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

14 LOG CABIN REPUBLICANS,	)	No. CV04-8425 VAP (Ex)
15 Plaintiff,	)	DEFENDANTS' SUPPLEMENTAL
16 v.	)	BRIEF ON STANDARD OF
17 UNITED STATES OF AMERICA AND	)	REVIEW
18 ROBERT M. GATES, Secretary of	)	
19 Defense,	)	
20 Defendants.	)	
21	)	
22	)	

TABLE OF CONTENTS

page

1

2

3 INTRODUCTION..... 1

4 ARGUMENT ..... 3

5 I. The Court Should Defer Adjudicating the Constitutional

6 Challenge to DADT Based upon Recent Legislative Events. .... 3

7 II. The Court Already Has Correctly Ruled That the *Witt*

8 Standard Does Not Apply..... 6

9 III. Assuming Heightened Scrutiny Were Applied, the Standard

10 in *Beller* Controls and Requires Judgment in Favor of

11 Defendants. .... 9

12 IV. LCR Cannot Satisfy its Burden under a Facial Challenge

13 Regardless of the Standard of Review Applied by the Court. .... 12

14 V. Because the Only “Evidence” Appropriate for Consideration

15 in this Case Is the Statute and Legislative History, a Trial

16 Concerning LCR’s Facial Constitutional Challenge Is

17 Unwarranted. .... 13

18 CONCLUSION ..... 14

19

20

21

22

23

24

25

26

27

28

1 **TABLE OF AUTHORITIES**

2 **CASES**

3 *Beller v. Middendorf*,  
4 632 F.2d 788 (9th Cir. 1980)..... *passim*

5 *Blue Cross & Blue Shield of Ala. v. Unity Outpatient Surgery Ctr., Inc.*,  
6 490 F.3d 718 (9th Cir. 2007)..... 5

7 *Bowers v. Hardwick*,  
8 478 U.S. 186 (1986). .... 10

9 *Cook v. Gates*,  
10 528 F.3d 42 (1st Cir. 2008).....10, 11,12

11 *FCC v. Beach Commc'n*,  
12 508 U.S. 307 (1993). .... 13

13 *Goldman v. Weinberger*,  
14 475 U.S. 503 (1986). .... 11, 13, 14

15 *Holmes v. California Army National Guard*,  
16 124 F.3d 1126 (9th Cir. 1997)..... 10

17 *Hunt v. Wash. State Apple Adver. Comm'n*,  
18 432 U.S. 333 (1977). .... 8

19 *Kremens v. Bartley*,  
20 431 U.S. 119 (1977)..... 4

21 *Lawrence v. Texas*,  
22 539 U.S. 558 (2003). .... 10

23 *Leyva v. Certified Grocers of Ca. Ltd.*,  
24 593 F.2d 857 (9th Cir. 1979)..... 5

25 *Milavetz, Gallop & Milavetz, P.A. v. United States*,  
26 130 S. Ct. 1324 (2010). .... 14

27 *Philips v. Perry*,  
28 106 F.3d 1420 (9th Cir. 1997)..... 12

*Rostker v. Goldberg*,  
453 U.S. 57 (1981). .... 6

*Sell v. United States*,  
539 U.S. 166 (2003). .... 7

*Spector Motor Services v. McLaughlin*,  
323 U.S. 101 (1944). .... 4, 5

*U.S. v. Vilches-Navarrete*,  
523 F.3d 1 (1st Cir. 2008)..... 4

1 *United States v. Raines*,  
2 362 U.S. 17 (1960). . . . . 8  
3 *United States v. Salerno*,  
4 481 U.S. 739 (1987). . . . . 4, 12  
5 *Wash. State Grange v. Wash. State Republican Party*,  
6 552 U.S. 442 (2008). . . . . 8, 9  
7 *Witt v. Department of the Air Force*,  
8 527 F.3d 806 (9th Cir. 2008). . . . . *passim*

7 **STATUTES**

8 10 U.S.C. § 654. . . . . 1, 3  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
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1 **INTRODUCTION**

2 Pursuant to the Court’s Order of May 27, 2010, *see* Doc. 170 at 26,  
3 defendants submit this supplemental brief addressing the potential application of  
4 the standard of review set forth in *Witt v. Dep’t of the Air Force*, 527 F.3d 806 (9th  
5 Cir. 2008), to plaintiff Log Cabin Republicans’ (“LCR’s”) facial challenge to the  
6 “Don’t Ask, Don’t Tell” (“DADT”) statute, 10 U.S.C. § 654, and implementing  
7 regulations.

8 First, at the outset, defendants urge this Court to defer any ruling as to the  
9 applicability of the *Witt* standard to LCR’s facial challenge and, indeed, to stay all  
10 further proceedings in this case because the political branches have taken concrete  
11 steps to facilitate repeal of the DADT statute. On May 27, 2010, consistent with  
12 the strong policy views of the Administration, a majority of the House of  
13 Representatives and a majority of the Senate Armed Services Committee voted in  
14 support of a measure to repeal the statute upon the issuance of a written  
15 certification (signed by the President, the Secretary of Defense, and the Chairman  
16 of the Joint Chiefs of Staff) stating, *inter alia*, that the Department of Defense had  
17 completed its review of implementation of repeal, that the necessary policies and  
18 regulations have been prepared, and the implementation of those policies and  
19 regulations is consistent with standards of military readiness, military  
20 effectiveness, unit cohesion, and recruiting and retention. In light of these  
21 developments, principles of constitutional avoidance and respect for the coequal  
22 branches of government militate in favor of a stay of proceedings pending  
23 completion of the process already undertaken by the political branches. Indeed,  
24 this is particularly true where, as here, a plaintiff brings a facial constitutional  
25 challenge. Accordingly, the Court should await the outcome of the process in  
26 which the political branches are now engaged before deciding the constitutional  
27 question presented.

1 Second, should the Court decide to proceed notwithstanding these  
2 legislative developments, it already has correctly ruled in its June 9, 2009 Order  
3 that the Ninth Circuit “explicitly” limited the three-part analysis set forth in *Witt* to  
4 as-applied challenges, and that LCR’s facial challenge is therefore governed by  
5 rational basis, not heightened review. *See* Doc. 83 at 17. There is no basis to  
6 reconsider that ruling, which was and remains correct. Indeed, the Ninth Circuit  
7 could not have been more clear on that score. The Court of Appeals stated: “[W]e  
8 hold that this heightened scrutiny analysis is as-applied rather than facial. ‘This is  
9 the preferred course of adjudication since it enables courts to avoid making  
10 unnecessarily broad constitutional judgments.’” *Witt*, 527 F.3d at 819 (quoting  
11 *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 447 (1985)). *Witt*’s  
12 heightened scrutiny standard thus has no application here.

13 Third, even if the Court were now to subject the DADT statute to some form  
14 of heightened review beyond rational basis review, the Ninth Circuit previously  
15 has considered and rejected, under intermediate scrutiny, a facial substantive due  
16 process challenge to the prior, more restrictive version of the policy. *See Beller v.*  
17 *Middendorf*, 632 F.2d 788, 810-11 (9th Cir. 1980) (Kennedy, J.). Because *Witt*  
18 does not disturb the analysis employed in *Beller* with respect to facial challenges,  
19 the *Beller* standard, not the as-applied *Witt* standard, is binding. Because LCR’s  
20 substantive due process challenge to the DADT statutory policy would fail under  
21 the *Beller* analysis, defendants are entitled to summary judgment as a matter of  
22 law.

23 Finally, to the extent the Court nonetheless decides incorrectly to apply the  
24 *Witt* as-applied test in its entirety to LCR’s facial challenge, a trial concerning that  
25 facial challenge is unnecessary and inappropriate. As settled Supreme Court  
26 precedent makes clear, whether under rational basis review or some form of  
27 heightened scrutiny, reliance on expert witnesses to undermine the military  
28 judgment of Congress is inappropriate. Under our constitutional scheme, it is not

1 for the judiciary to determine whether and to what extent the facts underlying that  
2 military judgment have changed. Such a determination is one for the political  
3 branches, which are actively engaged in precisely such an analysis.

4 **ARGUMENT**

5 **I. The Court Should Defer Adjudicating the Constitutional Challenge**  
6 **to DADT Based upon Recent Legislative Events**

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7 The Court should defer ruling on whether LCR's facial challenge to DADT  
8 is governed by the standard of review set forth in *Witt*, because the political  
9 branches have taken concrete steps to facilitate repeal of the DADT statute.

10 At the July 6, 2009 status conference, *see* Doc. 105-2 at 4-5, the Court asked  
11 the parties to make it aware of any legislative developments regarding possible  
12 repeal of the DADT statute. The Court should be aware that on May 27, 2010, a  
13 majority of the House of Representatives and a majority of the Senate Armed  
14 Services Committee voted to add to the fiscal 2011 defense authorization bill a  
15 measure to repeal the DADT statute. Repeal would be effective upon the issuance  
16 of a written certification (signed by the President, the Secretary of Defense, and  
17 the Chairman of the Joint Chiefs of Staff) stating, *inter alia*, that the Department  
18 of Defense has completed its Comprehensive Review on the Implementation of a  
19 Repeal of 10 U.S.C. § 654 (currently expected to be completed in December  
20 2010), and that –

21 (A) the President, the Secretary of Defense, and the Chairman of the Joint  
22 Chiefs of Staff have considered the recommendations contained in the  
23 report and the report's proposed plan of action;

24 (B) the Department of Defense has prepared the necessary policies and  
25 regulations to exercise the discretion provided by the repeal of § 654; and

26 (C) the implementation of necessary policies and regulations pursuant to the  
27 discretion provided by the repeal of § 654 is consistent with the standards of  
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1 military readiness, military effectiveness, unit cohesion, and recruiting and  
2 retention of the Armed Forces.

3 The House and Senate bills contain identical language and are attached hereto as  
4 Exhibits 1 and 2, respectively, for the Court’s convenience and review.

5 In light of the potential passage of this legislation and the written  
6 certifications by the Executive Branch, for several reasons the Court should defer  
7 resolving LCR’s facial constitutional challenges to DADT.

8 First, courts should not decide constitutional issues if they can reasonably  
9 avoid doing so. *See Spector Motor Servs. v. McLaughlin*, 323 U.S. 101, 105  
10 (1944) (“If there is one doctrine more deeply rooted than any other in the process  
11 of constitutional adjudication, it is that we ought not to pass on questions of  
12 constitutionality . . . unless such adjudication is unavoidable.”); *U.S. v.*  
13 *Vilches-Navarrete*, 523 F.3d 1, 10 n.6 (1st Cir. 2008) (“The maxim that courts  
14 should not decide constitutional issues when this can be avoided is as old as the  
15 Rocky Mountains and embedded in our legal culture for about as long.”).

16 As the Supreme Court explained in rejecting a constitutional challenge to a  
17 statute that subsequently had been repealed: “Constitutional adjudication being a  
18 matter of ‘great gravity and delicacy,’ we base our refusal to pass on the merits on  
19 “the policy rules often invoked by the Court ‘to avoid passing prematurely on  
20 constitutional questions. Because (such) rules operating in ‘cases confessedly  
21 within (the Court’s) jurisdiction’ . . . they find their source in policy rather than  
22 purely constitutional considerations.” *Kremens v. Bartley*, 431 U.S. 119, 128  
23 (1977) (citations omitted).

24 The principle articulated in *Kremens* applies with equal force in this case,  
25 where LCR brings a facial challenge. It is well-established that “[a] facial  
26 challenge to a legislative Act is the most difficult challenge to mount successfully,  
27 since the challenger must establish that no set of circumstances exists under which  
28 the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987). A



1 finding of facial invalidity, therefore, is the most sweeping constitutional  
2 pronouncement a court can make. It is thus a judgment that courts should refrain  
3 from making unless the need to do so “is unavoidable.” *Spector Motor Servs.*, 323  
4 U.S. at 105. Indeed, the Ninth Circuit recognized as much in *Witt* itself, noting  
5 that facial challenges invite “unnecessarily broad constitutional judgments.”  
6 *Witt*, 527 F.3d at 819 (internal citation omitted). Here, where one house of  
7 Congress has passed legislation to repeal DADT and the other house is moving  
8 forward with repeal, there is plainly no unavoidable necessity to render judgment  
9 on the facial validity of DADT. Because a service member separated between  
10 now and the effective date of any legislation repealing DADT could bring an as-  
11 applied challenge to a DADT-compelled separation, adjudication of LCR’s facial  
12 challenge is both avoidable and premature.

13         Second, the Ninth Circuit has recognized that a court may properly stay a  
14 case to allow the resolution of independent proceedings that may bear on the case.  
15 *Leyva v. Certified Grocers of Ca. Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979) (“A  
16 trial court may, with propriety, find it is efficient for its own docket and the fairest  
17 course for the parties to enter a stay of an action before it, pending resolution of  
18 independent proceedings which bear upon the case. This rule applies whether the  
19 separate proceedings are judicial, administrative, or arbitral in character, and does  
20 not require that the issues in such proceedings are necessarily controlling of the  
21 action before the court.”). Here, because the results of the legislative proceedings  
22 may render this case moot, the Court should stay this case and avoid unnecessarily  
23 adjudicating the contested constitutional questions.

24         Third, deferring ruling on LCR’s facial constitutional challenge is in the  
25 best interest of the parties, the Court, the public, and the military. *See Blue Cross*  
26 *& Blue Shield of Ala. v. Unity Outpatient Surgery Ctr., Inc.*, 490 F.3d 718, 724  
27 (9th Cir. 2007) (in determining whether to grant a stay, courts should consider the  
28 interests of the parties, the public, and the court). LCR has stated that, if this case

1 proceeds to trial, it intends to call seven expert witnesses and twelve fact  
2 witnesses, and introduce over 3,000 pages of documents as trial exhibits.<sup>1</sup>  
3 Deferring ruling on LCR’s facial constitutional claim would potentially save the  
4 parties and the Court from expending considerable time and resources on pretrial  
5 motions, trial preparation, trial, and any potential post-trial briefing concerning the  
6 constitutionality of a statute that may be repealed.

7 Finally, the public and military also have an interest in having Congress and  
8 the Executive Branch, rather than the Court, decide this issue. The Supreme Court  
9 has articulated both constitutional and institutional reasons for allowing Congress,  
10 rather than the courts, to make decisions regarding the military. *Rostker v.*  
11 *Goldberg*, 453 U.S. 57, 66 (1981) (“Not only is the scope of Congress’ constitu-  
12 tional power in this area broad, but the lack of competence on the part of the  
13 courts is marked.”). Indeed, the repeal provision before Congress contains a series  
14 of specific requirements that will ensure that the potential repeal of DADT is  
15 implemented efficiently and in a manner that takes into account the results of the  
16 study by the military working group.

17 In light of these recent legislative developments, the Court should defer  
18 ruling on LCR’s facial constitutional challenge to allow the political branches to  
19 properly consider whether the implementation of a repeal would be consistent with  
20 the standards of military readiness, military effectiveness, and unit cohesion.

21 **II. The Court Already Has Correctly Ruled That the *Witt* Standard Does**  
22 **Not Apply**

23 Should this Court nevertheless decide to consider LCR’s facial challenge in  
24 these unusual circumstances, it should adhere to its prior ruling that the standard  
25 of review set forth in *Witt* governs only as-applied – not facial – challenges. *See*  
26 \_\_\_\_\_

27 <sup>1</sup> Because evidence is inappropriate in a facial challenge to a federal statute, defendants  
28 intend to file at the appropriate time motions *in limine* to exclude LCR’s expert witnesses, lay  
testimony (whether provided live at trial or through deposition designation), and trial exhibits.

1 Doc. 83 at 15-17. The *Witt* standard referenced in the Court’s Order of May 27,  
2 2010, is the same standard and language that the Court discussed in its earlier June  
3 9, 2009 Order. *Compare* Doc. 83 at 15:12-18 *with* Doc. 177 at 26:11-14 (quoting  
4 same text from *Witt*, 527 F.3d at 819). The Court correctly noted that “[i]n the  
5 same discussion” in *Witt* where this standard is set forth, the “Ninth Circuit . . .  
6 **explicitly** ‘h[e]ld that this heightened scrutiny analysis is as-applied rather than  
7 facial . . . .’” *See* Doc. 83 at 15:22-23 (quoting *Witt*, 527 F.3d at 819) (emphasis  
8 added). This conclusion is indisputably correct, and there is no basis to revisit the  
9 Court’s earlier ruling in this regard. Nor is there any basis to now reconsider the  
10 Court’s recognition that the Ninth Circuit’s decision in *Witt* “clearly limits the  
11 heightened scrutiny standard it announces to [as-applied] challenges.” *See* Doc.  
12 83 at 16: 17-18. This Court’s ruling that LCR cannot “rely upon *Witt*’s heightened  
13 scrutiny standard” and must instead show that the policy violates rational basis  
14 review, *see* Doc. 83 at 17:1-3, is correct and should be applied at the summary  
15 judgment stage if the Court decides not to stay the litigation.

16 Critical to the Ninth Circuit’s analysis in *Witt* was its conclusion that the  
17 modified analysis employed in *Sell v. United States*, 539 U.S. 166 (2003), must be  
18 “as-applied rather than facial.” *See Witt*, 527 F.3d at 819. The Ninth Circuit thus  
19 made clear that challenges to the DADT statute under heightened scrutiny must be  
20 as-applied and conducted through an “individualized balancing analysis.” *Witt*,  
21 527 F.3d 821. The court in *Witt* emphasized that the application of the second and  
22 third *Sell* factors requires an “as-applied” challenge tied “specifically” to the  
23 circumstances of an individual. *Id.* at 821. It is “[o]nly then [that] DADT [can] be  
24 measured against the . . . constitutional standard” adopted in *Witt*. *Id.*

1 The Ninth Circuit insisted upon such an as-applied application of  
2 heightened scrutiny because courts otherwise would be pressed, as here, to make  
3 “unnecessarily broad constitutional judgments.” *Id.* at 819 (citations omitted).<sup>2</sup>  
4 Applying the three-part *Witt* test equally to both facial and as-applied challenges  
5 would contravene the core rationale for the *Witt* test, as well as Supreme Court  
6 precedent recognizing that facial challenges to statutes such as the DADT statute  
7 are disfavored. *See Wash. State Grange v. Wash. State Republican Party*, 552  
8 U.S. 442, 452 (2008). Because “[c]laims of facial invalidity often rest on  
9 speculation . . . they raise the risk of ‘premature interpretation of statutes on the  
10 basis of factually barebones records.’” *Id.* at 450 (quoting *Sabri v. United States*,  
11 541 U.S. 600, 609 (2004)). “Facial challenges also run contrary to the fundamental  
12 principle of judicial restraint that courts should neither ‘anticipate a question of  
13 constitutional law in advance of the necessity of deciding it’ nor ‘formulate a rule  
14 of constitutional law broader than is required by the precise facts to which it is to  
15 be applied.’” *Id.* (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis,  
16 J., concurring)); *accord United States v. Raines*, 362 U.S. 17, 21(1960).  
17 Permitting facial challenges to proceed, moreover, “threaten[s] to short circuit the  
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19 <sup>2</sup> Because of the Ninth Circuit’s recognition in this regard, defendants continue to  
20 contend that LCR’s facial challenge cannot continue after the Ninth Circuit’s decision in *Witt*.  
21 First, the *Witt* panel was careful to note that only “as-applied” substantive due process challenges  
22 to the statute can proceed. *See Doc. 77* at 5-7 (citing and quoting *Witt*). Because LCR makes a  
23 facial challenge to the statute, its substantive due process challenge cannot proceed as a matter of  
24 law. And second, unlike the situation in *Witt*, which was brought by an individual, LCR seeks to  
25 establish associational standing to challenge the statute. *See Doc. 77* at 7-8. Because *Witt* now  
26 makes clear that substantive due process challenges require the involvement of an individual,  
27 however, LCR cannot satisfy its burden of establishing associational standing; associational  
28 standing is precluded as a matter of law where the involvement of an individual is required. *See*  
*Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 342-343 (1977) (“so long as the nature  
of the claim and of the relief sought does not make the individual participation of each injured  
party indispensable to proper resolution of the cause, the association may be an appropriate  
representative of its members, entitled to invoke the court's jurisdiction”).

1 democratic process by preventing laws embodying the will of the people from  
2 being implemented in a manner consistent with the Constitution.” *Wash. State*  
3 *Grange*, 552 U.S. at 451. Accordingly, binding Ninth Circuit precedent requires  
4 that, in adjudicating LCR’s substantive due process challenge, the Court should  
5 refrain from applying the *Witt* standard altogether and, instead apply rational basis  
6 review.<sup>3</sup>

7 **III. Assuming Heightened Scrutiny Were Applied, the Standard in *Beller***  
8 **Controls and Requires Judgment in Favor of Defendants**

9 Assuming the Court were now to adopt some form of heightened scrutiny in  
10 analyzing LCR’s facial substantive due process challenge, the Ninth Circuit’s  
11 binding decision in *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), would  
12 apply, not the standard of review set forth in the *Witt* case.

13 In *Beller*, the Ninth Circuit rejected a facial substantive due process chal-  
14 lenge to the more restrictive policy that preceded the DADT statute. *See id.* at  
15 810-11. In evaluating that prior policy, the court assumed for the sake of  
16 argument that a heightened constitutional level of scrutiny applied to it. *See id.* at  
17 810. The court nonetheless upheld the policy even under that assumption,  
18 emphasizing that the military’s identity as the employer was “crucial” to its deci-  
19 sion to reject plaintiffs’ facial substantive due process challenge, because the  
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23 <sup>3</sup> The first *Witt* factor – whether the statute advances “an important governmental  
24 interest” – applies equally whether the analysis is facial or as applied. Although the Ninth  
25 Circuit in *Witt* remanded that case to the district court to develop a factual record on the  
26 application of the second and third prongs “as applied to Major Witt,” 527 F.3d at 821, the Court  
27 of Appeals concluded that DADT satisfies the first factor of the *Witt* analysis. As the *Witt* panel  
28 observed, “[i]t is clear that the government advances an important governmental interest. DADT  
concerns the management of the military, and judicial deference to . . . congressional exercise of  
authority is at its apogee when legislative action under the congressional authority to raise and  
support armies and make rules and regulations for their governance is challenged.” 527 F.3d at  
821 (quoting *Rostker*, 453 at 70).

1 “Supreme Court has repeatedly held that constitutional rights must be viewed in  
2 light of the special circumstances and needs of the armed forces.” *Id.*

3 *Beller* remains good law in the context of a *facial* constitutional challenge.  
4 Indeed, although the Ninth Circuit in *Witt* concluded that *Beller* had been  
5 overruled by subsequent Supreme Court precedent involving as-applied challenges  
6 and thus that *Beller* did not foreclose an as-applied challenge to the DADT statute,  
7 *see* 527 F.3d at 819-20 & n.9, *Witt* did not abrogate *Beller*’s holding that facial  
8 challenges to the military’s more restrictive version of DADT would fail. *See id.*  
9 at 820 (noting that “in *Beller* we explicitly declined to perform an as-applied  
10 analysis”). And a facial challenge is the only type of challenge brought here.<sup>4</sup>

11 The Ninth Circuit’s facial substantive due process analysis in *Beller* is  
12 entirely consistent with the post-*Lawrence* facial due process analysis employed  
13 by the First Circuit in *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008). In *Cook*, the  
14 First Circuit rejected a facial substantive due process challenge to DADT. *Id.* at  
15 56. The court held that the *Lawrence* Court “made it abundantly clear that there

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18 <sup>4</sup> In holding that plaintiff’s complaint stated a viable facial substantive due process claim,  
19 this Court relied on Justice Kennedy’s opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003).  
20 *Lawrence* sustained a substantive due process challenge to a statute that criminalized homosex-  
21 ual conduct among consenting civilian adults, thus overruling *Bowers v. Hardwick*, 478 U.S. 186  
22 (1986), which had reached the opposite conclusion for a similar criminal statute. *Id.* at 578. This  
23 Court reasoned that *Lawrence* implicitly overruled *Holmes v. California Army National Guard*,  
24 124 F.3d 1126, 1136 (9th Cir. 1997), because *Holmes* had relied on *Bowers* in rejecting a  
25 substantive due process challenge to DADT. *See* Doc. 83 at 17-18. But *Lawrence* does not  
26 undermine the reasoning on which then-Judge Kennedy relied 23 years earlier to reject the facial  
27 substantive due process challenge in the *Beller* case. *Beller* concluded that the issue presented in  
28 *Lawrence* – that is, whether the government may criminalize homosexual conduct done in the  
privacy of the home by consenting civilian adults – is distinct from the issue in this case – that is,  
whether Congress may require those serving in the military to refrain from engaging in  
homosexual conduct. *Beller* stated that other “cases might require resolution of the question  
whether there is a right to engage in this conduct in at least some circumstances.” 632 F.2d at  
810. “The instant cases,” the court observed in *Beller*, “are not ones in which the state seeks to  
use its criminal processes to coerce persons to comply with a moral precept even if they are  
consenting adults acting in private without injury to each other.” *Id.*

1 are many types of sexual activity that are beyond the reach of that opinion,” and  
2 that DADT “includes such other types of sexual activities.” *See id.*

3 As in *Beller*, the First Circuit in *Cook* recognized that deference to Congress  
4 in military matters is “well-established.” *Id.* at 57 (“It is unquestionable that  
5 judicial deference to congressional decision-making in the area of military affairs  
6 heavily influences the analysis and resolution of constitutional challenges that  
7 arise in this context”). This measure of deference is to be accorded regardless of  
8 the standard of review that applies. In *Goldman v. Weinberger*, 475 U.S. 503  
9 (1986), for example, a serviceman who was both an Orthodox Jew and an ordained  
10 rabbi challenged an Air Force regulation preventing him from wearing his  
11 yarmulke while in uniform, claiming that the regulation infringed upon his First  
12 Amendment freedom of exercise and religious belief. The Court declined to  
13 second-guess the military’s judgment that requiring servicemembers to wear only  
14 authorized headgear promoted military discipline and readiness, recognizing that  
15 “when evaluating whether military needs justify a particular restriction on  
16 religiously motivated conduct, courts must give great deference to the professional  
17 judgment of military authorities concerning the relative importance of a particular  
18 military interest.” *Id.* at 507. The Supreme Court thus rejected plaintiff’s First  
19 Amendment challenge and held that its “review of military regulations challenged  
20 on First Amendment grounds is far more deferential than constitutional review of  
21 similar laws or regulations designed for civilian society.” *Id.* at 507. The  
22 appellate courts in *Beller* and *Cook* recognized the management of the military as  
23 an important government interest, and the Ninth Circuit has reaffirmed that  
24 important governmental interest in *Witt*. *See Witt*, 527 F.3d at 821.

25 Accordingly, even if this Court were to decide to forgo rational-basis review  
26 and apply a higher standard of scrutiny, it is bound by the standard recognized in  
27 *Beller*. Under that standard, defendants are entitled to summary judgment.  
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1 **IV. LCR Cannot Satisfy its Burden under a Facial Challenge Regardless**  
2 **of the Standard of Review Applied by the Court**

3 As noted above, a facial challenge “is the most difficult challenge to mount  
4 successfully, since the challenger must establish that no set of circumstances exists  
5 under which the Act would be valid.” *Salerno*, 481 U.S. at 745.

6 In fact, as the First Circuit held, there are undoubtedly applications of  
7 DADT that are constitutional. *See Cook*, 528 F.3d at 56. Accordingly, any facial  
8 challenge must fail.

9 Moreover, given (1) the extensive findings contained in DADT’s legislative  
10 history, and (2) the substantial deference this Court owes to those findings  
11 particularly in the context of military affairs, LCR cannot discharge its heavy  
12 burden of establishing a facial substantive due process violation, regardless of the  
13 standard of review applied.

14 The Ninth Circuit already has observed that Congress in 1993 could have  
15 found that the DADT policy “further[s] military effectiveness.” *Philips v. Perry*,  
16 106 F.3d 1420, 1429 (9th Cir. 1997). The Ninth Circuit in *Philips* concluded that  
17 the Court of Appeals could not say that “the Navy’s concerns are based on ‘mere  
18 negative attitudes, or fear, unsubstantiated by factors which are properly  
19 cognizable’ by the military,” nor could it say that the rationale for the policy  
20 “lacks any ‘footing in the realities’ of the Naval environment in which Philips  
21 served.” *Id.* (quoting *Cleburne*, 473 U.S. at 448). Because the Ninth Circuit’s  
22 determination in this regard would apply equally to a case governed by rational  
23 basis or a case governed by some form of heightened review, LCR cannot satisfy  
24 its burden of proof under its facial challenge regardless of the standard of review.



1 **V. Because the Only “Evidence” Appropriate for Consideration in this**  
2 **Case Is the Statute and Legislative History, a Trial Concerning**  
3 **LCR’s Facial Constitutional Challenge Is Unwarranted**

4 In its May 27, 2010 Order, this Court granted defendants leave to file “any  
5 further supporting evidence” in support of their summary judgment motion. *See*  
6 Doc. 170 at 27. Regardless of the level of scrutiny the Court ultimately employs  
7 in this case, however, the question of DADT’s constitutionality should be decided  
8 as a matter of law without reference to evidence adduced through discovery.  
9 Accordingly, a trial on LCR’s facial constitutional challenge is inappropriate.

10 In its opposition to summary judgment, LCR relies heavily upon expert  
11 witnesses and a host of documents – many of which post-date the enactment of  
12 DADT. As an initial matter, the Supreme Court has made abundantly clear that a  
13 legislative choice subject to the rational basis test “is not subject to courtroom  
14 fact-finding and may be based on rational speculation unsupported by evidence or  
15 empirical data.” *FCC v. Beach Commc’n*, 508 U.S. 307, 315 (1993). LCR’s  
16 reliance on expert witnesses and numerous documents is therefore particularly  
17 inappropriate.

18 Moreover, the Supreme Court has rejected reliance upon expert testimony to  
19 support a constitutional challenge to military policy. *See Goldman*, 475 U.S. at  
20 509. As noted above, in *Goldman*, an Air Force colonel challenged on First  
21 Amendment Free Exercise grounds an Air Force regulation banning the wearing of  
22 a yarmulke while in uniform. *Id.* at 504. As in this case, the plaintiff in *Goldman*  
23 sought to introduce expert testimony to contradict the Air Force’s rationale for the  
24 ban. *Id.* at 509. The Supreme Court rejected that notion out of hand, finding  
25 expert testimony to have no relevance in the context of a constitutional challenge  
26 to military policy, and held that “[w]hether or not expert witnesses may feel that  
27 religious exceptions to [the air force regulation] are desirable is quite beside the  
28 point. The desirability of dress regulations in the military is decided by the

1 appropriate military officials, and they are under no constitutional mandate to  
2 abandon their considered professional judgment.” *Id.*<sup>5</sup> As in *Goldman*, the  
3 legislative history in this case reflects the substantial congressional and military  
4 deliberation on this issue, and LCR’s attempt to contradict that deliberation  
5 through the submission of expert testimony should be rejected given the deference  
6 owed to Congress and the military in this area.

7 In short, it is inappropriate for courts to pass on the constitutional validity of  
8 a duly enacted federal statute governing military matters based on judicial  
9 assessments that the facts underlying Congress’s military judgments have  
10 changed. Instead, it is up to the political branches to determine whether changed  
11 circumstances warrant a change in military policy – something they are actively  
12 undertaking at this time. Accordingly, defendants respectfully submit that  
13 conducting a trial regarding LCR’s facial constitutional claims is unnecessary, as  
14 there are no legally relevant facts that could be adduced beyond the statute and  
15 legislative history.<sup>6</sup>

## 16 CONCLUSION

17 For the foregoing reasons, the Court should defer ruling on LCR’s challenge  
18 to allow the political branches to properly consider whether the implementation of  
19 a repeal of the policy would be consistent with the standards of military readiness,  
20

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21 <sup>5</sup> Similarly, in the context of a First Amendment challenge to the federal bankruptcy  
22 statute, the Supreme Court earlier this year rejected the notion that the government must adduce  
23 evidence before banning misleading advertising, instead crediting “[e]vidence in the  
24 congressional record demonstrating a pattern of” misleading conduct. *Milavetz, Gallop &*  
*Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1340 (2010).

25 <sup>6</sup> While defendants respectfully disagree with the Court’s conclusions regarding standing  
26 in its Order of May 27, 2010, any trial in this case should be limited to the question of LCR’s  
27 standing, as to which there remain one or more “genuine issues of fact.” *See* Doc. 170 at 21.  
28 Standing is a fundamental, threshold basis for plaintiff’s cause of action, and it is the Court’s  
institutional obligation to ensure that it has subject-matter jurisdiction before it proceeds to the  
merits.

1 military effectiveness, and unit cohesion. If the Court declines to do so, it should  
2 apply rational basis review to LCR's facial constitutional challenge, and grant  
3 defendants' motion for summary judgment. To the extent the Court concludes that  
4 heightened scrutiny applies, it should apply the standard articulated in *Beller* and  
5 grant defendants' motion for summary judgment, particularly given that LCR  
6 brings only a facial challenge to the statute.

7 Dated: June 9, 2010

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