:** Defendants object to this Request because the terms “openly gay and  
23 lesbian” “prohibition,” and “documented adverse impact” are vague and  
24 ambiguous. Defendants can thus neither admit or deny this Request. To the  
25 extent a response is required, Defendants can neither admit nor deny this request.  
26 The Department of Defense has not conducted its own independent study of the  
27 extent to which service members who engage in homosexual conduct are able to  
28 serve in the armed forces of other nations or the impacts of any such service.

1 108. Admit that Australia abandoned its prohibition of military service by openly  
2 gay and lesbian service members without any documented adverse impact  
3 on national defense.

4 **Response:** Defendants object to this Request because the terms “openly gay and  
5 lesbian,” “prohibition,” and “documented adverse impact” are vague and  
6 ambiguous. Defendants can thus neither admit or deny this Request. To the  
7 extent a response is required, Defendants can neither admit nor deny this request.  
8 The Department of Defense has not conducted its own independent study of the  
9 extent to which service members who engage in homosexual conduct are able to  
10 serve in the armed forces of other nations or the impacts of any such service.

11 109. Admit that Canada abandoned its prohibition of military service by openly  
12 gay and lesbian service members without any documented adverse impact  
13 on unit cohesion.

14 **Response:** Defendants object to this Request because the terms “openly gay and  
15 lesbian” “prohibition,” and “documented adverse impact” are vague and  
16 ambiguous. Defendants can thus neither admit or deny this Request. To the  
17 extent a response is required, Defendants can neither admit nor deny this request.  
18 The Department of Defense has not conducted its own independent study of the  
19 extent to which service members who engage in homosexual conduct are able to  
20 serve in the armed forces of other nations or the impacts of any such service.

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1 110. Admit that Canada abandoned its prohibition of military service by openly  
2 gay and lesbian members without any documented adverse impact on troop  
3 morale.

4 **Response:** Defendants object to this Request because the terms “openly gay and  
5 lesbian” “prohibition,” and “documented adverse impact” are vague and  
6 ambiguous. To the extent a response is required, Defendants can neither admit nor  
7 deny this request. The Department of Defense has not conducted its own  
8 independent study of the extent to which service members who engage in  
9 homosexual conduct are able to serve in the armed forces of other nations or the  
10 impacts of any such service.

11 111. Admit that Australia abandoned its prohibition of military service by openly  
12 gay and lesbian service members without any documented adverse impact  
13 on national defense.

14 **Response:** Defendants object to this Request because the terms “openly gay and  
15 lesbian” “prohibition,” and “documented adverse impact” are vague and  
16 ambiguous. Defendants can thus neither admit or deny this Request. To the  
17 extent a response is required, Defendants can neither admit nor deny this request.  
18 The Department of Defense has not conducted its own independent study of the  
19 extent to which service members who engage in homosexual conduct are able to  
20 serve in the armed forces of other nations or the impacts of any such service.

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1 112. Admit that the United Kingdom abandoned its prohibition of military  
2 service by openly gay and lesbian service members without any documented  
3 adverse impact on unit cohesion.

4 **Response:** Defendants object to this Request because the terms “openly gay and  
5 lesbian” “prohibition,” and “documented adverse impact” are vague and  
6 ambiguous. Defendants can thus neither admit or deny this Request. To the  
7 extent a response is required, Defendants can neither admit nor deny this request.  
8 The Department of Defense has not conducted its own independent study of the  
9 extent to which service members who engage in homosexual conduct are able to  
10 serve in the armed forces of other nations or the impacts of any such service.

11 113. Admit that the United Kingdom abandoned its prohibition of military  
12 service by openly gay and lesbian service members without any documented  
13 adverse impact on troop morale.

14 **Response:** Defendants object to this Request because the terms “openly gay and  
15 lesbian” “prohibition,” and “documented adverse impact” are vague and  
16 ambiguous. Defendants can thus neither admit or deny this Request. To the  
17 extent a response is required, Defendants can neither admit nor deny this request.  
18 The Department of Defense has not conducted its own independent study of the  
19 extent to which service members who engage in homosexual conduct are able to  
20 serve in the armed forces of other nations or the impacts of any such service.

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1 114. Admit that the United Kingdom abandoned its prohibition of military  
2 service by openly gay and lesbian service members without any documented  
3 adverse impact on national defense.

4 **Response:** Defendants object to this Request because the terms “openly gay and  
5 lesbian” “prohibition,” and “documented adverse impact” are vague and  
6 ambiguous. Defendants can thus neither admit or deny this Request. To the  
7 extent a response is required, Defendants can neither admit nor deny this request.  
8 The Department of Defense has not conducted its own independent study of the  
9 extent to which service members who engage in homosexual conduct are able to  
10 serve in the armed forces of other nations or the impacts of any such service.

11 115. Admit that Israel abandoned its prohibition of military service by openly  
12 gay and lesbian service members without any documented adverse impact  
13 on unit cohesion.

14 **Response:** Defendants object to this Request because the terms “openly gay and  
15 lesbian” “prohibition,” and “documented adverse impact” are vague and  
16 ambiguous. Defendants can thus neither admit or deny this Request. To the  
17 extent a response is required, Defendants can neither admit nor deny this request.  
18 The Department of Defense has not conducted its own independent study of the  
19 extent to which service members who engage in homosexual conduct are able to  
20 serve in the armed forces of other nations or the impacts of any such service.

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1 116. Admit that Israel abandoned its prohibition of military service by openly  
2 gay and lesbian service members without any documented adverse impact  
3 on troop morale.

4 **Response:** Defendants object to this Request because the terms “openly gay and  
5 lesbian” “prohibition,” and “documented adverse impact” are vague ambiguous.  
6 Defendants can thus neither admit or deny this Request. To the extent a response  
7 is required, Defendants can neither admit nor deny this request. The Department  
8 of Defense has not conducted its own independent study of the extent to which  
9 service members who engage in homosexual conduct are able to serve in the  
10 armed forces of other nations or the impacts of any such service.

11 117. Admit that Israel abandoned its prohibition of military service by openly  
12 gay and lesbian service members without any documented adverse impact  
13 on national defense.

14 **Response:** Defendants object to this Request because the terms “openly gay and  
15 lesbian” “prohibition,” and “documented adverse impact” are vague and  
16 ambiguous. Defendants can thus neither admit nor deny this Request. To the  
17 extent a response is required, Defendants can neither admit nor deny this request.  
18 The Department of Defense has not conducted its own independent study of the  
19 extent to which service members who engage in homosexual conduct are able to  
20 serve in the armed forces of other nations or the impacts of any such service.

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1 118. Admit that in both Afghanistan and Iraq, U.S. Armed Forces fight side by  
2 side with coalition forces from Great Britain, Australia, and numerous other  
3 coalition member countries that allow lesbian and gay service members to  
4 serve openly in their respective militaries.

5 **Response:** Defendants objects to the form of this Request because it is a  
6 compound question that violates the requirement in Fed. R. Civ. P 36 (a)(2) that  
7 each matter must be separately stated. Defendants also object to the terms “side  
8 by side,” “numerous other coalition member countries,” and “openly” as vague  
9 and ambiguous. Defendants can thus neither admit or deny this Request.  
10 Defendants admit that armed forces from both America and Great Britain  
11 conducted or supported combat operations within Afghanistan at the same time.  
12 Defendants admit that armed forces from both America and Australia conducted or  
13 supported combat operations within Afghanistan at the same time. Defendants  
14 admit that, in addition to America, Great Britain, and Australia, armed forces from  
15 other countries conducted or supported combat operations within Afghanistan.  
16 Defendants admit that armed forces from both America and Great Britain  
17 conducted or supported combat operations within Iraq at the same time.  
18 Defendants admit that armed forces from both America and Australia conducted or  
19 supported combat operations within Iraq at the same time. Defendants admit that,  
20 in addition to America, Great Britain, and Australia, armed forces from other  
21 countries conducted or supported combat operations within Iraq.

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1 119. Admit that since members of the U.S. Armed Forces began fighting side by  
2 side with coalition forces from countries that allow lesbian and gay service  
3 members to serve openly in their respective militaries, there have been no  
4 documented adverse effects arising from the proximity of gay and lesbian  
5 coalition soldiers to American soldiers on the unit cohesion or morale of any  
6 member or members of the U.S. Armed Forces.

7 **Response:** Defendants object to this Request because it is a compound question  
8 that violates the requirement in Fed. R. Civ. P. 36(a)(2) that each matter must be  
9 separately stated. Defendants also objects to the terms “side by side,” “coalition  
10 forces”, “openly”, and “proximity of gay and lesbian coalition soldiers” as vague  
11 and ambiguous. To the extent a response is required, Defendants can neither  
12 admit nor deny this Request because Defendants do not keep or track data  
13 concerning incidents of American soldiers coming into direct contact with foreign  
14 soldiers who engage in homosexual conduct.

15 120. Admit the Federal Bureau of investigation has no ban on the service of  
16 openly gay or lesbian agents or employees.

17 **Response:** Defendants object to this request because “openly gay or lesbian  
18 agents or employees” is vague and ambiguous. To the extent a response is  
19 required, Defendants admit that the FBI has no ban on the service of gay or  
20 lesbian individuals.

21 121. Admit that Central Intelligence Agency has no ban on the service of openly  
22 gay or lesbian agents or employees.

23 **Response:** Defendants object to this request because “openly gay or lesbian  
24 agents or employees” is vague and ambiguous. To the extent a response is  
25 required, Defendants admit that the CIA has no ban on the service of gay or  
26 lesbian individuals.

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1 122. Admit that the National Security Agency has no ban on the service of  
2 openly gay or lesbian employees.

3 **Response:** Defendants object to this request because “openly gay or lesbian  
4 agents or employees” is vague and ambiguous. To the extent a response is  
5 required, Defendants admit that the NSA has no ban on the service of gay or  
6 lesbian individuals. To the extent military members are assigned to the NSA,  
7 however, they are subject to the conduct-based policy set forth in DADT. Civilian  
8 employees are not subject to DADT.

9 123. Admit that at least 21 states forbid discrimination on the basis of sexual  
10 orientation.

11 **Response:** Defendants can neither admit nor deny this Request. The information  
12 Defendants know or can readily obtain is insufficient for it to admit or deny this  
13 Request.

14 124. Admit that at least 21 states allow the service of openly gay or lesbian  
15 individuals in their fire departments.

16 **Response:** Defendants object to this Request because the terms “openly gay and  
17 lesbian” is vague and ambiguous. The information Defendants know or can  
18 readily obtain is insufficient for it to admit or deny this Request.

19 125. Admit that during the 1992 Congressional hearings on the service in the  
20 United States Armed Forces by gay and lesbian service members, Senator  
21 John Kerry asked how the United States Armed Forces could “properly or  
22 righteously or morally protect freedom if its policies deny freedom to  
23 significant minority of citizens.”

24 **Response:** Admit.

25 126. Admit that in a 2003 article in the National Law Review, Rear Admiral John  
26 Hutson (ret.) Described DADT as “odious” and “virtually unworkable in the  
27 military.”

28 **Response:** Admit.

1 127. Admit that in a New York Times essay date January 2, 2007, General John  
2 Shalikashvili (ret.), former chairman of the Joint Chiefs of staff, wrote:  
3 “When [the repeal of DADT] comes, gay men and lesbians will no longer  
4 have to conceal who they are, and the military will no longer need to  
5 sacrifice those whose service it cannot afford to lose.”

6 **Response:** Admit.

7 128. Admit that former Vice President Dick Cheney described the security risk  
8 rationale underlying policies banning gays and lesbians from service in the  
9 United States Armed Forces as “a bit of an old chestnut.”

10 **Response:** Admit.

11 129. Admit that NATO Commander Wesley Clark (ret.) On NBC’s *Meet the*  
12 *Press* on June 15, 2003 said: “People were much more irate about [gay  
13 service in the military] in the early 90's, for whatever reason, [perhaps  
14 because of] younger people coming into the military. It just didn’t seem to  
15 be the same emotional hot button issue by ‘98, ‘99, than it had been in ‘92,  
16 ‘93.”

17 **Response:** Admit.

18 130. Admit that in a 2007 Wall Street Journal essay, former Republican  
19 Congressman Bob Barr wrote: “The bottom line here is that, with nearly a  
20 decade and a half of the hybrid ‘don’t ask, don’t tell’ policy to guide us, I  
21 have become deeply impressed with the growing weight of credible military  
22 opinion which concludes that allowing gays to serve openly in the military  
23 does not pose insurmountable problems for the good order and discipline of  
24 the services.”

25 **Response:** Admit.  
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1 131. Admit that a 2006 Zogby poll of troops who had served in Afghanistan and  
2 Iraq found that 72% of respondents would be personally comfortable  
3 interacting with gays and lesbians in the United States Armed Forces.

4 **Response:** Denied; the Zogby Poll did not ask if “respondents would be  
5 personally comfortable interacting with gays and lesbians in the United States  
6 Armed Forces.”

7 132. Admit that Charles Moskos was one of the principal authors of DADT.


8 **Response:** Defendants object to this Request because the term “principal  
9 authors” is vague and ambiguous as used in this context. Defendants deny the  
10 Request because Congress enacted, and then-President Bill Clinton signed into  
11 law, the DADT statute in 1993 and are therefore the “principal author[s]” of the  
12 statute.

13  
14 Date: January 28, 2010

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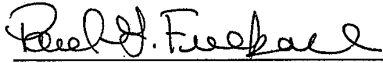
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**PROOF OF SERVICE**

I hereby certify that I served DEFENDANTS' OBJECTIONS AND  
RESPONSES TO PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSION  
by electronic mail and regular mail upon the persons below on January 28, 2010:

Dan Woods  
Patrick O. Hunnius  
White & Case LLP  
633 West Fifth Street, Suite 1900  
Los Angeles, CA 90071-2007  
Tel. (213) 620-7714

I declare under penalty of perjury that the above is true and correct.

  
\_\_\_\_\_  
Paul G. Freeborne

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of America and Secretary of Defense

11  
12 **UNITED STATES DISTRICT COURT**  
**FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
13 **EASTERN DIVISION**

14 LOG CABIN REPUBLICANS,  
15 Plaintiff,

16 v.

17 UNITED STATES OF AMERICA AND  
ROBERT GATES, Secretary of Defense,  
18 Defendants.

) No. CV04-8425 VAP (Ex)

) DEFENDANTS' OBJECTIONS  
) AND RESPONSES TO  
) PLAINTIFF'S FIRST SET OF  
) INTERROGATORIES

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DEFENDANTS' OBJECTIONS AND RESPONSES TO  
PLAINTIFF'S FIRST SET OF INTERROGATORIES

-1-

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



1 Pursuant to Federal Rules of Civil Procedure 26 and 33, and subject to the  
2 objections stated below, Defendants United States and Secretary Gates hereby  
3 respond to Plaintiff's First Set of Interrogatories for purposes of Merits Discovery.

4 **GENERAL OBJECTIONS**

5 1. Defendants object to the Interrogatories to the extent that Plaintiff  
6 seeks discovery to probe the motivations of the Legislative and Executive  
7 Branches in passing statutes and promulgating regulations implementing the law.  
8 Well-established Supreme Court precedent squarely provides that inquiry into the  
9 subjective motives of members of Congress is a "hazardous matter" and that courts  
10 will not strike down an otherwise constitutional statute on the basis of an alleged  
11 illicit motive." United States v. O'Brien, 391 U.S. 367, 383-84 (1968); Board of  
12 Educ. of the Westside Community Schools v. Mergens, 496 U.S. 226, 249 (1990)  
13 (in evaluating constitutionality of statute, "what is relevant is the legislative  
14 *purpose* of the statute, not the possibly religious *motives* of the legislators who  
15 enacted the law") (emphasis in original); Las Vegas v. Foley, 747 F.2d 1294, 1298  
16 (9<sup>th</sup> Cir. 1984) (same). The same is true of attempts to probe the motivations of the  
17 Executive Branch. See e.g., Village of Arlington Heights v. Metropolitan Hous.  
18 Dev. Corp., 429 U.S. 252, 268 n.18 (1977) ("judicial inquiries into legislative or  
19 executive motivation represent a substantial intrusion into the workings of other  
20 branches of government").

21 2. Defendants object to Plaintiff's Interrogatories to the extent that they  
22 are not reasonably calculated to lead to the discovery of admissible evidence. The  
23 Court has ruled that Plaintiff's challenge is governed by the rational basis standard  
24 of review. It is well understood that a legislative choice subject to the rational  
25 basis test "is not subject to courtroom fact-finding." Federal Communications  
26 Comm'n v. Beach Communications, 508 U.S. 307, 315 (1993) (quoting  
27 Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)). Defendants  
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1 accordingly have “no obligation to produce evidence to sustain the rationality of a  
2 statutory classification.” Heller v. Doe, 509 U.S. 312, 320 (1993). The analysis  
3 instead asks whether the legislature “rationally *could have believed*” that the  
4 conditions of the statute would promote its objective. Western and Southern Life  
5 Insurance Co. v. State Bd. of Equalization of California, 451 U.S. 654, 671-72  
6 (1981) (emphasis in original).

7 Rational basis review, moreover, “is not a license for courts to judge the  
8 wisdom, fairness, or logic of legislative choices.” Beach Communications, 508  
9 U.S. at 313. Rather, “those challenging the legislative judgment must convince the  
10 court that the legislative facts on which the classification is apparently based could  
11 not reasonably be conceived to be true by the governmental decisionmaker.”  
12 Vance v. Bradley, 440 U.S. 93, 111 (1979). While we understand that the Court  
13 has permitted Plaintiff to attempt to engage in discovery, the congressional  
14 findings and legislative history underlying the statute are “legislative fact[s]”  
15 subject to judicial notice and are not appropriate subjects for fact-finding or  
16 discovery.

17 3. Defendants object to Plaintiff’s Interrogatories to the extent that they  
18 call for information concerning the “continued rationality” of the statute.  
19 Classifications subject to rational basis review are not subject to challenge on the  
20 ground of changed circumstances. See, e.g., Montalvo-Huertas v. Rivera-Cruz,  
21 885 F.2d 971, 977 (1st Cir. 1989) (“[E]valuating the continued need for, and  
22 suitability of, legislation of this genre is exactly the kind of policy judgment that  
23 the rational basis test was designed to preclude.”). Indeed, courts have found that  
24 even where Congress has determined that a previous enactment is no longer  
25 necessary, that finding does render the statute unconstitutional. See Smart v.  
26 Ashcroft, 401 F.3d 119, 123 (2d Cir. 2005) (“A congressional decision that a  
27 statute is unfair, outdated, and in need of improvement does not mean that the  
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1 statute when enacted was wholly irrational or, for purposes of rational basis  
2 review, unconstitutional.”); Howard v. U.S. Dept. of Defense, 354 F.3d 1358,  
3 1361-62 (Fed. Cir. 2004) (“Congress acts based on judgments as to preferable  
4 policy; the fact that Congress repeals or modifies particular legislation does not  
5 reflect a judgment that the legislation, in its pre-amendment form, lacked rational  
6 support.”). Were it otherwise, all legislation subject to rational basis review – even  
7 legislation authoritatively sustained as constitutional by the Supreme Court – could  
8 potentially be subject to periodic judicial review on the basis of changed  
9 circumstances, a prospect incompatible with these principles and the Supreme  
10 Court’s well known and repeated admonition that “a legislative choice is not  
11 subject to courtroom factfinding and may be based on rational speculation  
12 unsupported by evidence or empirical data.” Heller, 509 U.S. at 320.

13 5. Defendants object to any Interrogatory that calls for information  
14 outside of the Department of Defense. This action is subject to review under the  
15 Administrative Procedure Act, which limits review to “[a]gency action.” See 5  
16 U.S.C. § 702. Defendants will thus conduct a reasonable search for information  
17 maintained within the agency charged with administering 10 U.S.C.  
18 § 654—the United States Department of Defense.

19 6. Defendants object to Plaintiff’s Interrogatories to the extent they seek  
20 information protected by the work-product doctrine, Privacy Act, attorney-client  
21 privilege, law enforcement privilege, deliberative process privilege, and any other  
22 applicable privilege.

23 7. Defendants object to the definitions and instructions generally to the  
24 extent that they seek to impose obligations beyond those imposed by the Federal  
25 Rules of Civil Procedure (Civil Rules). Defendant will answer these  
26 interrogatories consistent with the obligations imposed by the Civil Rules.

27 8. Defendants reserve the right to amend, supplement, or alter these  
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1 objections and responses to the Interrogatories at any time. The following  
2 responses are based upon information currently known to Defendants, and  
3 Defendants reserve the right to supplement or amend its responses should  
4 additional or different information become available.

5 9. The foregoing General Objections shall be considered as made, to the  
6 extent applicable, in response to each of the Interrogatories, as if General  
7 Objections were fully set forth in each response.

8 10. Nothing contained in the following responses constitutes a waiver of  
9 any applicable objection or privilege as to the requested discovery.

10 **INDIVIDUAL OBJECTIONS AND RESPONSES**

11 1. Describe in detail each of the governmental purposes and interests alleged to  
12 be advanced by DADT.

13 **RESPONSE:** The purposes and governmental interests advanced by DADT are set  
14 forth in the Statute, 10 U.S.C. § 654, and legislative history.

15 2. For each governmental purpose or interest identified in defendants' Answers  
16 to Interrogatory 1 above, describe in detail all facts that defendants contend  
17 establish the need or justification to further that purpose or interest.

18 **RESPONSE:** The facts establishing the purposes and interests advanced by DADT  
19 are set forth in the Statute, 10 U.S.C. § 654, and legislative history.

20 3. For each governmental purpose or interest identified in defendants' Answers  
21 to Interrogatory 1 above, describe in detail all facts that defendants contend  
22 demonstrate that DADT furthers that purpose or interest.

23 **RESPONSE:** The facts demonstrating that DADT advances governmental  
24 interests and purposes are set forth in the Statute, 10 U.S.C. § 654, and legislative  
25 history.

26 4. Identify all documents that defendants contend constitute the legislative  
27 history of DADT.

28 **RESPONSE:** Pursuant to Rule 33(d), Defendants will provide, with these

1 objections and responses, all documents they contend constitute the legislative  
2 history of DADT.

3 5. Describe in detail all facts and identify all documents that defendants  
4 contend demonstrate that DADT promotes military readiness.

5 **RESPONSE:** Defendants presently intend to rely upon, among other things, the  
6 text of the statute, the legislative history, and any other basis that Congress  
7 “rationally *could have believed*” supported the objectives of the statute. Western  
8 and Southern Life Ins. Co., 451 U.S. at 671-72 (1981) (emphasis in original).

9 6. Describe in detail all facts and identify all documents that defendants  
10 contend demonstrate that DADT promotes good order and discipline.

11 **RESPONSE:** Defendants presently intend to rely upon, among other things, the  
12 text of the statute, the legislative history, and any other basis that Congress  
13 “rationally *could have believed*” supported the objectives of the statute. Western  
14 and Southern Life Ins. Co., 451 U.S. at 671-72 (1981) (emphasis in original).

15 7. Describe in detail all facts and identify all documents that defendants  
16 contend demonstrate that DADT promotes unit cohesion.

17 **RESPONSE:** Defendants presently intend to rely upon, among other things, the  
18 text of the statute, the legislative history, and any other basis that Congress  
19 “rationally *could have believed*” supported the objectives of the statute. Western  
20 and Southern Life Ins. Co., 451 U.S. at 671-72 (1981) (emphasis in original).

21 8. Identify the public opinion polls and statistical and other studies upon which  
22 the Military Working Group relied in identifying and evaluating the alleged  
23 governmental purposes of DADT.

24 **RESPONSE:** Defendants object to this interrogatory to the extent that it calls for  
25 information protected by the deliberative process privilege. To the extent a  
26 response is required, Defendants do not know what public opinion polls, statistical  
27 data, or studies the Military Working Group relied on beyond that which will be  
28 provided in response to Plaintiff's Document Requests.

1 9. Describe the actions of the Military Working Group, including describing  
2 when, how and by whom the Military Working Group was formed, who its  
3 members were, when it met, what the subject matter(s) of its meetings were  
4 and to whom it reported.

5 **RESPONSE:** Defendants object to this interrogatory to the extent it call for  
6 information protected by the deliberative process privilege. Subject to their  
7 objection, Defendants will produce the Summary Report of the Military Working  
8 Group, July 1, 1993. This report states that the Secretary of Defense formed the  
9 military working group. It further states that the MWG was composed of a general  
10 or flag officer from each service. These members included Major General John P.  
11 Otjen, United State Army; Rear Admiral Scott Redd, United States Navy; Major  
12 General William B. Davitte, United States Air Force; Rear Admiral James M. Loy,  
13 United States Coast Guard; and Brigadier General Gerald L. Miller, United States  
14 Marine Corps. The report further states that the MWG had a support staff of  
15 approximately 50 officers, enlisted personnel, and civilian employees organized  
16 into four functional panels: military operations; service life; personnel policy; and  
17 legal. Defendants do not know the actions of the Military Working Group, beyond  
18 that which will be provided in response to Plaintiff's document requests.

19 10. Identify all DOD employees, including but not limited to those persons  
20 identified in defendants' Answer to Interrogatory 12, who communicated,  
21 either orally or in writing, or had meetings with persons in the Legislative  
22 Branch of the United States government concerning gay men and lesbians  
23 serving in the armed forces of the United States, identify those Legislative  
24 Branch employees with whom DOD employees communicated, identify the  
25 oral and written communications between DOD and Legislative Branch  
26 employees, and identify the meetings that DOD and the Legislative Branch  
27 employees attended.

28 **RESPONSE:** Defendants object to this interrogatory to the extent that it calls for

1 information that is intended to probe the motivations of Congress, and for  
2 information that is not in the possession of the Department of Defense. Defendants  
3 further object to this interrogatory because Plaintiff's request that Defendants  
4 identify "all DOD employees" who communicated with members of the legislative  
5 branch is unduly burdensome. To the extent a response is required, Defendants do  
6 not have sufficient information to respond to this interrogatory because the  
7 Department of Defense does not have a record of who at the Department has  
8 communicated with the members of the Legislative Branch concerning the Policy.

9  
10 11. Identify all persons, including but not limited to persons, organizations,  
11 committees, and other ad hoc working groups, from whom information or  
12 opinion was solicited by the military working group.

13 **RESPONSE:** Defendants object to this interrogatory to the extent that it calls for  
14 information protected by the deliberative process privilege. To the extent a  
15 response is required, Defendants do not know from whom the Military Working  
16 Group solicited information or opinion beyond information contained in the  
17 documents which will be provided in response to Plaintiff's document requests.

18 12. Identify all DOD employees who worked with, provided information to, or  
19 communicated with, either orally or in writing, employees of the RAND  
20 National Defense Institute concerning the studies that resulted in the final  
21 report entitled "Sexual Orientation and U.S. Military Personnel Policy:  
22 Options and Assessments" (1993).

23 **RESPONSE:** Defendants object to this interrogatory to the extent that it calls for  
24 information that is not in the possession of the Department of Defense. To the  
25 extent a response it required, Defendants do not have sufficient information to  
26 answer this interrogatory because the Department of Defense does not have a  
27 record of who at the Department worked with, provided information to or  
28 communicated with employees of the RAND National Defense Institute

1 concerning the report referenced in Plaintiff's interrogatory.

2 13. Identify all DOD employees who worked with, provided information to or  
3 communicated with, either orally or in writing, employees of the U.S.  
4 General Accounting Office concerning the study that resulted in the final  
5 report to congressional requesters entitled "Defense Force Management:  
6 DOD's Policy on Homosexuality" (June 1992), and the supplemental report  
7 entitled "Defense Force Management: Statistics Related to DOD's Policy on  
8 Homosexuality" (June 1992).

9 **RESPONSE:** Defendants object to this interrogatory to the extent that it calls for  
10 information that is not in the possession of the Department of Defense. To the  
11 extent a response is required, Defendants do not have sufficient information to  
12 answer this interrogatory because the Department of Defense does not have a  
13 record of who at the Department worked with, provided information to or  
14 communicated with employees of the General Accounting Office concerning the  
15 documents referenced in Plaintiff's interrogatory.

16 14. Describe in detail the so-called "stop-loss policy" as it applies to service  
17 members who are discharged or in the process of being discharged pursuant  
18 to the Act and the DOD Regulations, including all facts that defendants  
19 contend establish the need or justification for this policy.

20 **RESPONSE:** Defendants have never used the "stop-loss policy" to stop or  
21 suspend discharges for homosexual conduct under the Policy.

22 15. Identify all research conducted by or on behalf of defendants prior to  
23 January 1, 1994 demonstrating the need for, or advisability of, implementing  
24 DADT.

25 **RESPONSE:** To the best of their knowledge, Defendants have produced in  
26 response to Plaintiff's document requests all research conducted by or on behalf of  
27 Defendants prior to January 1, 1994 demonstrating the need for, or advisability of,  
28 implementing DADT.



1 16. Identify all research conducted by or on behalf of defendants since  
2 December 31, 1993 evaluating whether DADT is furthering the interests and  
3 goals identified in the responses to Interrogatory 1.

4 **RESPONSE:** To the best of their knowledge, Defendants have produced in  
5 response to Plaintiff's document requests all research conducted by or on behalf of  
6 Defendants since December 31, 1993 evaluating whether DADT is furthering the  
7 interests and goals identified in the responses to Interrogatory 1.

8  
9  
10 Date: February 22, 2010

TONY WEST  
Assistant Attorney General  
  
GEORGE S. CARDONA  
Acting United States Attorney

VINCENT M. GARVEY  
Deputy Branch Director

14 

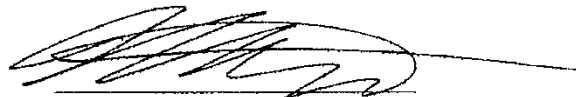
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*Counsel For Federal Defendants*

VERIFICATION

I have reviewed the responses of Defendants the United States of America and Secretary Gates to Plaintiff's First Set of Interrogatories, Nos. 1-16, in the matter of *Log Cabin Republicans v. United States of America, et al.*, 04-8425 (C.D. Cal.). As to the Department of Defense (DoD), I hereby declare, under penalty of perjury, that the information contained therein is accurate to the best of my knowledge based upon my review of documents available to me and information furnished to me by other employees of DoD.

Date: February 22, 2010

  
Michael J. Fucci

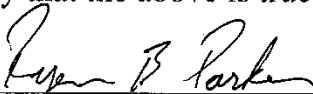
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**PROOF OF SERVICE**

I hereby certify that I served DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES by electronic mail and regular mail upon the persons below on February 22, 2010:

Dan Woods  
Patrick O. Hunnius  
White & Case LLP  
633 West Fifth Street, Suite 1900  
Los Angeles, CA 90071-2007  
Tel. (213) 620-7714

I declare under penalty of perjury that the above is true and correct.

  
\_\_\_\_\_  
Ryan B. Parker

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Assistant Attorney General

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10 Attorneys for Defendants United States  
of America and Secretary of Defense

11 **UNITED STATES DISTRICT COURT**  
12 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
13 **EASTERN DIVISION**

14 LOG CABIN REPUBLICANS,  
15 Plaintiff,  
16 v.

17 UNITED STATES OF AMERICA AND  
ROBERT GATES, Secretary of Defense,  
18 Defendants.

No. CV04-8425 VAP (Ex)  
DEFENDANTS' OBJECTIONS  
AND RESPONSES TO  
PLAINTIFF'S SECOND SET OF  
REQUESTS FOR ADMISSION

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1 Pursuant to Federal Rules of Civil Procedure 26 and 36, and subject to the  
2 objections stated below, Defendants United States and Secretary Gates hereby  
3 respond to Plaintiff's Second Set of Requests for Admission for purposes of  
4 Merits Discovery.

5 **GENERAL OBJECTIONS**

6 1. Defendants object to the Requests to the extent that Plaintiff seeks discovery  
7 to probe the motivations of the Legislative and Executive Branches in passing  
8 statutes and promulgating regulations implementing the law. Well-established  
9 Supreme Court precedent squarely provides that inquiry into the subjective  
10 motives of members of Congress is a "hazardous matter" and that courts will not  
11 strike down an otherwise constitutional statute on the basis of an alleged illicit  
12 motive." United States v. O'Brien, 391 U.S. 367, 383-84 (1968); Board of Educ.  
13 of the Westside Community Schools v. Mergens, 496 U.S. 226, 249 (1990) (in  
14 evaluating constitutionality of statute, "what is relevant is the legislative *purpose*  
15 of the statute, not the possibly religious *motives* of the legislators who enacted the  
16 law") (emphasis in original); Las Vegas v. Foley, 747 F.2d 1294, 1298 (9<sup>th</sup> Cir.  
17 1984) (same). The same is true of attempts to probe the motivations of the  
18 Executive Branch. See e.g., Village of Arlington Heights v. Metropolitan Hous.  
19 Dev. Corp., 429 U.S. 252, 268 n.18 (1977) ("judicial inquiries into legislative or  
20 executive motivation represent a substantial intrusion into the workings of other  
21 branches of government").

22 2. Defendants object to the Requests to the extent that they are not reasonably  
23 calculated to lead to the discovery of admissible evidence. The Court has ruled  
24 that Plaintiff's challenge is governed by the rational basis standard of review. It  
25 is well understood that a legislative choice subject to the rational basis test "is not  
26 subject to courtroom fact-finding." Federal Communications Comm'n v. Beach  
27 Communications, 508 U.S. 307, 315 (1993) (quoting Lehnhausen v. Lake Shore  
28

1 Auto Parts Co., 410 U.S. 356, 364 (1973)). Defendants accordingly have “no  
2 obligation to produce evidence to sustain the rationality of a statutory  
3 classification.” Heller v. Doe, 509 U.S. 312, 320 (1993). The analysis instead  
4 asks whether the legislature “rationally *could have believed*” that the conditions of  
5 the statute would promote its objective. Western and Southern Life Insurance Co.  
6 v. State Bd. of Equalization of California, 451 U.S. 654, 671-72 (1981) (emphasis  
7 in original).

8 Rational basis review, moreover, “is not a license for courts to judge the  
9 wisdom, fairness, or logic of legislative choices.” Beach Communications, 508  
10 U.S. at 313. Rather, “those challenging the legislative judgment must convince  
11 the court that the legislative facts on which the classification is apparently based  
12 could not reasonably be conceived to be true by the governmental decisionmaker.”  
13 Vance v. Bradley, 440 U.S. 93, 111 (1979). While we understand that the Court  
14 has permitted Plaintiff to attempt to engage in discovery, the congressional  
15 findings and legislative history underlying the statute are “legislative fact[s]”  
16 subject to judicial notice and are not appropriate subjects for fact-finding or  
17 discovery.

18 3. Defendants object to the Requests to the extent that they attempt to discover  
19 information concerning the “continued rationality” of the statute. Classifications  
20 subject to rational-basis review are not subject to challenge on the ground of  
21 changed circumstances. See, e.g., Montalvo-Huertas v. Rivera-Cruz, 885 F.2d  
22 971, 977 (1st Cir. 1989) (“[E]valuating the continued need for, and suitability of,  
23 legislation of this genre is exactly the kind of policy judgment that the rational  
24 basis test was designed to preclude.”). Indeed, courts have found that even where  
25 Congress has determined that a previous enactment is no longer necessary, that  
26 finding does not render the statute unconstitutional. See Smart v. Ashcroft, 401  
27 F.3d 119, 123 (2d Cir. 2005) (“A congressional decision that a statute is unfair,  
28

1 outdated, and in need of improvement does not mean that the statute when enacted  
2 was wholly irrational or, for purposes of rational basis review, unconstitutional.”);  
3 Howard v. U.S. Dept. of Defense, 354 F.3d 1358, 1361-62 (Fed. Cir. 2004)  
4 (“Congress acts based on judgments as to preferable policy; the fact that Congress  
5 repeals or modifies particular legislation does not reflect a judgment that the  
6 legislation, in its pre-amendment form, lacked rational support.”). Were it  
7 otherwise, all legislation subject to rational basis review – even legislation  
8 authoritatively sustained as constitutional by the Supreme Court – could  
9 potentially be subject to periodic judicial review on the basis of changed  
10 circumstances, a prospect incompatible with these principles and the Supreme  
11 Court’s well known and repeated admonition that “a legislative choice is not  
12 subject to courtroom factfinding and may be based on rational speculation  
13 unsupported by evidence or empirical data.” Heller, 509 U.S. at 320.

14 4. Defendants object to any response that calls for information outside of the  
15 Department of Defense. This action is subject to review under the Administrative  
16 Procedure Act, which limits review to “[a]gency action.” See 5 U.S.C. § 702.  
17 Defendants will thus make reasonable inquiry within the agency charged with  
18 administering 10 U.S.C. § 654—the United States Department of Defense.

19 5. Defendants object to the sheer volume and scope of these and previous  
20 Requests, which impose an undue burden. It is not Defendants’ obligation to  
21 undertake such an expansive inquiry in response to discovery. Defendants have  
22 conducted a reasonable inquiry and responded with information known or readily  
23 obtainable.

24 6. Defendants reserve the right to amend, supplement, or alter these objections  
25 and responses to the Requests at any time. The following responses are based  
26 upon information currently known to Defendants, and Defendants reserve the right  
27 to supplement or amend its responses should additional or different information  
28

1 become available.

2 7. The foregoing General Objections shall be considered as made, to the extent  
3 applicable, in response to each of the Requests, as if General Objections were fully  
4 set forth in each response.

5 8. Nothing contained in the following responses constitutes a waiver of any  
6 applicable objection or privilege as to the requested discovery.

7 **INDIVIDUAL OBJECTIONS AND RESPONSES**

8 133. President Obama has authority to halt enforcement of DADT by executive  
9 order.

10 **Response:** Defendants object to this request, as it does not call for facts, the  
11 application of law to fact, or an opinion about facts or the application of law to  
12 fact. See Fed. R. Civ. P. 36(a)(1)(A). Defendants further object to this request  
13 because the term “authority to halt enforcement,” as used in this context, is vague  
14 and ambiguous.

15 134. The 1957 Crittenden report, prepared for the U.S. Navy, concluded that gay  
16 people were no more likely to be a security risk than heterosexuals.

17 **Response:** Defendants deny this Request; the report concluded that there was  
18 insufficient data to determine whether homosexuals presented a security risk and  
19 recommended that a factual study of the issue be conducted.

20 135. The 1957 Crittenden report, prepared for the U.S. navy, concluded that there  
21 was no rational basis for excluding gay people from military service.

22 **Response:** Defendants deny this request; the report recommends that “there be no  
23 relaxation in the broad concept that the service cannot tolerate homosexual  
24 behavior.”

25 136. A 1988 Defense Personal Security Research Education Center Study  
26 concluded that “having a same-gender or an opposite-gender orientation is  
27 unrelated to job performance in the same way as is being left - or right -  
28 handed.”



1 **Response:** Defendants deny this request. The study referred to in Plaintiff's  
2 request simply reports on the findings of other researchers: "Studies of  
3 homosexual veterans make clear that having a same-gender or an opposite gender  
4 orientation is unrelated to job performance in the same way as is being left - or  
5 right - handed (Williams and Weinberg, 1971)." The Study then opines that those  
6 findings may be of limited value in the military context: "For the purpose of  
7 military organization, however, quality of job performance may be less important  
8 than the effects of homosexuals (minority group members) on that important but  
9 ephemeral quality: group cohesion."

10 137. In 1999, Regulation 500-3-3 [FORSCOM] allowed active duty deployment  
11 of Army reservists and National Guard troops who said they were gay or  
12 were accused of being gay.

13 **Response:** Defendants object to this request because the term "accused of being  
14 gay" is vague and ambiguous when used in this context. To the extent a response  
15 is required, Defendants admit this request but note that Regulation 500-3-3  
16 [FORSCOM] simply clarifies that once a unit receives an alert notification, service  
17 members who are not subject to a discharge request will enter active duty with  
18 their units.

19 138. In 1993, the National Defense Research Institute prepared a study for the  
20 Office of the Secretary of Defense, "Sexual Orientation and U.S. Military  
21 Personnel Policy: Options and Assessment" concluding that "circumstances  
22 could exist where the ban on homosexuals could be lifted with little or no  
23 adverse consequences for recruitment and retention."

24 **Response:** Defendants deny this request. The National Defense Research  
25 Institute study, cited above, introduces the statement quoted by Plaintiff as a  
26 possibility based on arguments set forth earlier in the study: "*These arguments*  
27 *imply that* circumstances could exist under which the ban on homosexuals could  
28 be lifted with little or no adverse consequences for recruitment or retention."

1 (emphasis added.) The study then examines the possible “adverse impacts” of  
2 rescinding the Policy.

3 139. In a May 2005 national poll conducted by the Boston Globe, 79% of  
4 respondents said openly gay people should be allowed to serve in the  
5 military.

6 **Response:** Admit.

7 140. In a 2008 Washington Post-ABC News poll, 75% of Americans said that  
8 openly gay people should be allowed to serve in the military.

9 **Response:** Admit.

10 141. In a 2006 Zogby International poll of current and/or former United States  
11 service members, 66% of respondents who had experience with gays or  
12 lesbians in their units said that the presence of gay or lesbian unit members  
13 had no impact or a positive impact on their personal morale.

14 **Response:** Defendants deny this request. The poll results show that of those who  
15 had experience with gays or lesbians in their units, 66% said that the presence of  
16 gays or lesbians in their units had *no impact* on their personal morale. In addition,  
17 6% said it had a positive impact on their personal morale, and 28% said it had a  
18 negative impact on their personal morale.

19 142. In a 2006 Zogby International poll of current and/or former United States  
20 service members, 64% of respondents who had experience with gays or  
21 lesbians in their units said that presence of gay or lesbian unit members had  
22 no impact or a positive impact on their personal morale on overall unit  
23 morale. [*sic*]

24 **Response:** Defendants deny this request. The poll results show that of those who  
25 had experience with gays and lesbians in their units, 64% said that the presence of  
26 gays or lesbians in their unit had no impact on their unit’s overall morale. In  
27 addition, 3% said it had a positive impact on their unit’s overall morale, and 27%  
28 said it had a negative impact on their unit’s overall morale.

1 143. In December 2007, 28 retired generals and admirals urged Congress to  
2 repeal DADT, citing evidence that 65,000 gay men and women are serving  
3 and that there are over 1 million gay veterans.

4 **Response:** Defendants admit that 28 retired generals and admirals urged  
5 Congress to repeal DADT and claimed that 65,000 gay men and women are  
6 serving and that there are over 1 million gay veterans.

7 144. In November 2008, 104 retired generals and admirals signed a statement  
8 urging Congress to repeal DADT.

9 **Response:** Admit.

10 145. On July 5, 2009, Colin Powell, in reference to DADT, said "this is a policy  
11 and a law that should be reversed."

12 **Response:** Defendants deny this request. On July 5, 2009, Colin Powell, in  
13 reference to DADT, said, "this is a policy and a law that should be *reviewed*"  
14 (emphasis added).

15 146. In September 2009, Air Force Colonel Om Prakash authored an article  
16 published in Joint Force Quarterly.

17 **Response:** Admit.

18 147. Air Force Colonel Om Prakash's September 2009 article, published in Joint  
19 Force Quarterly, won the Secretary of Defense National Security Essay  
20 competition for 2009.

21 **Response:** Admit.

22 148. Air Force Colonel Om Prakash's September 2009 article, published in Joint  
23 Force Quarterly, criticized DADT and argued that there was a lack of  
24 scientific basis for the proposition that unit cohesion is compromised by  
25 homosexuals serving openly in the military.

26 **Response:** Admit.

27 149. Of the 26 countries that participate in NATO, 22 permit openly gay people  
28 to serve in their armed forces.

1 **Response:** Defendants object to this Request because the term “openly gay  
2 people” is vague and ambiguous. To the extent a response is required, Defendants  
3 can neither admit nor deny this request. The Department of Defense has not  
4 conducted its own independent study of the extent to which service members who  
5 engage in homosexual conduct are able to serve in the armed forces of other  
6 nations or the impacts of any such service.

7 150. Of the European Union countries, all but one permit gay people to serve  
8 openly in their armed forces.

9 **Response:** Defendants object to this Request because the term “gay people to  
10 serve openly” is vague and ambiguous. To the extent a response is required,  
11 Defendants can neither admit nor deny this request. The Department of Defense  
12 has not conducted its own independent study of the extent to which service  
13 members who engage in homosexual conduct are able to serve in the armed forces  
14 of other nations or the impacts of any such service.

15 151. The Argentine Republic permits openly gay and lesbian service members to  
16 enlist and serve in its armed forces.

17 **Response:** Defendants object to this Request because the term “openly gay and  
18 lesbian” is vague and ambiguous. To the extent a response is required, Defendants  
19 can neither admit nor deny this request. The Department of Defense has not  
20 conducted its own independent study of the extent to which service members who  
21 engage in homosexual conduct are able to serve in the armed forces of other  
22 nations or the impacts of any such service.

23 152. The Oriental Republic of Uruguay permits openly gay and lesbian service  
24 members to enlist and serve in its armed forces.

25 **Response:** Defendants object to this Request because the term “openly gay and  
26 lesbian” is vague and ambiguous. Defendants can thus neither admit nor deny this  
27 Request. To the extent a response is required, Defendants can neither admit nor  
28 deny this request. The Department of Defense has not conducted its own

1 independent study of the extent to which service members who engage in  
2 homosexual conduct are able to serve in the armed forces of other nations or the  
3 impacts of any such service.

4 153. Republic of the Philippines permits openly gay and lesbian service members  
5 to enlist and serve in its armed forces.

6 **Response:** Defendants object to this Request because the term “openly gay and  
7 lesbian” is vague and ambiguous. Defendants can thus neither admit nor deny this  
8 Request. To the extent a response is required, Defendants can neither admit nor  
9 deny this request. The Department of Defense has not conducted its own  
10 independent study of the extent to which service members who engage in  
11 homosexual conduct are able to serve in the armed forces of other nations or the  
12 impacts of any such service.

13 154. The defendants have no evidence to substantiate their position that DADT  
14 preserves order and discipline.

15 **Response:** Defendants deny this request; the text and legislative history of the  
16 statute, which embody the considered judgment of Congress, provide the  
17 necessary support for the law.

18 155. The defendants have no evidence to substantiate their position that DADT  
19 preserves unit cohesion.

20 **Response:** Defendants deny this request; the text and legislative history of the  
21 statute, which embody the considered judgment of Congress, provide the  
22 necessary support for the law.

23 156. The defendants have no evidence to substantiate their position that DADT  
24 preserves troop morale.

25 **Response:** Defendants deny this request; the text and legislative history of the  
26 statute, which embody the considered judgment of Congress, provide the  
27 necessary support for the law.

1 157. The same rationale used to exclude homosexuals from openly serving in the  
2 military was used previously to exclude African-Americans from serving in  
3 the United States military.

4 **Response:** Defendants object to this request because the term “the same rationale”  
5 is vague and ambiguous when used in this context. To the extent a further  
6 response is required, Defendants deny this request because the historical  
7 circumstances and the set of rationales with respect to those historical  
8 circumstances are not identical.

9 158. The same rationale used to exclude homosexuals from openly serving in the  
10 military was used previously to exclude women from serving in the United  
11 States military.

12 **Response:** Defendants object to this request because the term “the same rationale”  
13 is vague and ambiguous when used in this context. To the extent a further  
14 response is required, Defendants deny this request because the historical  
15 circumstances and the set of rationales with respect to those historical  
16 circumstances are not identical.

17 159. There is a rational basis for prejudice against homosexuals.

18 **Response:** Defendants object to this request because the term “prejudice” is  
19 vague and ambiguous. To the extent the term “prejudice” means “an unfavorable  
20 opinion or feeling formed beforehand or without knowledge, thought, or reason,<sup>1</sup>”  
21 Defendants deny this request.

22 160. There is no rational basis for prejudice against homosexuals.

23 **Response:** Defendants object to this request because the term “prejudice” is  
24 vague and ambiguous. To the extent the term “prejudice” means “an unfavorable  
25

26 \_\_\_\_\_  
27 <sup>1</sup> See prejudice. Dictionary.com. Dictionary.com Unabridged. Random House,  
28 Inc. <http://dictionary.reference.com/browse/prejudice> (accessed: February 18,  
2010).

1 opinion or feeling formed beforehand or without knowledge, thought, or reason,”  
2 Defendants admit this request.

3 161. There is a rational basis for prejudice against homosexuals openly serving in  
4 the military.

5 **Response:** Defendants object to this request because the term “prejudice” is  
6 vague and ambiguous. To the extent the term “prejudice” means “an unfavorable  
7 opinion or feeling formed beforehand or without knowledge, thought, or reason,”  
8 Defendants deny this request.

9 162. There is no rational basis for prejudice against homosexuals openly serving  
10 in the military.

11 **Response:** Defendants object to this request because the term "prejudice" is  
12 vague and ambiguous. To the extent the term "prejudice" means "an unfavorable  
13 opinion or feeling formed beforehand or without knowledge, thought, or reason,”  
14 Defendants admit this request.

15 163. Openly gay officers from the armed forces of other countries have  
16 commanded U.S. service members.

17 **Response:** Defendants have made a reasonable inquiry but the information they  
18 know or can readily obtain is insufficient to enable them to admit or deny whether  
19 openly gay officers from the armed forces of other countries have commanded  
20 U.S. service members.

21 164. Openly gay officers from the armed forces of other countries have  
22 commanded U.S. service members without any negative impact on unit  
23 cohesion or troop morale.

24 **Response:** Defendants have made a reasonable inquiry but the information they  
25 know or can readily obtain is insufficient to enable them to admit or deny whether  
26 openly gay officers from the armed forces of other countries have commanded  
27 U.S. service members .  
28

1 165. In 1999, President Bill Clinton stated that DADT was "out of whack" and  
2 "not working."

3 **Response:** Defendants admit that, according to a CNN article dated December 11,  
4 1999, then-President Clinton stated, "What I'd like to do is focus on making the  
5 policy we announced back in 1993 work the way it's intended to, because it's out  
6 of whack now, and I don't think any serious person could say it's not." Otherwise,  
7 Defendants deny this request.

8 166. There is no federal law prohibiting an openly gay or lesbian individual from  
9 serving as the President of the United States and Commander in Chief of the  
10 United States Armed Forces.

11 **Response:** Admit.

12 167. There is no Department of Defense regulation or directive prohibiting an  
13 openly gay or lesbian individual from serving as the President of the United  
14 States and Commander in Chief of the United States Armed Forces.

15 **Response:** Admit.

16 168. Admit that persons who have identified themselves as lesbians and gay men  
17 have received honorable discharges from the Armed Forces of the United  
18 States.

19 **Response:** Admit.

20 169. Admit that under DADT a member's sexual orientation is considered a  
21 personal and private matter, and is not a bar to continued services unless  
22 manifested by homosexual conduct as described in DADT.

23 **Response:** Defendants object to this request because it calls for a legal  
24 conclusion. To the extent a response is required, Defendants admit this request.

25 170. Admit that under DADT defendants will not inquire into the sexual  
26 orientation of prospective or active service members, and will not seek to  
27 exclude a service member for homosexual conduct in the absence of  
28 credible evidence indicating that the service member has engaged in



1 homosexual conduct as defined in DADT.

2 **Response:** Defendants object to this request because it calls for a legal  
3 conclusion. To the extent a response is required, Defendants admit this request.

4 171. Admit that under DADT defendants will not seek to exclude a service  
5 member for homosexual conduct in the absence of credible evidence  
6 indicating that a service member has engaged in homosexual conduct as  
7 defined in the Act and regulations.

8 **Response:** Defendants object to this request because it calls for a legal  
9 conclusion. To the extent a response is required, Defendants admit this request.

10 172. Admit that defendants will not contend in this litigation that the rationale  
11 that gay men and lesbians pose security risks is a basis for DADT.

12 **Response:** Defendants object to this request because it is a contention  
13 interrogatory rather than a proper request for admission under Rule 33. To the  
14 extent a response is required, Defendants admit that they have no intention of  
15 relying on the rationale that gay men and lesbians are more likely than their  
16 heterosexual counterparts to reveal classified or otherwise confidential  
17 information as a basis for DADT.

18 173. Admit that defendants will not contend in this litigation that the rationale  
19 that gay men and lesbians have a physical or psychological defect rendering  
20 them unfit to serve within the Armed Forces of the United States is basis for  
21 DADT.

22 **Response:** Defendants object to this request because it is a contention  
23 interrogatory rather than a proper request for admission under Rule 33. To the  
24 extent a response is required, Defendants admit that they have no intention of  
25 relying on such a rationale as a basis underlying DADT.

26 174. Admit that defendants will not contend in this litigation that the rationale  
27 that gay men and lesbians are more likely than heterosexuals to violate a  
28 code of conduct, other rules generally, the UCMJ, or other DOD regulations

1 is a basis for DADT.

2 **Response:** Defendants object to this request because it is a contention  
3 interrogatory rather than a proper request for admission under Rule 33. To the  
4 extent a response is required, Defendants admit that they have no intention of  
5 relying on such a rationale as a basis underlying DADT.

6 175. Admit that the Military Working Group did not have the final report of the  
7 RAND National Defense Research Institute entitled "Sexual Orientation and  
8 U.S. Military Personnel Policy: Options and Assessments," dated 1993.

9 **Response:** Admit.

10 176. Admit that the Military Working Group did not provide the 103rd Congress  
11 with the final report of the RAND National Defense Research Institute  
12 entitled "Sexual Orientation and U.S. Military Personnel Policy: Options  
13 and Assessments," dated 1993.

14 **Response:** Defendants have made a reasonable inquiry but the information they  
15 know or can readily obtain is insufficient to enable them to admit or deny this  
16 request. The Department of Defense does not have a record of documents that  
17 were provided to the 103<sup>rd</sup> Congress (1993-1995).

18 177. Admit that defendants did not provide the 103rd Congress with the GAO  
19 draft report entitled "Defense Force Management: DOD's Policy on  
20 Homosexuality," dated March 9, 1992.

21 **Response:** Defendants have made a reasonable inquiry but the information they  
22 know or can readily obtain is insufficient to enable them to admit or deny this  
23 request. The Department of Defense does not have a record of documents that  
24 were provided to the 103<sup>rd</sup> Congress (1993-1995). Defendants note, however, that  
25 the Government Accountability Office is part of Congress.

26 178. Admit that defendants did not provide the 103rd Congress with the GAO  
27 final report entitled "Defense Force Management: DOD's Policy on  
28 Homosexuality," dated June, 1992.

1 **Response:** Defendants have made a reasonable inquiry but the information they  
2 know or can readily obtain is insufficient to enable them to admit or deny this  
3 request. The Department of Defense does not have a record of documents that  
4 were provided to the 103<sup>rd</sup> Congress (1993-1995). Defendants note, however, that  
5 the Government Accountability Office is part of Congress.

6 179. Admit that defendants did not provide the 103rd Congress with the GAO  
7 report entitled "Defense Force Management: Statistics Related to DOD's  
8 Policy on Homosexuality," dated June, 1991.

9 **Response:** Defendants have made a reasonable inquiry but the information they  
10 know or can readily obtain is insufficient to enable them to admit or deny this  
11 request. The Department of Defense does not have a record of documents that  
12 were provided to the 103<sup>rd</sup> Congress (1993-1995). Defendants note, however, that  
13 the Government Accountability Office is part of Congress.

14 180. Admit that defendants did not provide the 103rd Congress with the  
15 memorandum from Craig Alderman, Jr., Deputy Undersecretary of Defense  
16 for Policy, to DOD PERSEREC Director, regarding PERS-TR-89-002,  
17 "Nonconforming Sexual Orientations and Military Suitability," dated  
18 January 18, 1989.

19 **Response:** Defendants have made a reasonable inquiry but the information they  
20 know or can readily obtain is insufficient to enable them to admit or deny this  
21 request. The Department of Defense does not have a record of documents that  
22 were provided to the 103<sup>rd</sup> Congress (1993-1995).

23 181. Admit that defendants did not provide the 103rd Congress with the  
24 memorandum from Carson K. Eoyang, PERSEREC Director, to Deputy  
25 Undersecretary of Defense for Policy, regarding PERSEREC research on  
26 homosexuality and suitability, dated January 30, 1989.

27 **Response:** Defendants have made a reasonable inquiry but the information they  
28 know or can readily obtain is insufficient to enable them to admit or deny this

1 request. The Department of Defense does not have a record of documents that  
2 were provided to the 103<sup>rd</sup> Congress (1993-1995).

3 182. Admit that defendants did not provide the 103rd Congress with the  
4 memorandum from Craig Alderman, Jr., Deputy Undersecretary of Defense  
5 for Policy, to Peter Nelson through Maynard Anderson, regarding  
6 PERSEREC draft report, "Nonconforming Sexual Orientations," dated  
7 February 10, 1989.

8 **Response:** Defendants have made a reasonable inquiry but the information they  
9 know or can readily obtain is insufficient to enable them to admit or deny this  
10 request. The Department of Defense does not have a record of documents that  
11 were provided to the 103<sup>rd</sup> Congress (1993-1995).

12 183. Admit that defendants did not provide the 103rd Congress with the  
13 PERSEREC report entitled "Preservice Adjustment of Homosexual and  
14 Heterosexual Military Accessions: Implications for Security Clearance  
15 Suitability," dated January 1989.

16 **Response:** Defendants have made a reasonable inquiry but the information they  
17 know or can readily obtain is insufficient to enable them to admit or deny this  
18 request. The Department of Defense does not have a record of documents that  
19 were provided to the 103<sup>rd</sup> Congress (1993-1995).

20 184. Admit that defendants did not provide the 103rd Congress with the  
21 PERSEREC report entitled "Homosexuality and Personnel Security," dated  
22 September 1991.

23 **Response:** Defendants have made a reasonable inquiry but the information they  
24 know or can readily obtain is insufficient to enable them to admit or deny this  
25 request. The Department of Defense does not have a record of documents that  
26 were provided to the 103<sup>rd</sup> Congress (1993-1995).

27 185. Admit that defendants did not provide the 103rd Congress with the  
28 Crittenden Report.

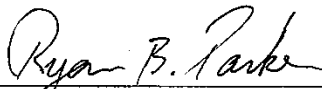
1 **Response:** Defendants have made a reasonable inquiry but the information they  
2 know or can readily obtain is insufficient to enable them to admit or deny this  
3 request. The Department of Defense does not have a record of documents that  
4 were provided to the 103<sup>rd</sup> Congress (1993-1995).

5  
6 Date: February 22, 2010

TONY WEST  
Assistant Attorney General

7  
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*Counsel For Federal Defendants*

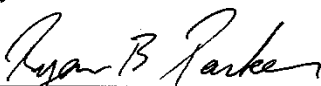
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**PROOF OF SERVICE**

I hereby certify that I served DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFF'S SECOND SET OF REQUESTS FOR ADMISSION by electronic mail and regular mail upon the persons below on February 22, 2010:

Dan Woods  
Patrick O. Hunnius  
White & Case LLP  
633 West Fifth Street, Suite 1900  
Los Angeles, CA 90071-2007  
Tel. (213) 620-7714

I declare under penalty of perjury that the above is true and correct.

  
\_\_\_\_\_  
Ryan B. Parker

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Assistant Attorney General  
2  
3 GEORGE S. CARDONA  
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10 Attorneys for Defendants United States  
11 of America and Secretary of Defense

12 **UNITED STATES DISTRICT COURT**  
13 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
**EASTERN DIVISION**

14 LOG CABIN REPUBLICANS,  
15 Plaintiff,  
16 v.  
17 UNITED STATES OF AMERICA AND  
ROBERT GATES, Secretary of Defense,  
18 Defendants.  
19

No. CV04-8425 GPS (Ex)  
DEFENDANTS' OBJECTIONS  
AND RESPONSES TO  
PLAINTIFF'S SECOND SET OF  
REQUESTS FOR PRODUCTION  
OF DOCUMENTS

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DEFENDANTS' OBJECTIONS AND RESPONSES TO  
PLAINTIFF'S SECOND SET OF REQUESTS FOR PRODUCTION  
OF DOCUMENTS

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

1 Pursuant to Federal Rules of Civil Procedure 26 and 34, and subject to the  
2 objections stated below, Defendants United States and Secretary Gates hereby  
3 respond to Plaintiff's Second Set of Requests for Production of Documents  
4 ("Document Requests").

5 To the extent possible, Defendants plan to scan the documents they produce  
6 onto compact discs, which will then be mailed to Plaintiff's counsel. If production  
7 in this manner becomes unduly burdensome, Defendants will make responsive  
8 documents available for inspection.

### 9 GENERAL OBJECTIONS

10 1. Defendants object to Plaintiff's Document Requests to the extent that  
11 Plaintiff seeks discovery to probe the motivations of the Legislative and Executive  
12 Branches in passing statutes and promulgating regulations implementing the law.  
13 Well-established Supreme Court precedent squarely provides that inquiry into the  
14 subjective motives of members of Congress is a "hazardous matter" and that courts  
15 will not strike down an otherwise constitutional statute on the basis of an alleged  
16 illicit motive." United States v. O'Brien, 391 U.S. 367, 383-84 (1968); Board of  
17 Educ. of the Westside Community Schools v. Mergens, 496 U.S. 226, 249 (1990)  
18 (in evaluating constitutionality of statute, "what is relevant is the legislative  
19 *purpose* of the statute, not the possibly religious *motives* of the legislators who  
20 enacted the law") (emphasis in original); Las Vegas v. Foley, 747 F.2d 1294, 1298  
21 (9<sup>th</sup> Cir. 1984) (same). The same is true of attempts to probe the motivations of the  
22 Executive Branch. See e.g., Village of Arlington Heights v. Metropolitan Hous.  
23 Dev. Corp., 429 U.S. 252, 268 n.18 (1977) ("judicial inquiries into legislative or  
24 executive motivation represent a substantial intrusion into the workings of other  
25 branches of government").

26 2. Defendants object to Plaintiff's Document Requests to the extent that  
27 they are not reasonably calculated to lead to the discovery of admissible evidence.  
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1 The Court has ruled that Plaintiff's challenge is governed by the rational basis  
2 standard of review. It is well understood that a legislative choice subject to the  
3 rational basis test "is not subject to courtroom fact-finding." Federal  
4 Communications Comm'n v. Beach Communications, 508 U.S. 307, 315 (1993)  
5 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).  
6 Defendants accordingly have "no obligation to produce evidence to sustain the  
7 rationality of a statutory classification." Heller v. Doe, 509 U.S. 312, 320 (1993).  
8 The analysis instead asks whether the legislature "rationally *could have believed*"  
9 that the conditions of the statute would promote its objective. Western and  
10 Southern Life Insurance Co. v. State Bd. of Equalization of California, 451 U.S.  
11 654, 671-72 (1981) (emphasis in original).

12 Rational basis review, moreover, "is not a license for courts to judge the  
13 wisdom, fairness, or logic of legislative choices." Beach Communications, 508  
14 U.S. at 313. Rather, "those challenging the legislative judgment must convince  
15 the court that the legislative facts on which the classification is apparently based  
16 could not reasonably be conceived to be true by the governmental decisionmaker."  
17 Vance v. Bradley, 440 U.S. 93, 111 (1979). Although the Court has permitted  
18 Plaintiff to pursue discovery, this is not the type of discovery plaintiff is entitled to  
19 pursue; the congressional findings and legislative history underlying the statute  
20 are "legislative fact[s]" subject to judicial notice and are not appropriate for  
21 fact-finding or discovery.

22 3. Defendants object to Plaintiff's Document Requests to the extent that  
23 they call for documents concerning the "continued rationality" of the statute.  
24 Classifications subject to rational basis review are not subject to challenge on the  
25 ground of changed circumstances. See, e.g., Montalvo-Huertas v. Rivera-Cruz,  
26 885 F.2d 971, 977 (1st Cir. 1989) ("[E]valuating the continued need for, and  
27 suitability of, legislation of this genre is exactly the kind of policy judgment that  
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1 the rational basis test was designed to preclude.”). Indeed, courts have found that  
2 even where Congress has determined that a previous enactment is no longer  
3 necessary, that finding does render the statute unconstitutional. See Smart v.  
4 Ashcroft, 401 F.3d 119, 123 (2d Cir. 2005) (“A congressional decision that a  
5 statute is unfair, outdated, and in need of improvement does not mean that the  
6 statute when enacted was wholly irrational or, for purposes of rational basis  
7 review, unconstitutional.”); Howard v. U.S. Dept. of Defense, 354 F.3d 1358,  
8 1361-62 (Fed. Cir. 2004) (“Congress acts based on judgments as to preferable  
9 policy; the fact that Congress repeals or modifies particular legislation does not  
10 reflect a judgment that the legislation, in its pre-amendment form, lacked rational  
11 support.”). Were it otherwise, all legislation subject to rational basis review –  
12 even legislation authoritatively sustained as constitutional by the Supreme Court –  
13 could potentially be subject to periodic judicial review on the basis of changed  
14 circumstances, a prospect incompatible with these principles and the Supreme  
15 Court’s well known and repeated admonition that “a legislative choice is not  
16 subject to courtroom factfinding and may be based on rational speculation  
17 unsupported by evidence or empirical data.” Heller, 509 U.S. at 320.

18 4. Defendants object to Plaintiff’s Document Requests to the extent they  
19 request that Defendants produce documents that are not in their possession,  
20 custody, or control. Fed. R. Civ. P. 34.

21 5. Defendants object to Plaintiff’s Document Requests as duplicative  
22 and unduly burdensome to the extent they call for production of identical copies of  
23 the same document.

24 6. Defendants object to the definitions and instructions in Plaintiff’s  
25 Document Requests to the extent that they conflict with or purport to expand upon  
26 Defendants’ obligations under the Federal Rules of Civil Procedure or the local  
27 rules of this Court.

1           7. Defendants object to Plaintiff's Document Requests to the extent that  
2 they are overbroad or attempt to impose obligations on Defendants that are unduly  
3 burdensome, expensive, and/or oppressive.

4           8. Defendants object to Plaintiff's Document Requests as unduly  
5 burdensome to the extent that they require production of electronic information,  
6 the retrieval of which, to the extent possible, would involve undue expense, time,  
7 and allocation of resources for minimal return. Defendants, accordingly, object to  
8 instruction nos. 16 and 17. Counsel will meet and confer as to the production of  
9 electronically stored documents in an effort to arrive at a mutually agreeable  
10 approach to the production of such information.

11           9. Defendants object to Plaintiff's Document Requests to the extent that  
12 they seek information and documents protected by the work-product doctrine,  
13 Privacy Act, attorney-client privilege, law enforcement privilege, deliberative  
14 process privilege, and any other applicable privilege. Defendants object to  
15 paragraph (2) of the instructions purporting to require Defendants to set forth  
16 "[t]he identity of each Person who received and/or saw [an] original or a copy" of  
17 a privileged document. To the extent there are any documents subject to the  
18 privileges and protections referenced above, Defendants will produce a privilege  
19 log that identifies (to the extent relevant, ascertainable, and not privileged or  
20 otherwise protected from disclosure) the author or creator of the document,  
21 the recipient(s) of the document (including any individuals who were sent copies  
22 of the document), the date of the document, the privilege or protection claimed,  
23 and a description of the document sufficient to enable the parties to assess the  
24 applicability of the privilege or protection. See Fed. R. Civ. P. 26(b)(5)(A).

25           10. A statement that Defendants intend to produce documents responsive  
26 to a particular request indicates that Defendants will conduct a good-faith search  
27 for such documents, and does not constitute a representation that such documents  
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1 do, in fact, exist.

2 11. Defendants object to Plaintiff's Document Requests to the extent they  
3 seek "any and all" or "all" documents as overly broad, unduly burdensome, and  
4 not reasonably calculated to lead to the discovery of admissible evidence.

5 12. Defendants object to Plaintiff's Document Request to the extent they  
6 call for information outside of the Department of Defense (the "DoD"). Courts in  
7 the Ninth Circuit have applied the waiver of sovereign immunity found in the  
8 Administrative Procedures Act ("APA"), 5 U.S.C. § 702, to Constitutional claims  
9 seeking nonmonetary relief. See, e.g., The Presbyterian Church v. United States,  
10 870 F.2d 518, 525 n. 9 ("This court has previously held that the 1976 amendment  
11 to § 702 waives sovereign immunity not only for suits brought under § 702 itself,  
12 but for constitutional claims brought under the general federal-question  
13 jurisdiction statute, 28 U.S.C. § 1331." (citations omitted)). Claims under Section  
14 702, must be the result of "agency action." Because the Department of Defense  
15 ("DOD"), not Congress or any other governmental agency, is charged with  
16 administering 10 U.S.C. § 654 and the applicable regulations, discovery  
17 obligations do not reach beyond that Department.

18 13. To the extent that the Department of Defense houses documents  
19 belonging to another agency, Congress, or an instrumentality of the Government,  
20 the Department of Defense will only produce those documents with the consent of  
21 the agency, instrumentality or Congress.

22 14. Defendants object to the Plaintiff's characterization of any particular  
23 document.

24 15. Defendants reserve the right to amend, supplement, or alter these  
25 objections and responses to Plaintiff's Document Requests at any time.  
26 Defendants further reserve the right to redact any portions of documents for any  
27 reason contemplated under the Federal Rules of Civil Procedure or the local rules  
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1 of this Court without waiving any rights either by doing so or by producing  
2 unredacted portions of documents.

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**DOCUMENT REQUESTS**

The foregoing General Objections shall be considered as made, to the extent applicable, in response to each of the Document Requests, as if the General Objections were fully set forth in each response.

**DOCUMENT REQUEST NO. 1:**

All Documents referring or related to meetings of the Joint Chiefs of the United States Armed Forces between January 20, 2007 and the present at which DADT was discussed, including all memoranda created by any person in preparation for, or for use during, the meeting(s) and all documents which summarize what occurred or was discussed during the meeting(s).

**RESPONSE:** Defendants object to this request because it is not reasonably calculated to lead to the discovery of admissible evidence; documents referring or relating to meetings of the Joint Chiefs of the United States Armed Forces between January 2007 and the present have no bearing on whether Congress had a rational basis for enacting the DADT Statute in 1993. Defendants also object to this request because it is unduly burdensome. The Joint Chiefs of the United States Armed Forces maintain busy schedules and searching for and reviewing “all documents” related to meetings at which DADT was discussed, over a period of more than three years, would impose an undue burden on the Joint Chiefs and their staffs. Defendants further object to this request to the extent it calls for documents protected by the deliberative process privilege, the attorney-client privilege, the attorney work product privilege, or any other applicable privilege. Moreover, this request is a further attempt by Plaintiff to use the tools of civil discovery to affect the political process that has been initiated to address issues related to the Policy; discovery of this type directly interferes with the work of the political branches and is improper. See United States v. Morgan, 313 U.S. 409, 422 (1941) (explaining that it is not the function of the court to probe the mental

1 processes of agency decision makers).

2 Subject to the general objections set forth above and the specific objections  
3 set forth herein, Defendants intend to produce responsive documents identified  
4 through a reasonable and good faith search.

5 **DOCUMENT REQUEST NO. 2:**

6 All Documents referring or relating to the position of the Chairman of the  
7 Joint Chiefs of Staff, the Secretary of Defense, the Chief of Staff of the Army, the  
8 Chief of Naval Operations, the Chief of Staff of the Air Force, and the  
9 Commandant of the Marine Corps or their advisors, not including legal counsel,  
10 regarding the repeal of DADT.

11 **RESPONSE:** Defendants object to this request because it is not reasonably  
12 calculated to lead to the discovery of admissible evidence; documents referring or  
13 relating to the positions of military leaders regarding the repeal of DADT have no  
14 bearing on whether Congress had a rational basis for enacting the Statute in 1993.  
15 Defendants also object to this request to the extent it calls for documents protected  
16 by the deliberative process privilege or any other applicable privilege. Moreover,  
17 this request is a further attempt by Plaintiff to use the tools of civil discovery to  
18 affect the political process that has been initiated to address issues related to the  
19 Policy; discovery of this type directly interferes with the work of the political  
20 branches and is improper. See United States v. Morgan, 313 U.S. 409, 422 (1941)  
21 (explaining that it is not the function of the court to probe the mental processes of  
22 agency decision makers).

23 Subject to the general objections set forth above and the specific objections  
24 set forth herein, Defendants intend to produce responsive documents identified  
25 through a reasonable and good faith search.

26 **DOCUMENT REQUEST NO. 3:**

27 All Documents referring or relating to the position of the any [*sic*] legal  
28

1 counsel to [*sic*] Chairman of the Joint Chiefs of Staff, the Secretary of Defense,  
2 the Chief of Staff of the Army, the Chief of Naval Operations, the Chief of Staff of  
3 the Air Force, and the Commandant of the Marine Corps, regarding the repeal of  
4 DADT.

5 **RESPONSE:** Defendants object to this request because it is not reasonably  
6 calculated to lead to the discovery of admissible evidence; documents referring or  
7 relating to the positions of legal counsel to military leaders regarding the repeal of  
8 DADT have no bearing on whether Congress had a rational basis for enacting the  
9 Statute in 1993. Defendants also object to this request to the extent it calls for  
10 documents protected by the deliberative process privilege, the attorney-client  
11 privilege, the attorney work product privilege, or any other applicable privilege.  
12 Moreover, this request is a further attempt by Plaintiff to use the tools of civil  
13 discovery to affect the political process that has been initiated to address issues  
14 related to the Policy; discovery of this type directly interferes with the work of the  
15 political branches and is improper. See United States v. Morgan, 313 U.S. 409,  
16 422 (1941) (explaining that it is not the function of the court to probe the mental  
17 processes of agency decision makers).

18 Subject to the general objections set forth above and the specific objections  
19 set forth herein, Defendants intend to produce responsive documents identified  
20 through a reasonable and good faith search.

21 **DOCUMENT REQUEST NO. 4:**

22 All Documents referring or relating to any request by congress or DOD that  
23 the RAND Corporation update studies it previously conducted regarding gays in  
24 the military.

25 **RESPONSE:** Defendants object to this request to the extent it calls for  
26 documents that are outside the possession of the DOD. Plaintiff's suit challenges  
27 a statute that was implemented and is enforced by the DOD, and the relief that  
28



1 Plaintiff seeks must necessarily lie against that agency. Accordingly, Plaintiff's  
2 discovery should be limited to documents in the possession of the DOD.  
3 Defendants also object to this request to the extent it calls for the production of  
4 documents that are protected by the deliberative process privilege, the attorney  
5 client privilege, the attorney work product privilege, or any other applicable  
6 privilege.

7 Subject to the general objections set forth above and the specific objections  
8 set forth herein, Defendants intend to produce responsive documents identified  
9 through a reasonable and good faith search.

10 **DOCUMENT REQUEST NO. 5:**

11 All Documents referring or relating to any plan or draft plan by DOD to  
12 repeal DADT.

13 **RESPONSE:** Defendants object to this request because it is not reasonably  
14 calculated to lead to the discovery of admissible evidence; documents referring or  
15 relating to any plan or draft plan by DOD to repeal DADT have no bearing on  
16 whether Congress had a rational basis for enacting the Statute in 1993.  
17 Defendants also object to this request to the extent it calls for documents protected  
18 by the deliberative process privilege, the attorney-client privilege, the attorney  
19 work product privilege, or any other applicable privilege. Moreover, this request  
20 is a further attempt by Plaintiff to use the tools of civil discovery to affect the  
21 political process that has been initiated to address issues related to the Policy;  
22 discovery of this type directly interferes with the work of the political branches  
23 and is improper. See United States v. Morgan, 313 U.S. 409, 422 (1941)  
24 (explaining that it is not the function of the court to probe the mental processes of  
25 agency decision makers).

26 Subject to the general objections set forth above and the specific objections  
27 set forth herein, Defendants intend to produce responsive documents identified  
28