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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 M. GATES, Secretary of  
 18 Defense,  
 19 Defendants.

No. CV04-8425 VAP (Ex)

DEFENDANTS' NOTICE OF  
 MOTION AND MOTION *IN*  
*LIMINE* TO EXCLUDE LAY  
 WITNESS TESTIMONY

DATE: June 28, 2010

TIME: 2:30 p.m.

BEFORE: Judge Phillips

22 Filed herewith:

- 23 1. Notice of Motion and Motion *in Limine* to Exclude Lay Witness
- 24 Testimony
- 25 2. Memorandum of Points and Authorities
- 26 3. Attachments 1 through 9
- 27 4. Proposed Order

28 DEFENDANTS' NOTICE OF MOTION  
 AND MOTION *IN LIMINE* TO EXCLUDE  
 LAY WITNESS TESTIMONY

UNITED STATES DEPARTMENT OF JUSTICE  
 CIVIL DIVISION, FEDERAL PROGRAMS BRANCH  
 P.O. Box 883, BEN FRANKLIN STATION  
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**NOTICE OF MOTION AND MOTION *IN LIMINE***  
**TO EXCLUDE LAY WITNESS TESTIMONY**

**NOTICE IS HEREBY GIVEN** that on June 28, 2010, at 2:30 p.m., in the Courtroom of the Honorable Virginia A. Phillips, United States District Judge, Defendants United States of America and the Secretary of Defense (collectively, “Defendants”), by and through counsel, will move *in limine* to exclude certain lay witness testimony that Plaintiff intends to offer into evidence at trial. The Motion will be based upon these moving papers, the attached Memorandum of Points and Authorities in support of the Motion, and upon such other and further arguments, documents, and grounds as may be advanced in the future.

This Motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place by telephone on June 8, 2010.

Dated: June 18, 2010

Respectfully submitted,

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**TABLE OF CONTENTS**

1

2

3

4 INTRODUCTION ..... 1

5 BACKGROUND ..... 3

6

7 ARGUMENT ..... 5

8 I. Plaintiff Failed to Disclose the Identities of Eight  
of its Lay Witnesses as Required by the Rules ..... 6

9 II. All of the Contemplated Lay Witness Testimony Regarding  
10 the Merits Is Irrelevant in this Facial Challenge ..... 8

11 III. Presenting Testimony by *Six* Former Service  
12 Members Would Constitute “Needless Presentation  
of Cumulative Evidence” ..... 12

13 IV. The Designated Testimony of the 30(b)(6) Witnesses  
14 Is Irrelevant to the Extent it Constitutes the Personal  
Views of the Witnesses ..... 13

15 V. At Least Three Specific Areas Inquired into in the  
30(b)(6) Depositions Are Irrelevant ..... 15

16 A. Testimony Regarding Research and Developments  
17 that Occurred After Enactment of 10 U.S.C. § 654  
Is Irrelevant ..... 16

18 B. Testimony Regarding Enlistment Waivers for  
19 Convicted Felons Is Irrelevant ..... 17

20 C. Testimony Regarding the Experiences of Foreign  
21 Militaries Is Irrelevant ..... 18

22 VI. Certain of the Specific Questions and Answers  
23 Designated by the Plaintiff Are Also Inadmissible  
for Various Reasons ..... 19

24 CONCLUSION ..... 20

25

26

27

28

**TABLE OF AUTHORITIES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

<u>CASES</u>	<u>PAGE(S)</u>
<i>Brazos River Auth. v. GE Ionics, Inc.</i> , 469 F.3d 416 (5th Cir. 2006) .....	13
<i>City of Las Vegas v. Foley</i> , 747 F.2d 1294 (9th Cir. 1984) .....	16
<i>Detoy v. City &amp; County of San Francisco</i> , 196 F.R.D. 362 (N.D. Cal. 2000) .....	14
<i>Equity Lifestyle Props., Inc. v. County of San Luis Obispo</i> , 548 F.3d 1184 (9th Cir. 2008) .....	16
<i>FCC v. Beach Communications</i> , 508 U.S. 307 (1993) .....	1, 8, 10
<i>Falchenberg v. New York State Dep’t of Educ.</i> , 642 F. Supp. 2d 156 (S.D.N.Y. 2008) .....	14
<i>Goldman v. Weinberger</i> , 475 U.S. 503 (1986) .....	10, 11
<i>Gonzales v. Carhart</i> , 550 U.S. 124 (2007) .....	11
<i>Great American Ins. Co. v. Vegas Constr. Co.</i> , 251 F.R.D. 534 (D. Nev. 2008) .....	13
<i>Hunt v. Washington State Apple Adver. Comm’n</i> , 432 U.S. 333 (1977) .....	12
<i>MDK, Inc. v. Village of Grafton</i> , 277 F. Supp. 2d 943 (E.D. Wis. 2003) .....	10
<i>Medic Alert Found. U.S., Inc. v. Corel Corp.</i> , 43 F. Supp. 2d 933 (N.D. Ill. 1999) .....	14
<i>Metro Broadcasting, Inc. v. FCC</i> , 497 U.S. 547 (1990) .....	9
<i>Philips v. Perry</i> , 106 F.3d 1420 (9th Cir. 1997) .....	8
<i>Rostker v. Goldberg</i> , 453 U.S. 57 (1981) .....	11
<i>Sanitation &amp; Recycling Indus., Inc. v. City of New York</i> , 928 F. Supp. 407 (S.D.N.Y. 1996) .....	10

1 *Shimozono v. May Dep't Stores Co.*, No. 00-4261 WJR (AJWx),  
2002 WL 34373490 (C.D. Cal. Nov. 20, 2002) ..... 6

2 *Sugar Ass'n, Inc. v. McNeil-PPC, Inc.*, No. CV 04-10077 DSF (Rzx),  
3 2008 WL 4755611 (C.D. Cal. Jan. 7, 2008) ..... 5

4 *Turner Broadcasting Sys., Inc. v. FCC*,  
5 520 U.S. 180 (1997) ..... 9

6 *United States v. Bynum*,  
7 327 F.3d 986 (9th Cir. 2003) ..... 10

8 *United States v. Connors*,  
9 825 F.2d 1384 (9th Cir. 1987) ..... 5

10 *United States v. Hooton*,  
11 662 F.2d 628 (9th Cir. 1981) ..... 12

12 *United States v. Ives*,  
13 609 F.2d 930 (9th Cir. 1979) ..... 12

14 *United States v. Jackson*,  
15 84 F.3d 1154 (9th Cir. 1996) ..... 16

16 *Vance v. Bradley*,  
17 440 U.S. 93 (1979) ..... 9

18 *Washington State Grange v. Washington State Republican Party*,  
19 552 U.S. 442 (2008) ..... 10, 11

20 *Western & S. Life Ins. Co. v. State Bd. of Equalization*,  
21 451 U.S. 648 (1981) ..... 8

22 *Yeti by Molly Ltd. v. Deckers Outdoor Corp.*,  
23 259 F.3d 1101 (9th Cir. 2001) ..... 6

24 STATUTES

25 10 U.S.C. § 504 ..... 4, 17, 18

26 10 U.S.C. § 654 ..... passim

27 FEDERAL RULES OF CIVIL PROCEDURE

28 Rule 26 ..... passim

Rule 30 ..... passim

Rule 32 ..... 5, 19

Rule 33 ..... 7

1 Rule 37 ..... 1, 6

2

3 FEDERAL RULES OF EVIDENCE

4 Rule 401 ..... 14

5 Rule 402 ..... 8, 14

6 Rule 403 ..... 12

7

8 LEGISLATIVE HISTORY

9 S. Rep. No. 103-112 (1993) ..... 9, 18

10

11

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## INTRODUCTION

1  
2 This is a facial constitutional challenge to 10 U.S.C. § 654, known as Don't  
3 Ask, Don't Tell ("DADT"), and the Court has previously held that rational basis  
4 review applies here. Plaintiff Log Cabin Republicans ("LCR") intends to offer into  
5 evidence at trial the testimony of *fourteen* lay witnesses – eleven of them live and  
6 three of them by deposition. Six of the proposed witnesses are former military  
7 service members who were discharged under DADT; three are current officers of  
8 LCR; two are either former officers of LCR or former counsel to the organization;  
9 and three (those whose testimony LCR seeks to present by deposition) were  
10 designated by Defendants to be deposed under Rule 30(b)(6) of the Federal Rules  
11 of Civil Procedure.

12 The testimony of *twelve* of these lay witness – or, alternatively, portions of  
13 their testimony – should be excluded for various reasons.<sup>1</sup> First, LCR failed to  
14 reveal the identity of *eight* of these witnesses in either its initial disclosures or its  
15 responses to Defendants' interrogatories, and did not otherwise make known the  
16 identity of these individuals during discovery. Thus, the testimony of these eight  
17 witnesses should be excluded for this reason alone. *See* Fed. R. Civ. P.  
18 26(a)(1)(A)(i), 37(c)(1).

19 Second, since this is a facial constitutional challenge, any "courtroom  
20 fact-finding" would be inappropriate, and *all* evidence on the merits beyond the  
21 statute and legislative record should be excluded (that is, all testimony not going  
22 solely to LCR's standing). *FCC v. Beach Communications*, 508 U.S. 307, 315  
23 (1993). This is especially true regarding the six former service members, who,  
24 based on information provided informally by counsel for LCR, are expected to

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25  
26 <sup>1</sup> Defendants do not move to exclude Terry Hamilton or Philip Bradley as witnesses.  
27 LCR identified them during discovery, and their testimony goes to standing rather than to the  
28 merits. Defendants also do not move to exclude the testimony of Alexander Nicholson *on the*  
*issue of standing*, because he was also properly identified to the Defendants. This motion does,  
however, apply to any merits-related testimony by Mr. Nicholson.



1 offer testimony regarding the circumstances surrounding their discharges under  
2 DADT. Since this is a facial challenge to DADT, any testimony regarding the  
3 *application* of the statute to an individual would be irrelevant under Federal Rule  
4 of Evidence 402 and should be excluded as such. Third, to the extent the Court  
5 were to accept testimony from any former service members, testimony from the *six*  
6 such persons identified by LCR would be cumulative.

7 Fourth, regarding the three 30(b)(6) witnesses, portions of the designated  
8 testimony constitute the personal testimony of the witnesses rather than the testi-  
9 mony of the organizational deponent under Rule 30(b)(6) – because the questions  
10 either exceeded the permissible scope of the deposition notice or explicitly sought  
11 the witness’s personal views – and should be excluded as irrelevant. Fifth,  
12 assuming *any* testimony in this facial challenge were otherwise appropriate,  
13 portions of the designated 30(b)(6) testimony are irrelevant for the additional  
14 reason that the questions sought information on subjects that have no bearing on  
15 the constitutionality of DADT – specifically, research and other developments that  
16 occurred after Congress enacted the statute; the circumstances in which the U.S.  
17 military allows a person to enlist despite a prior felony conviction; and the  
18 experiences of foreign militaries that permit open service by gays and lesbians.

19 Finally, certain of the individual questions posed during the 30(b)(6)  
20 depositions are otherwise objectionable, such as for lack of foundation, and the  
21 testimony given in response to those questions should be excluded on that basis.  
22 Those specific objections are noted in Attachments 7, 8, and 9 hereto.

23 For these reasons, most of LCR’s contemplated lay witness testimony, as set  
24 forth in greater detail further below, should be excluded from the evidence at trial.

**BACKGROUND**

LCR has filed its “Trial Witness List,” which includes the following lay witnesses (Doc. 173).<sup>2</sup> Based on the summary judgment briefing in this case and on other information provided by counsel for LCR, Plaintiff apparently intends to offer each witness in the capacity indicated below:

Mike Almy	Former service member
Jenny Kopfstein	Former service member
Anthony Loverde	Former service member
J. Alexander Nicholson III	Former service member
Joseph Christopher Rocha	Former service member
Stephen Vossler	Former service member
Philip Bradley	LCR board member
Craig Engle	Outside counsel to LCR
Jamie Ensley	President of LCR Georgia chapter
Terry Hamilton	LCR national chairman
C. Martin Meekins	Former LCR board member and former outside counsel to LCR
Jamie Scott Brady	30(b)(6) witness
Dennis Drogo	30(b)(6) witness
Paul Gade	30(b)(6) witness

Except for the 30(b)(6) witnesses, only three of these witnesses were identified by name during the discovery period in this case: Alexander Nicholson, who was identified as a potential lay witness in LCR’s initial disclosures (Attachment 1 hereto) and in response to Defendants’ interrogatory seeking the identify of “each person likely to have information relating to your case”

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<sup>2</sup> In addition to the lay witnesses addressed in this motion, LCR’s Trial Witness List includes seven proposed expert witnesses, whose intended testimony is addressed in Defendants’ Motion *in Limine* Regarding Plaintiff’s Expert Witnesses.

1 (Attachment 2 hereto); Terry Hamilton, who was also identified in response to the  
2 above-quoted interrogatory; and Philip Bradley, who was identified during Mr.  
3 Hamilton's deposition as knowing the identity of "John Doe," the anonymous  
4 "member" upon whom LCR relies for standing. Neither under Rule 26(a) or 26(e)  
5 nor in response to Defendants' discovery requests did LCR ever identify the other  
6 lay witnesses nor state the contemplated subjects of their testimony. In an email on  
7 June 7, 2010, after the close of discovery, counsel for LCR stated for the first time  
8 that the six former service members listed above were expected to testify "about  
9 the circumstances surrounding their discharges pursuant to DADT" (Attachment 4  
10 hereto).

11 The 30(b)(6) witnesses listed above – Jamie Scott Brady, Dennis Drogo, and  
12 Paul Gade – were identified pursuant to a notice of deposition served by LCR on  
13 the Defendants, seeking testimony on seventeen subjects (Doc. 118-2). Ruling on  
14 a motion to compel filed by LCR, the Court ordered Defendants to produce one or  
15 more persons to testify regarding ten of those subjects, but denied LCR's motion as  
16 to the other seven matters (Doc. 127). For example, the Court did not permit LCR  
17 to inquire about "Defendants' contention that [DADT] is rationally related to a  
18 legitimate purpose," or "[s]tatistics regarding discharges from 1994 through the  
19 present pursuant to [DADT]," or "[t]he fiscal effect of [DADT]."

20 Defendants designated three 30(b)(6) witnesses to address the subjects  
21 permitted by the Court: Lt. Col. Jamie Scott Brady was designated to address  
22 items 1, 2, 3, 4, 7, 10, 15, and 17 in LCR's deposition notice (Doc. 118-2); Dr. Paul  
23 Gade was designated to address item 6 (related to "the experience of the armed  
24 forces of nations other than the United States with military service by individuals  
25 with a homosexual orientation"); and Mr. Dennis Drogo was designated to address  
26 item 14 (related to Defendants' implementation of 10 U.S.C. § 504, which permits  
27 enlistment of persons convicted of felonies in some circumstances). Plaintiff  
28 deposed all three witnesses under Rule 30(b)(6), and has now designated portions

1 of the Brady and Drogo depositions, and nearly all of the Gade deposition, for trial  
 2 under Rule 32(a) (Attachment 5 hereto).

3 **ARGUMENT**

4 LCR failed to identify eight of its witnesses to the Defendants as required by  
 5 the rules, and those witnesses should be excluded for that reason alone.

6 Additionally, from a more substantive standpoint, the testimony of *all* of LCR's  
 7 witnesses, except testimony regarding standing, should be excluded as irrelevant in  
 8 this facial challenge to a statute. The proponent of evidence bears the burden of  
 9 showing that it is both relevant and admissible, and LCR cannot do so as to the  
 10 testimony addressed in this motion. *See United States v. Connors*, 825 F.2d 1384,  
 11 1390 (9th Cir. 1987); *Sugar Ass'n, Inc. v. McNeil-PPC, Inc.*, No. CV 04-10077  
 12 DSF (Rzx), 2008 WL 4755611, at \*1 (C.D. Cal. Jan. 7, 2008) (citing *Bourjaily v.*  
 13 *United States*, 483 U.S. 171, 175 (1987)).

14 Furthermore, assuming any extra-legislative evidence were deemed relevant  
 15 here, the testimony of LCR's lay witnesses should be excluded, either entirely or in  
 16 part, for *other* reasons as stated in the following tables and as further explained  
 17 below:

18 **Former military service members**

19	Mike Almy	Not properly identified; cumulative
20	Jenny Kopfstein	"
21	Anthony Loverde	"
22	Joseph C. Rocha	"
23	Stephen Vossler	"
24	Alexander Nicholson	Testimony regarding discharge irrelevant in facial 25 challenge

26 **Persons connected with LCR**

27	Craig Engle	LCR outside counsel	Not properly identified; cumulative
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1 Jamie Ensley Pres. of Ga. chapter Not properly identified; cumulative

2 C. Martin Meekins Former board member Not properly identified; cumulative  
3 and outside counsel

4  
5 30(b)(6) witnesses<sup>3</sup>

6 Jamie Scott Brady Irrelevant; some testimony also personal

7 Dennis Drogo Irrelevant; some testimony also personal

8 Paul Gade Some testimony personal or otherwise irrelevant

9  
10 **I. Plaintiff Failed to Disclose the Identities of Eight**  
11 **of its Lay Witnesses as Required by the Rules**

12 Rule 37(c)(1) of the Federal Rules of Civil Procedure provides, “[i]f a party  
13 fails to provide information or identify a witness as required by Rule 26(a) or (e),  
14 the party is not allowed to use that information or witness to supply evidence on a  
15 motion, at a hearing, or at a trial unless the failure was substantially justified or is  
16 harmless.” Given the express language of this provision, the Ninth Circuit has  
17 found these sanctions to be “self-executing” and “automatic” unless the non-  
18 disclosing party shows that its failure to disclose was “substantially justified or  
19 harmless.” *Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th  
20 Cir. 2001) (quoting advisory committee note to Fed. R. Civ. P. 37); *see Shimozono*  
21 *v. May Dep’t Stores Co.*, No. 00-4261 WJR (AJWx), 2002 WL 34373490, at  
22 \*17-19 (C.D. Cal. Nov. 20, 2002) (excluding trial witnesses not properly  
23 disclosed).

24  
25  
26 <sup>3</sup> In addition to the bases for exclusion referred to in this table regarding the 30(b)(6)  
27 witnesses (and in addition to the overall irrelevance of extra-legislative evidence in a facial  
28 challenge), Defendants have other objections to specific questions posed to these three witnesses,  
as noted in Attachments 7, 8, and 9 hereto.

1 Here, there is no justification for LCR's failure to properly and timely  
2 identify *eight* of its *eleven* lay witnesses (excluding the 30(b)(6) witnesses). Nor  
3 can there be any serious question about prejudice: Defendants were denied the  
4 opportunity to depose these non-disclosed witnesses during the discovery period,  
5 and thus to prepare adequately for their testimony at trial. Accordingly, for this  
6 reason alone, the Court should exclude in their entirety the testimony of all  
7 witnesses not properly and timely identified.

8 Former military service members

9 Other than Alexander Nicholson, LCR did not provide the names of the  
10 military service members it intended to call at trial (Mike Almy, Jenny Kopfstein,  
11 Anthony Loverdel, Joseph Christopher Rocha, and Stephen Vossler) until May 17,  
12 2010, after Defendants had contacted counsel for LCR about the need to conduct a  
13 Rule 16 conference (Attachment 3 hereto). Even then, the addresses and telephone  
14 numbers required by Rule 26(a)(1)(A)(i) were not provided until June 7, 2010  
15 (Attachment 4 hereto). As this Court has said, "where a party fails to disclose the  
16 identity of a witness required by either Rule 26(a) or otherwise requested during  
17 discovery without substantial justification, the party may not later rely on evidence  
18 from that witness . . . to support its claims or defenses" (Doc. 170 at 7-8).

19 Based on pre-motion consultation with counsel for LCR (Attachment 3),  
20 LCR may argue that these former service members were "identified" in Plaintiff's  
21 initial disclosures, which stated that LCR intended to call "[f]ormer service  
22 members who have been discharged from the military under DADT" (Attachment  
23 1). Rule 26(a) requires, however, that contemplated witnesses be identified *by*  
24 *name*; thus, a mere reference to a category of witnesses is not sufficient. LCR may  
25 also assert that Defendants can now depose these individuals before trial  
26 (Attachment 3). But Defendants should not be pressed into taking six depositions  
27 while attempting to prepare for trial, as a remedy to LCR's refusal to comply with  
28 its discovery obligations under Rules 26(a) and (e) and Rule 33.

Persons connected with LCR

LCR submitted the declarations of Craig Engle, Jamie Ensley, and C. Martin Meekins during the summary judgment briefing (Docs 144, 146, 163), in an effort to establish standing. Those witnesses, however, were never identified under Rule 26(a) or in response to Defendants' interrogatories. Defendants acknowledge this Court's holding that Rule 26(a) did not require disclosure of Mr. Meekins (Doc. 170), but respectfully continue to believe that these witnesses should have been so disclosed.<sup>4</sup>

**II. All of the Contemplated Lay Witness Testimony Regarding the Merits Is Irrelevant in this Facial Challenge**

All of LCR's contemplated lay witness testimony *on the merits* should be excluded in this facial challenge to a federal statute pursuant to Federal Rule of Evidence 402. Such testimony would be irrelevant regardless of the applicable standard of review.

This Court already has determined that rational basis review is the correct standard for LCR's facial constitutional challenge (Doc. 83 at 14-18). In rational basis review of legislative action, the government need only show that the legislature "*rationality could have believed*" that the statute in question would promote its objectives. *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-72 (1981) (emphasis in original); *see Philips v. Perry*, 106 F.3d 1420, 1424-29 (9th Cir. 1997) (government has no obligation to produce evidence to sustain DADT). A legislative choice subject to the rational basis test "*is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.*" *FCC v. Beach Communications*, 508 U.S. 307, 315 (1993) (emphasis added). Rational basis review "is not a license for

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<sup>4</sup> The parties have reached an agreement in principle, not yet finalized in writing, under which LCR will remove Craig Engle from its witness list in exchange for Defendants' stipulation to the authenticity and admissibility of the exhibit to Mr. Engle's declaration (Doc. 144).



1 courts to judge the wisdom, fairness, or logic of legislative choices.” *Id.* at 313.  
2 Rather, “those challenging the legislative judgment must convince the court that  
3 the legislative facts on which the classification is apparently based could not  
4 reasonably be conceived to be true by the governmental decisionmaker.” *Vance v.*  
5 *Bradley*, 440 U.S. 93, 111 (1979).

6 “Courtroom fact-finding” in the context of rational basis review is especially  
7 inappropriate where Congress has made its own express findings based on an  
8 extensive legislative record. Courts “must pay close attention to . . . the fact-  
9 finding of Congress” and must give its decisions “great weight” on questions of  
10 fact that underlie constitutional issues. *Metro Broadcasting, Inc. v. FCC*, 497 U.S.  
11 547, 569 (1990), *overruled on other grounds, Adarand Constructors, Inc. v. Peña*,  
12 515 U.S. 200 (1995). The Judiciary owes substantial deference to its co-equal  
13 Branch’s legislative findings, both “out of respect for [Congress’] authority to  
14 exercise the legislative power” and because Congress “is far better equipped than  
15 the judiciary to amass and evaluate the vast amounts of data bearing upon  
16 legislative questions.” *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180,  
17 195-96 (1997) (internal quotation marks omitted). Whether conflicting evidence  
18 may exist in the record is irrelevant: “The Constitution gives to Congress the role  
19 of weighing conflicting evidence in the legislative process.” *Id.* at 199.

20 In this case, Plaintiff challenges statutory judgments reached after extensive  
21 congressional hearings. Congress held “detailed hearings” over several days  
22 regarding open homosexuality in the military, conducted a field visit to a naval  
23 facility, and heard testimony from persons on all sides of the debate. *See S. Rep.*  
24 *No. 103-112*, at 263, 268-70 (1993), *available at* 1993 WL 286446, at \*\*181,  
25 \*\*187-89. Based on its “weighing [of this] conflicting evidence,” *see Turner*  
26 *Broadcasting Sys., Inc.*, 520 U.S. at 199, Congress made fifteen express findings  
27 explaining the legislative judgment embodied in the current statute. 10 U.S.C.  
28 § 654(a).



1 Notwithstanding this extensive legislative record and this Court's holding  
2 that LCR's challenge is subject to rational basis review, Plaintiff asks the Court to  
3 hear and consider testimony on the merits from six former military service  
4 members and three 30(b)(6) designees of the Department of Defense. Receiving  
5 any such testimony in the context of this case, however, would constitute inappro-  
6 priate "courtroom fact-finding" and would violate well-established principles  
7 requiring deference to congressional fact-finding and congressional judgment. *See*  
8 *Beach Communications*, 508 U.S. at 315.

9 Moreover, given that this is a facial challenge to a statute, any testimony on  
10 the merits would be inappropriate even if this Court were to apply a *heightened*  
11 level of scrutiny. As the Ninth Circuit has observed, "a facial challenge to the  
12 constitutionality of a statute is a question of law," *United States v. Bynum*, 327  
13 F.3d 986, 990 (9th Cir. 2003); thus, "[i]n determining whether a law is facially  
14 invalid, [a court] must be careful not to go beyond the statute's facial  
15 requirements." *Washington State Grange v. Washington State Republican Party*,  
16 552 U.S. 442, 449-50 (2008); *accord MDK, Inc. v. Village of Grafton*, 277  
17 F. Supp. 2d 943, 947 (E.D. Wis. 2003) ("A facial challenge alleges that the law  
18 cannot constitutionally be applied to anyone, no matter what the facts of the  
19 particular case may be.") (citing *Forsyth County v. Nationalist Movement*, 505 U.S.  
20 123, 133 n.10 (1992)); *Sanitation & Recycling Indus., Inc. v. City of New York*, 928  
21 F. Supp. 407, 419 n.8 (S.D.N.Y. 1996) ("[A] facial challenge is made in a 'factual  
22 vacuum'; any factual determinations are irrelevant"). Indeed, the Supreme Court  
23 has specifically rejected reliance on evidence outside the statute and legislative  
24 history to support a constitutional challenge under heightened review. *See*  
25 *Goldman v. Weinberger*, 475 U.S. 503, 509-10 (1986) (rejecting expert testimony  
26 in First Amendment challenge to military policy regarding the wearing of  
27 yarmulka, and holding that such evidence has no relevance in the context of a  
28 constitutional challenge to military policy). The Court's holding in *Goldman* is

1 especially pertinent here, for, like the plaintiff in that case, LCR challenges a  
2 policy regarding the military, to which the courts must accord “great deference.”  
3 *Goldman, id.* at 507; *see Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981)  
4 (“[J]udicial deference to . . . congressional exercise of authority is at its apogee  
5 when legislative action under the congressional authority to raise and support  
6 armies and make rules and regulations for their governance is challenged.”).

7 Furthermore, testimony on the merits from the six former military service  
8 members on LCR’s witness list would be particularly inappropriate here. Counsel  
9 for LCR has indicated that these individuals will be called to testify “about the  
10 circumstances surrounding their discharges pursuant to DADT” (Attachment 4  
11 hereto). Plaintiff’s proposed findings of fact and conclusions of law describe four  
12 of these former service members and their discharges in detail, asserting that they  
13 are “examples of how DADT does not further its stated purposes” (Attachment 6  
14 hereto at 35). But no such “examples” are appropriate in a *facial* challenge to a  
15 statute. Testimony regarding how a statute has been *applied* is patently irrelevant  
16 and inappropriate in a *facial* challenge. For example, whether the application of  
17 DADT in a given instance furthers the statute’s purposes is irrelevant to the  
18 statute’s facial validity. As noted already, the Supreme Court has made clear that  
19 courts must not “go beyond the statute’s facial requirements” in adjudicating facial  
20 challenges. *Washington State Grange*, 552 U.S. at 449-50. “It is neither [the  
21 court’s] obligation nor within [the court’s] traditional institutional role to resolve  
22 questions of constitutionality with respect to each potential situation that might  
23 develop.” *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (considering a facial  
24 substantive due process challenge).

25 LCR’s intent to present the testimony of former service members “about the  
26 circumstances surrounding their discharges” also contradicts its own assertion of  
27 associational standing in this case. To establish associational standing, LCR must  
28 demonstrate as a threshold matter that “neither the claim asserted nor the relief

1 requested requires the participation of individual members [of the plaintiff organi-  
2 zation] in the lawsuit.” *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S.  
3 333, 343 (1977). Although it is unknown whether any of the former service  
4 members except Alexander Nicholson is a member of LCR, if Plaintiff believes  
5 that deciding its claims requires presenting “as-applied” testimony, then LCR  
6 would appear to lack associational standing under the *Hunt* test. LCR cannot have  
7 it both ways: purporting to pursue a facial challenge under associational standing,  
8 while at the same time presenting testimony that would be appropriate only in an  
9 as-applied challenge.

10 Accordingly, on this basis alone, the Court should exclude in their entirety  
11 the testimony of Mike Almy, Jenny Kopfstein, Anthony Loverde, Joseph  
12 Christopher Rocha, Stephen Vossler, Jamie Scott Brady, Dennis Drogo, and Paul  
13 Gade. The Court should also exclude, for the same reason, any testimony of J.  
14 Alexander Nicholson III that goes to the merits rather than solely to LCR’s  
15 standing.

### 16 **III. Presenting Testimony by Six Former Service Members Would** 17 **Constitute “Needless Presentation of Cumulative Evidence”**

18 Under Federal Rule of Evidence 403, a court may exclude relevant evidence  
19 “if its probative value is substantially outweighed by . . . considerations of . . .  
20 needless presentation of cumulative evidence.” Cumulative evidence is evidence  
21 that “replicates other admitted evidence.” *United States v. Ives*, 609 F.2d 930, 933  
22 (9th Cir. 1979). A district court has “broad discretion” to exclude cumulative  
23 evidence under this Rule. *United States v. Hooton*, 662 F.2d 628, 636 (9th Cir.  
24 1981).

25 In this facial constitutional challenge, LCR seeks to present six witnesses to  
26 testify regarding how the challenged statute has been applied to them. Assuming  
27 any “as-applied” testimony were appropriate or relevant at all, there is no conceiv-  
28 able reason why the Court would need to hear the stories of six discharged service

1 members. Especially in the context of this facial challenge, such a parade of  
 2 service members would be a paradigm of the “needless presentation of cumulative  
 3 evidence.”

4 Accordingly, assuming the Court accepts testimony by any of the former  
 5 service members designated as lay witnesses by LCR (Mike Almy, Jenny  
 6 Kopfstein, Anthony Loverde, J. Alexander Nicholson III, Joseph Christopher  
 7 Rocha, or Stephen Vossler), only one such witness should be heard regarding the  
 8 application of DADT.<sup>5</sup>

9 **IV. The Designated Testimony of the 30(b)(6) Witnesses Is Irrelevant to**  
 10 **the Extent it Constitutes the Personal Views of the Witnesses**

11 Rule 30(b)(6) of the Federal Rules of Civil Procedure allows a party to seek  
 12 the deposition of a governmental agency or other organization on matters described  
 13 “with reasonable particularity” in the notice or subpoena. The organization  
 14 designates one or more persons to testify on its behalf regarding those matters,  
 15 setting out “the matters on which each person designated will testify.” The persons  
 16 so designated are to “testify about information known or reasonably available to  
 17 the organization.” “The testimony of a Rule 30(b)(6) designee represents the  
 18 knowledge of the [entity], not of the individual deponents.” *Great American Ins.*  
 19 *Co. v. Vegas Constr. Co.*, 251 F.R.D. 534, 538 (D. Nev. 2008) (internal quotation  
 20 marks omitted); *accord Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 433  
 21 (5th Cir. 2006) (“[A] rule 30(b)(6) designee does not give his personal opinions,  
 22 but presents the [designating entity’s] ‘position’ on the topic.”). By the same  
 23 token, if a deposing party asks questions beyond the scope of a Rule 30(b)(6)  
 24 notice, the answers to those questions do not bind the entity being deposed and are

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25 <sup>5</sup> Aside from testimony on the merits regarding the application of DADT, Defendants  
 26 understand that five of the individuals on LCR’s witness list are expected to provide testimony  
 27 going to standing – that is, Philip Bradley, Craig Engle, Jamie Ensley, Terry Hamilton, and  
 28 Alexander Nicholson. To the extent the testimony of any of these witnesses is cumulative, it,  
 too, should be excluded on that basis.

1 treated as the “answers or opinions” of the witness as an individual. *See Detoy v.*  
2 *City & County of San Francisco*, 196 F.R.D. 362, 365-67 (N.D. Cal. 2000); *accord*  
3 *Falchenberg v. New York State Dep’t of Educ.*, 642 F. Supp. 2d 156, 164  
4 (S.D.N.Y. 2008) (“Questions and answers exceeding the scope of the 30(b)(6)  
5 notice will not bind the corporation, but are merely treated as the answers of the  
6 individual deponent.”).

7 In the three depositions conducted in this case under Rule 30(b)(6), counsel  
8 for LCR asked numerous questions outside the permitted area or areas for which  
9 each witness had been designated, including questions regarding topics as to which  
10 the Court had expressly denied LCR’s motion to compel (Doc. 127). For example,  
11 Lt. Col. Brady was asked, “Are you aware of any report or study of the number of  
12 women officers discharged under Don’t Ask, Don’t Tell”? (Attachment 7 hereto at  
13 40:1-3), which falls under item 12 in the notice of deposition (“Statistics regarding  
14 discharges . . . pursuant to [DADT]”), as to which the Court expressly denied  
15 LCR’s motion to compel (Doc. 127). Additionally, two of the witnesses, Lt. Col.  
16 Brady and Dr. Gade, were expressly asked about their “personal” views on a  
17 number of matters. For example, Lt. Col. Brady was asked his “personal opinion”  
18 about whether knowing that a fellow service member was gay would affect his  
19 working relationship with such person or would cause him personal concerns about  
20 privacy (Attachment 7 at 248:22-258:6).

21 Under the Federal Rules of Evidence, evidence is irrelevant if it has no  
22 “tendency to make the existence of any fact that is of consequence to the determi-  
23 nation of the action more probable or less probable.” *See Fed. R. Evid. 401.*  
24 “Evidence which is not relevant is not admissible.” *See Fed. R. Evid. 402.* This  
25 action is a facial challenge to the constitutionality of the Don’t Ask, Don’t Tell  
26 policy. Thus, the personal views of Defendants’ 30(b)(6) designees are of no  
27 “consequence to the determination of [this] action.” *See Medic Alert Found. U.S.,*  
28 *Inc. v. Corel Corp.*, 43 F. Supp. 2d 933, 936 n.2 (N.D. Ill. 1999) (“Information

1 about this incident is outside the scope of plaintiff's Rule 30(b)(6) witness, and no  
 2 corroborating evidence is presented. It is therefore inadmissible.”). Testimony  
 3 beyond the scope of the areas into which the Court permitted LCR to inquire under  
 4 Rule 30(b)(6), and testimony responding to questions about a witness's personal  
 5 views, constitute the witness's personal testimony rather than the testimony of the  
 6 Defendants and is, therefore, irrelevant and inadmissible.

7 The deposition testimony that should be excluded on this basis is marked in  
 8 the transcripts attached hereto: Attachment 7 (Jamie Scott Brady), Attachment 8  
 9 (Dennis Drogo), and Attachment 9 (Paul Gade).<sup>6</sup>

10 **V. At Least Three Specific Areas Inquired into in the**  
 11 **30(b)(6) Depositions Are Irrelevant**

12 LCR's designations of testimony from the 30(b)(6) depositions include  
 13 (1) testimony regarding research and other developments that occurred after the  
 14 enactment of DADT, (2) testimony regarding the circumstances in which the U.S.  
 15 military will allow a person to enlist despite a prior felony conviction, and  
 16 (3) testimony regarding the experiences of foreign militaries in permitting service  
 17 by openly homosexual service members. Even if evidence beyond the legislative  
 18 record were otherwise relevant in this case, testimony on each of these three  
 19 subjects would be irrelevant, for the reasons set forth below. Thus, this testimony  
 20 should be excluded for these additional reasons.

21 The 30(b)(6) testimony that should be excluded on these bases is marked in  
 22 Attachments 7, 8, and 9 hereto. All of the designated testimony of Dennis Drogo  
 23 and Paul Gade falls into either the second or the third category, respectively.

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24  
 25 <sup>6</sup> Given that the present motion does not cite the testimony in these depositions for their  
 26 content, Defendants believe that Local Rule 32-1 is inapplicable as to this motion. In any event,  
 27 in light of LCR's designation of the deposition testimony under Fed. R. Civ. P. 32, the original  
 28 transcripts are currently being marked pursuant to Local Rule 16-2.7 and will be lodged no later  
 than the first day of trial under Local Rule 32-1, unless the Court first grants this motion *in*  
*limine*.



1           **A. Testimony Regarding Research and Developments that Occurred**  
2           **After Enactment of 10 U.S.C. § 654 Is Irrelevant**

3           As noted above, this Court has held that rational basis review applies here  
4 (Doc. 83 at 14-18). The precedent in this Circuit is very clear that rational basis  
5 review of a statute turns on conditions that existed when the law was enacted – that  
6 is, “whether the enacting body could have rationally believed *at the time of*  
7 *enactment* that the law would promote its objective.” *Equity Lifestyle Props., Inc.*  
8 *v. County of San Luis Obispo*, 548 F.3d 1184, 1194 (9th Cir. 2008) (emphasis  
9 added, internal quotation marks omitted); *see United States v. Jackson*, 84 F.3d  
10 1154, 1161 (9th Cir. 1996) (rejecting challenge to 100:1 difference between sen-  
11 tences for crack and powder cocaine possession notwithstanding that Sentencing  
12 Commission had recently recommended eliminating difference). Under rational  
13 basis review, “[t]he relevant governmental interest is determined by objective  
14 indicators as taken from the face of the statute, the effect of the statute, comparison  
15 to prior law, facts surrounding enactment of the statute, the stated purpose, and the  
16 record of proceedings.” *City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir.  
17 1984). Thus, classifications subject to rational basis review are not subject to  
18 challenge based on changed circumstances, and the issue in this case is whether  
19 Congress could have believed, when it enacted 10 U.S.C. § 654 in 1993, that the  
20 statute was rationally related to legitimate governmental interests.

21           In light of this aspect of rational basis review, any testimony regarding  
22 research or developments that occurred after the enactment of Section 654 is  
23 irrelevant. For example, Lt. Col. Brady was asked extensively about reports and  
24 polls that post-dated the enactment of DADT. Similarly, Dr. Gade was asked  
25 about any research regarding the experiences of foreign militaries that post-dated  
26 enactment of the statute.

1           **B.     Testimony Regarding Enlistment Waivers for Convicted**  
2                   **Felons Is Irrelevant**

3           Section 504(a) of Title 10, U.S. Code provides:

4           No person who . . . has been convicted of a felony, may be enlisted in  
5           any armed force. However, the Secretary concerned may authorize  
6           exceptions, in meritorious cases, for the enlistment of . . . persons  
7           convicted of felonies.

8           One of the topics on which LCR sought 30(b)(6) testimony was “[t]he history . . .  
9           development . . . adoption, and implementation . . . of the United States Armed  
10          Forces’ . . . policy regarding moral waivers of prior felony convictions” (Doc. 127)  
11          – that is, the circumstances in which the military would allow a person to enlist  
12          despite a prior felony conviction pursuant to the second sentence of Section 504(a).  
13          Defendants designated Mr. Dennis Drogo to address this topic, and the testimony  
14          that LCR has now designated from Mr. Drogo’s deposition includes this topic.

15          As noted already, the issue in this case is the constitutionality of Congress’  
16          decision in 1993 to require the discharge of service members who have engaged in  
17          homosexual acts or who demonstrate a propensity or intent to engage in homo-  
18          sexual acts. 10 U.S.C. § 654. Resolution of this issue turns on the governmental  
19          interests behind that enactment and the statute’s relationship to those interests –  
20          that is, the government’s interests in foreclosing continued service by such  
21          members and the extent to which the DADT statute serves those interests.

22          In this constitutional analysis, the circumstances under which the military  
23          may permit someone to enlist despite a felony conviction are irrelevant, regardless  
24          of the standard of review to be applied here. The government’s interests in fore-  
25          closing enlistment by convicted felons, as expressed in Section 504, are entirely  
26          different from, and unrelated to, the interests on which Congress relied or could  
27          have relied in enacting Section 654. Presumably, Plaintiff’s intent is to argue that  
28          the government should allow gays and lesbians to remain in the military if it allows



1 some convicted felons to enlist. But that comparison is a policy argument for  
 2 Congress rather than a constitutional argument for the courts; as a constitutional  
 3 matter, each statute must be judged on its own terms, based on the governmental  
 4 interests behind each enactment. Furthermore, any such argument would go to the  
 5 statutes themselves, and not to the “development . . . adoption, and implementation  
 6 . . . of the United States Armed Forces’ . . . policy” regarding enlistment waivers  
 7 under Section 504.

8 Accordingly, all of the designated testimony by Dennis Drogo – all of which  
 9 deals with this subject – should be excluded, without regard to the standard of  
 10 review applied in this case.

11 **C. Testimony Regarding the Experiences of**  
 12 **Foreign Militaries Is Irrelevant**

13 During hearings on the bill that became 10 U.S.C. § 654, Congress heard  
 14 extensive testimony regarding the experiences of foreign militaries in relation to  
 15 service by gays and lesbians. An entire hearing was devoted to that subject, at  
 16 which the Senate Armed Services Committee heard testimony from “Dr. Charles  
 17 Moskos, Professor of Sociology at Northwestern University; Dr. David Segal,  
 18 Professor of Sociology at the University of Maryland; Dr. Judith Stiehm,  
 19 [Professor] of Political Science at Florida International University; and Lt. Gen.  
 20 Calvin Waller, U.S. Army (retired).” *See* S. Rep. No. 103-112 (1993), at 269,  
 21 *available at* 1993 WL 286446, at \*\*188. Having heard that testimony and  
 22 considered the applicability of foreign military experiences to that of the United  
 23 States, Congress reached the policy judgment now embodied in the DADT statute.  
 24 *See id.* at 288, *available at* 1993 WL 286446, at \*\*205-06 (“[W]hile the foreign  
 25 experience is worth monitoring, it does not provide a relevant basis for permitting  
 26 gays and lesbians to serve openly in the armed forces of the United States.”).

27 Notwithstanding that congressional testimony and judgment, item 6 in  
 28 LCR’s notice of deposition under Rule 30(b)(6) sought testimony regarding

1 “[r]eports, studies or analyses conducted by or on behalf of Defendants relating to  
2 the experience of the armed forces of nations other than the United States with  
3 military service by individuals with a homosexual orientation or by individuals  
4 who engage in homosexual conduct” (Doc. 118-2). Defendants designated Dr.  
5 Paul Gade to address this topic, and LCR has now designated most of Dr. Gade’s  
6 deposition for trial under Rule 32.

7 Given that Congress considered the experiences of foreign militaries,  
8 however, LCR’s contemplated presentation of evidence on that subject appears to  
9 be simply an attempt to challenge the wisdom of the policy determination  
10 embodied in 10 U.S.C. § 654. Congress having already considered evidence on  
11 this subject in 1993 – evidence that can now be reviewed in the record of the  
12 congressional hearings – no evidence presented to this Court on the same subject is  
13 relevant to the validity of Congress’s policy determination.

14 Accordingly, all of the designated testimony by Paul Gade – all of which  
15 deals with the experiences of foreign militaries – should be excluded, regardless of  
16 the standard of review to be applied here.

17 **VI. Certain of the Specific Questions and Answers Designated by**  
18 **the Plaintiff Are Also Inadmissible for Various Reasons**

19 In addition to the bases set forth above for excluding all or part of the  
20 deposition testimony designated by LCR, certain portions of the testimony should  
21 be excluded for other reasons specific to the given question and answer.  
22 Specifically, certain questions were vague, argumentative, called for speculation,  
23 or lacked an adequate foundation regarding the witness’s knowledge. The  
24 deposition testimony that should be excluded on any such basis is marked, with an  
25 indication of the basis or bases for the exclusion, in Attachments 7, 8, and 9 hereto.

**CONCLUSION**

For the foregoing reasons, Defendants respectfully request that the Court grant Defendants' motion *in limine* and exclude the above-described testimony of lay witnesses.

Dated: June 18, 2010

Respectfully submitted,

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