

Attachment 6

Plaintiff's Proposed Findings of Fact and Conclusions of Law

Simpson, Scott (CIV)

From: Kahn, Aaron [aakahn@la.whitecase.com]
Sent: Tuesday, June 15, 2010 2:11 AM
To: Freeborne, Paul (CIV); Simpson, Scott (CIV); Gardner, Joshua E (CIV); Parker, Ryan (CIV)
Cc: Woods, Dan; Hunnius, Patrick
Subject: Log Cabin Republicans' Proposed Findings of Fact & Conclusions of Law
Attachments: LCR Proposed Findings of Fact and Conclusions of Law _Sent to DOJ_06-14-10.pdf

Counsel,

Attached please find Log Cabin Republicans' Proposed Findings of Fact and Conclusions of Law.

Best Regards,

Aaron A. Kahn
Disputes
White & Case LLP
633 W. Fifth Street, 19th Floor
Los Angeles, CA 90071-2007
Telephone: +1-213-620-7751
Fax: +1-213-452-2329
aakahn@whitecase.com

=====
This communication may be privileged and confidential and is intended only for the individual or entity named above and others who have been specifically authorized to receive it. If you are not the intended recipient, please do not read, copy, use or disclose this communication to others; also, please notify the sender by replying to this e-mail or by telephone at (213) 620-7700, and then delete the e-mail and any copies of it.
=====

1 DAN WOODS (State Bar No. 78638)
PATRICK HUNNIUS (State Bar No. 174633)
2 WHITE & CASE LLP
633 West Fifth Street, Suite 1900
3 Los Angeles, CA 90071-2007
Telephone: (213) 620-7700
4 Facsimile: (213) 452-2329
E-mail: dwoods@whitecase.com
5 E-mail: phunnius@whitecase.com

6 Attorneys for Plaintiff
7 Log Cabin Republicans

8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 LOG CABIN REPUBLICANS, a non-
11 profit corporation,

12
13
14 Plaintiff,

15 vs.

16
17 UNITED STATES OF AMERICA and
18 ROBERT M. GATES (substituted for
Donald H. Rumsfeld pursuant to FRCP
19 25(d)), SECRETARY OF DEFENSE,
20 in his official capacity,

21 Defendants.
22

Case No. CV04-8425 VAP (Ex)

**PLAINTIFF LOG CABIN
REPUBLICANS' [PROPOSED]
FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Judge: Hon. Virginia A. Phillips

Complaint filed: October 12, 2004
Trial Date: July 13, 2010

1 Pursuant to Federal Rule of Civil Procedure 52, Local Rules 52-1 and 52-3,
2 and the Court's June 3, 2010 Minute Order, Plaintiff Log Cabin Republicans
3 (hereinafter referred to as "Log Cabin") submits the following Proposed Findings
4 of Fact and Conclusions of Law in the action brought by Log Cabin Republicans
5 against the United States of America and Robert Gates, Secretary of Defense
6 (hereinafter collectively referred to as "the government").

7 If any proposed finding of fact should properly be a conclusion of law or if
8 any proposed conclusion of law should properly be a finding of fact, Log Cabin
9 respectfully requests that they be deemed so.

10
11 A trial was held in this case on July 13, 2010. The Court, having considered
12 the testimony and evidence presented at trial, and the briefs of the parties, enters the
13 following Findings of Fact and Conclusions of Law in accordance with its
14 obligations under the Federal Rules of Civil Procedure.

15 16 I.

17 **FINDINGS OF FACT**

18 **A. The Parties**

19 **i. Plaintiff**

20 1. Plaintiff Log Cabin Republicans is a nonprofit corporation organized
21 under the laws of the District of Columbia, is associated with the Republican Party,
22 and is dedicated to the interests of the homosexual community.

23 2. Founded in 1978, Log Cabin Republicans is the oldest and largest
24 organization associated with the Republican Party advocating equal rights for all
25 Americans, including homosexuals. Log Cabin Republicans has over sixty chapters
26 across the United States, a full-time Washington, D.C. office, chapters in
27 California, a federal political action committee, and membership in the thousands,
28 including members who are residents of California.

1 3. Log Cabin Republicans supports political candidates, policies and
2 initiatives that provide equal rights to all Americans, promotes nondiscrimination
3 against homosexual persons and encourages participation in the Republican Party
4 by homosexual Americans.

5 4. Log Cabin’s membership includes current, retired, and former
6 homosexual members of the U.S. armed forces. It includes homosexual Americans
7 who served in the United States Armed Forces but who were separated from the
8 Armed Forces because of the United States military policy commonly known as
9 “Don’t Ask, Don’t Tell” (hereinafter, “DADT”) and/or were otherwise injured by
10 DADT as a result of, including but not limited to, the inability to reenlist, forced
11 resignations, denial of promotions and/or separation proceedings.

12 **a. *John Alexander Nicholson***

13 5. Log Cabin’s bylaws provide that individuals may become members of
14 the organization by paying annual dues or by virtue of honorary memberships
15 conferred by a local chapter of Log Cabin Republicans.

16 6. John Alexander Nicholson is a member of Log Cabin Republicans.

17 7. In 2006, Log Cabin’s Georgia chapter awarded Mr. Nicholson
18 honorary membership. Mr. Nicholson has attended several of Plaintiff’s national
19 conventions.

20 8. In addition, Mr. Nicholson addressed Log Cabin Republicans’ national
21 convention in 2006.

22 9. Mr. Nicholson signed up to be included in Log Cabin Republicans’
23 database in April 2006.

24 10. Log Cabin Republicans itself, and its management, have considered
25 Mr. Nicholson to have been a member of Log Cabin Republicans, continuously,
26 since April 2006.

27 11. Mr. Nicholson enlisted in the United States Army just days after the
28 September 11, 2001 attacks. He already spoke four languages when he began his

1 Army training as a human intelligence collector. Nicholson Dep. 104:8. One of
2 Nicholson's languages was Portuguese, which he practiced during a recent
3 relationship with a Brazilian man.

4 12. In February 2002, Mr. Nicholson's sexual orientation became known
5 to members of the Army when someone intercepted and read a personal letter from
6 him to another man in Portuguese and revealed the contents of the letter to other
7 members.

8 13. Several weeks later, his commanding officer confronted Nicholson and
9 notified him of the allegations regarding his sexual orientation. Nicholson
10 understood that if he didn't acknowledge his sexual orientation officially, he would
11 be investigated, which might subject him to a less-than-honorable discharge from
12 the Army. To avoid this and an investigation of his personal life, Nicholson
13 decided to admit his sexual orientation. He was separated on March 22, 2002 as a
14 result of his statement.

15 14. If DADT were repealed or invalidated, Mr. Nicholson would reenlist
16 in the United States Armed Services.

17 **b. Lt. Col. John Doe**

18 15. "John Doe" is also a member of Log Cabin Republicans. Colonel Doe
19 joined Log Cabin prior to October 12, 2004.

20 16. Lt. Colonel Doe is an officer in the United States Army Reserves. He
21 recently completed a tour of duty in Iraq.

22 17. Lt. Colonel Doe is homosexual and wishes to continue his service in
23 the United States Army without fear of investigation, discharge, stigma, forfeiture
24 of constitutional civil liberties, harassment, and other negative repercussions
25 resulting from enforcement of DADT.

26 18. As a result of DADT, Lt. Colonel Doe (and all homosexual members
27 of the United States Armed Services) may not communicate the core of emotions
28 and identity to others in the same manner as his heterosexual comrades, nor can he

1 exercise his constitutionally protected right to engage in private, consensual
2 homosexual conduct without intervention of the United States government.

3 19. Lt. Col. Doe is unable to identify himself publicly as a member of Log
4 Cabin. Lt. Colonel Doe believes that if he were to identify himself and his role in
5 this case, he would be subject to investigation and discharge under DADT.

6 20. Lt. Colonel Doe's fears are valid. The language of DADT is
7 mandatory, see 10 U.S.C. § 654(b)(2) ("A member of the armed forces shall be
8 separated from the armed forces...if...the member has stated that he or she is a
9 homosexual....") (emphasis added).

10 21. Lt. Col. Doe has stated – in this case – that he is a homosexual; the
11 mandatory nature of DADT requires it be applied to him if he is identified.

12 22. Lt. Col. Doe is unable to fully participate in this litigation and testify at
13 trial for fear he will be discharged.

14 **ii. Defendants**

15 23. Defendants are the United States of America and the Secretary of
16 Defense, Robert M. Gates.

17
18 **B. History of Service by Homosexuals**

19 24. Before the 20th century, homosexual conduct was viewed as
20 something all people were prone to engage in during moments of moral weakness;
21 there was no concept of people as having an enduring or innate homosexual
22 identity, as in a characteristic behavior of one type of person called a homosexual.

23 25. During this period, military regulations did not speak of homosexual
24 persons and did not explicitly address the act of sodomy, but relied on vague
25 euphemisms such as "unnatural carnal copulation" to refer to people with
26 homosexual proclivities as well as others viewed as non-conformists.

27 26. During the World War I period, homosexuality was normally screened
28 out of the military only when it manifested itself in overt conduct or glaring

1 nonconformity.

2 27. Only in 1917 was sodomy – though still not homosexual identity –
3 explicitly banned in the military by the “Articles of War.”

4 28. Military policies expressly aimed at excluding homosexuals from
5 service arose for the first time in the World War II era. By the end of World War
6 II, homosexuals were deemed “unsuitable for military service” and were officially
7 banned from all branches.

8 29. The military used examinations of limited pools of mentally troubled
9 subjects to draw sweeping conclusions about the mental state of homosexuals.
10 Based on these highly unrepresentative samples, the military sought to justify the
11 exclusion of homosexual people from military service.

12 30. Because it was difficult to pin down what it meant to have a proclivity
13 to engage in homosexual conduct, authorities came to rely heavily on stereotypes,
14 especially the association of effeminacy with homosexuality.

15 31. The 1957 Crittenden Report, commissioned by the Secretary of the
16 Navy to investigate its homosexual exclusion policy, concluded that no factual data
17 exists to support the contention that homosexuals are a greater security risk than
18 heterosexuals. The Crittenden report stated that “the number of cases of blackmail
19 revealed as a result of past investigations [of homosexuals], which were cited to the
20 Board, is negligible.”

21 32. On January 16, 1981, President Carter’s deputy secretary of defense
22 implemented a service-wide ban on homosexuals in uniform, removing any
23 discretion previously enjoyed by different branches or individual commanders.

24 33. The new policy modified the language that had called homosexual
25 people unsuitable for military service, opting instead for language stating that
26 “homosexuality is incompatible with military service.”

27 34. Two studies commissioned in 1988 by the military’s Personnel
28 Security Research and Education Center (“PERSEREC”) found that the ban on

1 homosexual service was unnecessary and damaging and found that sexual
2 orientation had no relationship to job performance or unit cohesion.

3 35. The first PERSEREC report pointed to growing tolerance of
4 homosexuality and concluded that “the military cannot indefinitely isolate itself
5 from the changes occurring in the wider society, or which it is an integral part.” It
6 found that “having a same-gender or an opposite gender orientation is unrelated to
7 job performance in the same way as being left- or right-handed.”

8 36. Deputy Under Secretary of Defense Craig Alderman refused to accept
9 the findings of the PERSEREC report entitled “Nonconforming Sexual Orientations
10 and Military Suitability.” Alderman ordered the PERSEREC director to cease all
11 research on the subject not explicitly identified in the initial research plan.

12 37. Department of Defense officials later disavowed all association with
13 this PERSEREC report, even going so far as to express to the U.S. Government
14 Accountability Office (“GAO”) that the report did not reflect the opinions of the
15 Department of Defense. The GAO disagreed, writing, “DOD should not discount
16 the information obtained and presented because such data was not authorized as
17 part of the original task.”

18 38. The second PERSEREC report found that “the preponderance of the
19 evidence presented indicates that homosexuals show pre-service suitability-related
20 adjustment that is as good [as] or better than the average heterosexual,” a result that
21 appeared to “conflict with conceptions of homosexuals as unstable, maladjusted
22 persons.”

23 39. The U.S. Military suspended the discharge proceedings of a number of
24 homosexual troops during the first Gulf War and sent those troops to the Middle
25 East to fight in the war.

26 40. In the six months following the 1991 Gulf War, over a thousand
27 homosexuals were discharged, including many whose superiors knew about their
28 sexual orientation.

1 41. At the same time, several former servicemembers discharged under the
2 previous policy barring homosexuals from military service successfully challenged
3 their separations on constitutional grounds.

4 42. One such servicemember, Margarethe Cammermeyer, was discharged
5 in 1992 for admitting that she was a lesbian after 26 years of service, including
6 service as the Chief Nurse of the 352nd Evacuation Hospital in Oakland, CA.
7 Cammermeyer v. Aspin, 850 F. Supp. 910, 912-913 (W.D. Wash. 1994). The court
8 determined that her discharge from the National Guard constituted government-
9 sponsored discrimination against homosexuals as a class solely on the basis of
10 prejudice, violating Cammermeyer's equal protection and due process rights. Id. at
11 927-928.

12 43. Another servicemember, Dusty Pruitt, served in the U.S. Army and
13 Army Reserve as a Methodist minister, but was discharged in 1986 for her
14 homosexual orientation after she publicly declared that she was a lesbian. The 9th
15 Circuit held that the circumstances of Pruitt's separation stated an equal protection
16 claim. Pruitt v. Cheney, 963 F.2d 1160, 1167 (9th Cir. 1991).

17 44. Keith Meinhold, a twelve-year veteran of the U.S. Navy, also
18 successfully challenged his separation for homosexual orientation. Meinhold
19 appeared on national television in 1992 to identify himself as homosexual, and was
20 subsequently discharged for his sexual orientation. The 9th Circuit found that the
21 policy authorizing Meinhold's discharge solely on the basis of an acknowledgement
22 of homosexual orientation – the predecessor policy to DADT – was
23 unconstitutional absent concrete expressions of desire to commit prohibited
24 conduct. Meinhold v. Dep't of Defense, 34 F.3d 1469, 1480 (9th Cir. 1994).

25 45. In 1992, the GAO conducted a study of the homosexual exclusion
26 policy. Its researchers looked at seventeen different countries and eight police and
27 fire departments in four U.S. cities and reviewed military and nonmilitary polls,
28 studies, legal decisions, and scholarly research on homosexual service. The GAO

1 recommended in an early draft that Congress “may wish to direct the Secretary of
2 Defense to reconsider the basis” for homosexual exclusion.

3
4 **C. Enactment of Don’t Ask Don’t Tell**

5 46. On January 29, 1993, President Clinton signed a memorandum
6 directing Secretary Aspin to develop a policy “ending discrimination on the basis of
7 sexual orientation in determining who may serve in the Armed Forces of the United
8 States” and requesting submission of a draft Executive Order that embodied a new,
9 non-discriminatory policy.

10 47. Secretary Aspin also directed that separations based solely on
11 homosexual status be approved by the Attorney General.

12 48. Secretary Aspin then commissioned a study from the National Defense
13 Research Institute of the RAND Corporation, asking it to provide “information and
14 analysis that would be useful in helping formulate the required draft Executive
15 Order.”

16 49. The RAND study was a large interdisciplinary effort prepared by over
17 70 social scientists including, among others, a sociologist, psychologist,
18 anthropologist, two physicians, a statistician, and a lawyer, as well as invited
19 representatives from each of the branches of the U.S. Military.

20 50. The RAND study was framed as a response to Secretary Aspin’s
21 request and responded to a memorandum from President Clinton to the Secretary of
22 Defense asking for an executive order that would end discrimination on the basis of
23 sexual orientation “in a manner that is practical, realistic, and consistent with the
24 high standards of combat effectiveness and unit cohesion our armed forces must
25 maintain.” The RAND researchers’ mission was to determine whether it was
26 possible to end discrimination in a manner that would be consistent with those
27 criteria.

28 51. At the onset of the RAND study, Dr. MacCoun and others identified a

1 variety of research tasks, including studying foreign militaries, unit cohesion
2 literature, police and fire departments, public health related issues, and
3 organizational issues. The work was divided among separate teams.

4 52. In preparing the RAND report, researchers, including Dr. Robert
5 MacCoun, visited toilet and shower facilities of submarines, battleships, and
6 barracks to make sure they understood the conditions under which people in the
7 military work in forming their conclusions. The RAND researchers were informed
8 that the facilities they visited were representative of the toilet and shower facilities
9 throughout the world for the U.S. Military.

10 53. In conducting the RAND study, researchers learned from their military
11 focus groups, cohesion experts, and from anecdotal evidence provided by
12 servicemembers that incidents of sexual tension, romantic relationships, sexual
13 assaults, and favoritism in the chain of command commonly occur among
14 heterosexuals serving in the U.S. Military.

15 54. The RAND researchers also based their conclusions on evidence from
16 six countries and data analyses from hundreds of studies of cohesion. In
17 researching foreign militaries, the RAND team visited various members at different
18 ranks in foreign military organizations. In each interview, RAND asked the foreign
19 military member if they could recall incidents involving openly homosexual
20 servicemembers causing disruption to the unit. These interviews revealed that, to
21 the extent any problems arose from allowing homosexuals to serve openly, they had
22 not risen to a level of serious concern.

23 55. Part of the RAND study examined police and fire departments in
24 several U.S. cities, which it regarded as “the closest possible domestic analog” to
25 the military setting.

26 56. At the end of the information gathering phase, the teams reconvened to
27 brief each other on their findings and deliberate as to the conclusions of the report.

28 57. The RAND Corporation study, titled “Sexual Orientation and U.S.

1 Military Personnel Policy: Options and Assessments,” ultimately concluded that
2 sexual orientation alone was “not germane” to determining whether an individual
3 was fit for military service, that permitting openly homosexual servicemembers to
4 serve would not impair how the U.S. military functioned, and that sexual
5 orientation was irrelevant to determining whether an individual was fit for military
6 service.

7 58. The RAND report proposed that should a servicemember’s sexual
8 orientation become known to his or her unit, it would have no bearing on the
9 member’s status in the U.S. Military.

10 59. Dr. MacCoun wrote the RAND report chapter on the effect of allowing
11 homosexuals to serve openly on unit cohesion. Based on his review of the cohesion
12 literature, Dr. MacCoun concluded that to the extent that there is an association
13 between unit cohesion and performance, the correlation is stronger for task
14 cohesion (shared goals among individuals) and performance than for social
15 cohesion (whether people like each other) and performance. Dr. MacCoun also
16 cited evidence that high levels of social cohesion can actually interfere with a
17 group’s performance.

18 60. Dr. MacCoun’s research indicated that if homosexuals were allowed to
19 serve openly, the most likely bad outcome is ostracism, not a breakdown in
20 cohesion.

21 61. The RAND study also reported that permitting openly homosexual
22 servicemembers to serve did not impair or reduce the functioning or effectiveness
23 of numerous foreign militaries. In Canada, where the ban had just ended, RAND
24 found “no resignations (despite previous threats to quit), no problems with
25 recruitment, and no diminution of cohesion, morale, or organizational
26 effectiveness.” The same conclusions were reached about Israel. The study
27 reported that even in those countries where homosexuals were allowed to serve, “in
28 none of these societies is homosexuality widely accepted by a majority of the

1 population.”

2 62. RAND found that most U.S. police and fire departments had integrated
3 homosexuals, and doing so actually enhanced cohesion and improved the
4 department’s community standing and organizational effectiveness.

5 63. Finally, the RAND study concluded that circumstances could exist
6 under which the ban on homosexuals could be lifted with little or no adverse
7 consequences for recruitment or retention.

8 64. Also in 1993, the GAO reported in a separate study that permitting
9 openly homosexual servicemembers to serve did not impair the functioning of
10 numerous foreign militaries. The GAO studied twenty-five foreign militaries, with
11 special focus on Israel, Canada, Germany, and Sweden. According to its final
12 report, “Military officials in all four countries said that the presence of homosexuals
13 in the military is not an issue and has not created problems in the functioning of
14 military units.” A key factor, said the report, was that homosexuals are reluctant to
15 openly admit their sexual orientation, even once the ban is lifted.

16 65. Secretary Aspin also directed the Deputy Assistant Secretary of
17 Defense to form a working group (“the Military Working Group”) to address the
18 same issue that he asked RAND to address.

19 66. The Military Working Group charged with submitting
20 recommendations to Congress on the U.S. Armed Forces’ homosexuality policy
21 ignored evidence regarding the relevance of sexual orientation to military service in
22 their report.

23 67. The Military Working Group did not review the final report of the
24 RAND National Defense Research Institute entitled “Sexual Orientation and U.S.
25 Military Personnel Policy: Options and Assessments,” released in 1993.

26 68. The 1993 Military Working Group never weighed research or
27 empirical data about service of homosexual servicemembers in the military.

28 69. Members of the 1993 Military Working Group decided to retain the

1 ban on openly homosexual servicemembers before ever convening.

2 70. The Military Working Group ultimately reached a conclusion contrary
3 to that of the RAND Study and found that DADT would be best for the U.S.
4 military.

5 71. In 1993, the Army Research Institute (“ARI”) was initially assigned by
6 the Army's Chief of Staff to conduct extensive research regarding President
7 Clinton's proposal to lift the ban on homosexuals from serving openly in the Armed
8 Forces. However, “[d]ue to decisions at senior levels, ARI was never given the
9 'green light' to pursue the tasking to the full extent. In particular, there were
10 stringent restrictions on seeking attitudes and opinions, through surveys or
11 discussion groups, from service members.”

12 72. While RAND and the Military Working Group prepared their reports,
13 Congress held hearings regarding the ban.

14 73. The Senate Armed Services Committee recognized that, among both
15 heterosexuals and homosexuals, “[s]exual behavior is one of the most intimate and
16 powerful forces in society.” The Committee also recognized that “the armed forces
17 do not presume that service members will remain celibate.”

18 74. On June 19, 1993, Attorney General Reno wrote a memorandum to
19 President Clinton describing the defensibility of DADT. Attorney General Reno’s
20 memorandum argued that DADT did not constitute a violation of First Amendment
21 rights on the rationale that the servicemembers are not being punished for their
22 speech, rather their speech is evidence of prohibited conduct.

23 75. On July 19, 1993, Secretary Aspin wrote another letter to the military
24 branches that changed the policy instituted in his February letter and which
25 approximated the ultimate DADT policy. Secretary Aspin directed the branches of
26 the military to suspend asking questions regarding sexual orientation at time of
27 enlistment.

28 76. Subsequently, Don’t Ask, Don’t Tell became law. 10 U.S.C. § 654.

1 77. In enacting DADT, Congress and the President ignored research,
2 studies, and other evidence demonstrating that permitting openly homosexual
3 individuals to serve in the U.S. Armed Forces would have no adverse effect on unit
4 cohesion, morale, order, discipline, or military readiness. Rather, the decision to
5 exclude openly homosexual servicemembers under DADT was based on animus,
6 prejudice, hostility, ignorance, and fear of homosexuals. The unit cohesion and
7 other rationales stated in the DADT statute were mere pretext.

8 78. Specifically, the Military suppressed the 1957 Crittenden report,
9 discussed above, that found that service of homosexuals does not harm the Military.

10 79. The Military also suppressed the PERSEREC reports, which
11 considered whether homosexuals serving in the Military were vulnerable to
12 blackmail and concluded that homosexuals do not pose a security risk to the armed
13 forces. The Pentagon later disavowed the PERSEREC reports on the basis that they
14 were drafts.

15 80. In considering DADT, Congress ignored that comparable foreign
16 militaries had already changed their policies to allow open service by homosexuals
17 without any negative impact on unit cohesion.

18 81. Foreign military experiences are diagnostic of what would happen if
19 the U.S. Military allowed homosexuals to serve openly. Foreign military
20 experiences can be comparable to what the United States military will experience
21 should DADT be repealed. According to Defendants Fed. R. Civ. P. 30(b)(6)
22 witness, Paul Gade, Ph.D., in terms of combat experience, the Israeli military is
23 most comparable to the United States military and United Kingdom and Canadian
24 militaries are most comparable in terms of culture and society. Dr. Gade also
25 acknowledged that the United States could follow lessons of other nation in
26 repealing DADT.

27 82. The experiences of foreign militaries demonstrate that, at least in the
28 short run, very few homosexual servicemembers would reveal their sexual

1 orientation as a result of repeal of DADT.

2 83. The integration of homosexuals into the Canadian military, which
3 occurred in 1992, produced no discernible impact on military readiness.

4 84. The Canadian experience demonstrates that the inclusion of openly
5 homosexual servicemembers in combat units is a non-issue in terms of military
6 effectiveness and that military effectiveness is determined by the competence of
7 individual soldiers, not their sexual orientation.

8 85. The rhetoric during the national debate over whether to lift the ban on
9 homosexual servicemembers in 1992 and 1993 was characterized by a well-
10 organized and effective campaign by religious conservatives to stigmatize
11 homosexuals and cast them as a threat to the military's effectiveness and core
12 values.

13 86. Influencing passage of Don't Ask, Don't Tell were unfounded and
14 unsupported assertions with no evidentiary support. Those assertions included, for
15 example,

- 16 a. that homosexuality is a moral virus,
- 17 b. that the homosexual lifestyle is unhealthy,
- 18 c. that homosexuals are perverted and promiscuous,
- 19 d. that homosexual servicemembers are rife with disease,
- 20 e. that homosexuals would increase transmission of sexually
21 transmitted diseases, including AIDS,
- 22 f. that homosexuals are abnormal and mentally unstable,
- 23 g. that homosexuals are more prone to criminal activity,
- 24 h. that homosexuals are sexual predators and pedophiles,
- 25 i. that servicemembers could not respect and take orders from
26 individuals who enjoy anal sex, and
- 27 j. that likened homosexuals to cowards and thieves.

28 87. Behind the scenes, members of the Pentagon acknowledged that the

1 ban on homosexuality in the military was motivated primarily by moral concerns,
2 not concerns for unit cohesion, but recognized that such rationale would not be
3 accepted by the public.

4 88. The Military Working Group reached its conclusions on the basis of
5 fear, politics, prejudice, stereotypes, and resistance to any change in military
6 tradition.

7 89. The Military Working Group's June 1993 report, which served as the
8 basis for the ultimate DADT policy, stated:

- 9 a. "[L]ifting the ban would leave the military's image 'tarnished'"
10 and that "[t]he homosexual lifestyle has been clearly
11 documented as being unhealthy."
12 b. "Due to their sexual practices, active male homosexuals in the
13 military could be expected to bring an increased incidence of
14 sexually transmitted diseases, including AIDS, which could
15 create the perception of an 'enemy within.'"
16 c. "The core values of the military profession would be seen by
17 many to have changed fundamentally if homosexuals were
18 allowed to serve," and that "this would undermine institutional
19 loyalty and the moral basis for service, sacrifice, and
20 commitment" for the bulk of straight soldiers. This statement
21 suggests it was the opinion of the military that the "core values"
22 of the armed forces are, and properly should be, anti-
23 homosexual.

24 90. In enacting DADT, Congress relied on three influential leaders:
25 General Colin Powell, Senator Sam Nunn, and Professor Charles Moskos. Each of
26 these leaders argued against lifting the ban for what were actually personal, not
27 military, reasons.

28 91. Gen. Colin Powell, then Chairman of the Joint Chiefs of Staff, said

1 repeatedly that the service of open homosexuals would harm “order and discipline,”
2 and would be “difficult to accommodate.” While some observers compared the
3 homosexual ban to racial segregation in the military, Powell forcefully rejected the
4 analogy, leaning on his stature as a top African-American general to bolster his
5 moral authority. Rear Admiral John Hutson, a high-ranking JAG official who was
6 part of the talks over whether to lift the homosexual ban, recalled that “Powell put a
7 hole in the analogy to racial integration, not particularly logically, but just by force
8 of his personality and who he was.” Hutson said it allowed the rest of the military
9 leadership to “hide” behind Powell. It allowed other champions of anti-homosexual
10 discrimination to say, “this isn’t the same as racial integration. This is different,
11 and General Powell says so.”

12 92. Senator Sam Nunn, who oversaw Congressional hearings on
13 homosexual troops as Chairman of the Senate Armed Services Committee, has a
14 record of anti-homosexual actions and sentiment. He had backed Senator John
15 Glenn’s bid for the White House in 1984 citing his “courage” in expressing his
16 “strongly held moral belief that homosexuals should not be the role models for our
17 children.” Nunn had also dismissed two political aides because they were
18 homosexual. In a television appearance in 1993, Nunn said it was important not to
19 “put individual rights above the mission,” thus framing months of hearings as if
20 homosexual service was an inherent trade-off with military effectiveness, despite a
21 total absence of evidence to that effect. He said the government should not
22 “endorse the sex behavior of people that are lesbian and gay” even though the
23 current separate standard for straight soldiers does precisely that, while a policy of
24 equal treatment would be the opposite of endorsing one kind of behavior over
25 another. Asked if he was “saying the heterosexual lifestyle is superior, is morally
26 superior, to the homosexual lifestyle,” Nunn answered that he was “not only saying
27 that,” but that “the American family deterioration is one of the biggest problems we
28 face in our culture, and government programs cannot solve that,” implying

1 homosexuality was somehow responsible for this decline. At field hearings, Nunn
2 directed hostile questioning to a homosexual naval officer, saying, “You decided
3 that you had to come out in the open. Could you tell us why you felt that you had
4 to come out in the open. And did you take into account by doing so, whether they
5 are right or wrong, you were really making an awful lot of other people feel very
6 uncomfortable in their surroundings?” Nunn also removed certain people from
7 roster of those who would testify at the Armed Services Committee hearings
8 because he believed they would testify in favor of allowing homosexual serviceman
9 to serve openly and Nunn disagreed. For example, Nunn removed Barry
10 Goldwater.

11 93. Professor Charles Moskos, known as the academic architect of the
12 policy acknowledged to me that he defended his policy in part because he worried
13 he would disappoint his friends if he “turncoated.” Moskos also admits in the book
14 that “unit cohesion” is not the real reason he opposed openly homosexual service;
15 he says “Fuck unit cohesion; I don’t care about that.” Despite rooting his public
16 opposition to openly homosexual service in unit cohesion, he says the real reason is
17 the “moral right” of straights not to serve with known homosexuals. Moskos told
18 lawmakers that the principal reason for the homosexual ban is to repress the
19 homoerotic desire that is an inherent part of military culture. Recalling the
20 hearings, a colleague of Moskos’ claimed they were “all rigged. Moskos and Nunn
21 had already found an agreement” and the hearings proceeded in an effort to bolster
22 the pre-determined conclusion that a ban ought to remain in place.

23 94. Moreover, Lieutenant Colonel Robert Lee Maginnis was an advisor to
24 the Military Working Group, and subsequently became a vice president at the
25 Family Research Council. Lt. Col. Maginnis wrote a paper entitled, “The
26 Homosexual Subculture,” which indicted the mental health of homosexuals.
27 “Homosexuals are a very unstable group,” he wrote, whose lifestyle “breeds
28 enormous amounts of guilt” over their promiscuity, dishonesty, and failed

1 relationships. “They are restless in their contacts, lonely, jealous, and neurotic
2 depressive.” He concluded that, “As a category of people, homosexuals have a
3 greater indiscipline problem than heterosexuals.”

4 95. Retired Marine Brigadier General William Weise released a report
5 saying that “the real goal of [homosexuals] in the military fight was to change
6 society’s behavior, indoctrinate children, stop HIV screening, repeal age-of-consent
7 laws, secure federal funding for explicitly sexual art, and protect abortion rights.”
8 Weise was allowed to testify before Congress on the homosexual ban, where he
9 said that letting homosexuals serve would turn the military into a “wishy-washy
10 force” that would “needlessly cost thousands of American lives,” because militant
11 activists were demanding “special rights.” He said that his report found there was
12 “much higher criminal activity among the homosexual than the heterosexual
13 population in the military,” even though his evidence consisted exclusively of
14 homosexual court-martial records and a manufactured figure for how large the
15 homosexual population was in the military.

16 96. Commander Eugene Gomulka argued in a 1992 position paper
17 distributed by the senior leadership of the Marine Corps that the government had a
18 “legitimate role to play in checking the spread of homosexual behavior,” especially
19 among “innocent” young soldiers, whose minds are still in their “formative stages,”
20 and thus especially vulnerable to the sexual predations of homosexuals.

21 97. The Chaplaincy of Full Gospel Churches wrote a letter to President
22 Clinton in January 1993, which said letting homosexuals in the military “would do
23 more than just undermine discipline and morale, although they would do that as
24 well.” Such letter included statements such as: “Homosexuals are notoriously
25 promiscuous.” They are “perverted,” “aggressive recruiters,” and “going for the
26 young—pedophiles.” It went on to ask whether: “innocent soldiers” should be
27 forced to serve “with someone lusting after them?” or should they be required to aid
28 injured comrades “whose body fluids may be spilling out, without the benefit of

1 latex gloves?”

2 98. In his book *Military Necessity and Homosexuality*, retired colonel
3 Ronald Ray contended that homosexuals were addicted to sex, that they engaged in
4 practices that “are inherently degrading or humiliating and are rarely practiced by
5 heterosexuals,” that pedophilia was “close to the heart of homosexuality,” and that
6 homosexuals acted compulsively to obtain sex, especially once they come out of the
7 closet. “The gay community,” he wrote, was “seized by a deadly fatalism that sees
8 life as absurd and short.” They do not care about the future or about others, only
9 about the pleasures of the moment. “They have no direct links with the next
10 generation, no reason to invest in the future, no reason to defer gratification. Their
11 lives consist of little more than having an exciting time while life lasts and seeking
12 ‘self-fulfillment,’ a modern euphemism for selfish gratification and ambition.”

13 99. Representative Robert Dornan of California said, “You gentleman all
14 know that the best of your troops can never respect and thereby orders totally from
15 someone who likes taking it up the bum, no matter how secret he keeps it. Once it
16 leaks out, they think this person is abnormal, perverted, and deviant from the
17 norm.”

18 100. Colonel John Ripley, a retired marine, called homosexual people
19 “walking depositories of disease.” Under the “queers, cowards, and thieves” rule,
20 which according to Ripley was a mainstay of the Marine Corps, anyone falling into
21 any of these categories would be alienated from the group.

22 101. Brigadier General James Hutchens, the associate director of the
23 National Association of Evangelical’s Commission on Chaplains, testified before
24 the House of representative that homosexuality was a dangerous “moral virus” that
25 must be stopped. He left Congress with a list summarizing the Bible’s views on
26 homosexuality: (i) The wrath of God is being revealed against it; (ii) it is based on a
27 refusal to honor God; (iii) it is based on ingratitude toward God; (iv) it is based on a
28 willful choice; (v) God has lifted his restraining hand; (vi) what starts as a choice

1 becomes all-consuming; (vii) those who practice it know full well God’s decree, yet
2 continue to aggressively promote this behavior; (viii) condoning homosexuality is
3 wrong, and is a further step away from God.

4 102. General Peter Pace, chairman of the Joint Chiefs of Staff, said in
5 March 2007, “I believe homosexual acts between two individuals are immoral and
6 that we should not condone immoral acts.”

7 103. There were many powerful congressional leaders, including Sam
8 Nunn, Robert Dornan, and Strom Thurman, who either expressed clear animus
9 against homosexuals or who had a record of having expressed or behaved in such a
10 way that reflected that anger.

11 104. Although all sides were given the opportunity to be heard at the
12 Congressional hearings on homosexuals serving in the armed forces, each side was
13 not heard in equivalent proportions. The ban itself prevented active-duty
14 homosexual service members from participating in the debate.

15 105. Military officials and experts who helped craft the ban stated that there
16 was almost no consultation of empirical research and that the conclusions that were
17 drawn were subjective, not based on any fact.

18 106. Religious military officials say they were told by political allies not to
19 discuss the moral basis of their position because the “unit cohesion” argument
20 would be more effective. They decided to focus on secular research for what one
21 referred to as “political reasons” which they viewed as being more compelling in
22 political debate than anchoring their argument in morality or religion.

23 107. Colin Powell was reported to have been very concerned by the “moral
24 argument” about homosexual service, and General Carl Mundy, then a member of
25 the Joint Chiefs of Staff, praised and circulated an inflammatory anti-homosexual
26 video and essay produced by leaders of the religious right.

27 108. Admiral John Hutson, former JAG of the Navy and a supporter of the
28 homosexual ban in the internal Navy debates over homosexual service in 1993, has

1 said that senior military officers exaggerated the risks to unit cohesion while
2 minimizing the true religious and cultural basis of their opposition to homosexual
3 service. He says the Navy brass “declined” to discuss the issue in terms of morality
4 even though moral animus against homosexuality was the real reason they resisted
5 the change. Hutson, who now opposes “don’t ask, don’t tell,” called the policy a
6 “moral passing of the buck” because senior military and political leaders tried to
7 blame the supposed intolerance of young recruits for the ban. None of the Navy
8 officials responsible for helping formulate the policy “had much of a sense of what
9 was going on,” he says, and “decisions were based on nothing. It wasn’t empirical.
10 It wasn’t studied, it was completely visceral, intuitive.” The policy was created
11 entirely “by the seat of our pants.”

12 109. General Robert Alexander, the first head of the Military Working
13 Group, a panel of generals and admirals that essentially wrote “don’t ask, don’t
14 tell,” acknowledged that its members did not understand what “sexual orientation”
15 meant, and “had to define in the first few sessions what we figured they were
16 talking about.” When General Alexander warmed to the idea of letting
17 homosexuals serve, he was quickly removed from his position. General Alexander
18 admitted that the MWG “thought they knew the results of what was going to
19 happen” before they met, and that it was “going to be very difficult to get an
20 objective, rational review” of the policy. “Passion leads and rationale follows,” he
21 says, adding that his group “didn’t have any empirical data” about homosexual
22 service and the MWG position was based on fear, politics and prejudice.

23 110. Vince Patton, the highest-ranking enlisted person in the Coast Guard,
24 and a member of the MWG staff, has said that the group “had already made a
25 decision about what they were going to do” before the meetings. He says the
26 group’s leaders did not weigh research and instead met “behind closed doors” and
27 made decisions based on “anti-gay stereotypes and resistance to any outside forces
28 that challenged military tradition.”

1 111. Congress and the President also ignored the nation’s experience
2 integrating African-Americans in the U.S. Military.

3 112. No research has ever shown that the presence of openly homosexual
4 servicemembers would cause or has caused the deterioration of morale, good order
5 and discipline, or unit cohesion in the military, any more than the presence of
6 women or black men in previous decades caused such ill effects.

7 113. The arguments and fears of those who have historically opposed
8 openly homosexual service has precisely echoed the arguments and fears of those
9 who opposed racial integration in the military following World War II.

10 114. While the experience of being an African-American soldier is distinct
11 from that of being a homosexual soldier, the similarity of sentiment shared by those
12 who have opposed each suggests that resistance is rooted in prejudice and fear of
13 the unfamiliar, rather than in relevant evidence of how either group would impact
14 military effectiveness.

15 115. In the 1940s, it was frequently told that whites would not respect or
16 obey commands by an African-American; that integration would prompt violence
17 against a despised minority that the military would be helpless to stop; that
18 integration would lower public acceptance of the military and the federal
19 government; that the military should not be used for “social experimentation”; that
20 military integration was being used to further a larger minority rights agenda, which
21 would ultimately break the armed forces; that the military is unique, and is not a
22 democracy; and that God’s plan was to keep whites above blacks, and thus
23 integration would thwart God’s will.

24 116. In 1992, a four-star general insisted “good people will leave the
25 military in droves” if homosexuals were allowed to serve. In 1942, a captain
26 testified that “the minute the negro is introduced in to general service... the high
27 type of man that we have been getting for the last twenty years will go elsewhere
28 and we will get the type of man who will lie in bed with a negro.”

1 117. In 1993, a general testified that homosexuals might sexually assault
2 straights, who would be “physically coerced to engage in [homosexual] acts.” In
3 1948, Senator Richard Russell said racial integration would “increase the rate of
4 crime committed by servicemen,” since “Negro troops” committed rape thirteen
5 times more often than whites.

6 118. In 1993, opponents of homosexual service complained that lifting the
7 ban could spread AIDS and other STD’s. Likewise, Russell cast African
8 Americans as disease-riddled outsiders who threatened innocent young white boys
9 with sexually transmitted diseases. Syphilis, gonorrhea, chancre, and tuberculosis,
10 he said, are “appallingly higher among the members of the Negro race than among
11 the members of the white race.”

12 119. A colonel claimed in 1993 that “it has been proven in the scientific
13 literature that homosexuals are not able-bodied.” In 1942 a Naval officer insisted
14 that “the white man is more adaptable and more efficient in the various conditions
15 which are involved in the making of an effective man-of-war.”

16 120. Sen. Sam Nunn said in 1993 that, “when the interests of some
17 individuals bear upon the cohesion and effectiveness of an institution upon which
18 our national security depends, we must, in my view, move very cautiously. This
19 caution is not prejudice; it is prudence.” Decades earlier, a Korean War
20 commander said that racial integration would weaken the armed forces and that
21 “there is no question in my mind of the inherent difference in races. This is not
22 racism—it is common sense and understanding.”

23 121. Clear, consistent rules governing behavior is what makes homosexual
24 inclusion work. Palm researchers concluded that if people are seen as working hard
25 and contributing to the team effort, “individual differences in opinion or in their
26 personal lives are not considered relevant.” During racial integration of the U.S.
27 military, researchers found that the sensitivity training and educational programs
28 designed to reduce discriminatory behavior against blacks caused resentment and

1 even hostility and so failed to solve the problems. Instead, better results were
2 achieved when outward behavior was the focus. These changes amounted to an
3 endorsement of fair and equal treatment as a principle embraced by the larger
4 group.

5 122. Finally, during the Congressional deliberations regarding DADT, there
6 was no discussion of whether the statute would further privacy interests and there
7 was no discussion regarding the impact the law would have upon women
8 servicemembers.

9
10 **D. The Don't Ask Don't Tell Policy**

11 123. The DADT Policy includes both the statutory language appearing at 10
12 U.S.C. section 654 and the implementing instructions appearing as DoDIs 1332.14,
13 1332.30, and 1304.26. DADT can be triggered by three kinds of “homosexual
14 conduct:” (1) “homosexual acts”; (2) statements that one “is a homosexual”; or (3)
15 marriage to, or an attempt to marry, a person of one’s same biological sex. 10
16 U.S.C. § 654 (b); DoDI 1332.14 at 17–18; 1332.30 at 9–10.

17 124. First, Defendants may “initiate separation proceedings” — i.e., begin
18 the process of removing an active service member from military ranks — if a
19 service member engages in a “homosexual act,” defined as “(A) any bodily contact,
20 actively undertaken or passively permitted, between members of the same sex for
21 the purpose of satisfying sexual desires; and (B) any bodily contact which a
22 reasonable person would understand to demonstrate a propensity or intent to engage
23 in an act described in subparagraph (A).” 10 U.S.C. § 654 (b)(1), (f)(3).

24 125. Second, Defendants may initiate separation if a service member makes
25 a statement “he or she is a homosexual or bisexual, or words to that effect.” 10
26 U.S.C. § 654(b)(2). These words create a presumption the service member is a
27 “person who engages in, attempts to engage in, has a propensity to engage in, or
28 intends to engage in homosexual acts.” 10 U.S.C. § 654(b)(2). A propensity is

1 "more than an abstract preference or desire to engage in homosexual acts; it
2 indicates a likelihood that a person engages or will engage in homosexual acts."
3 DoDI 1332.14 at 18.

4 126. The third route to separation under DADT, marriage or attempted
5 marriage to a person of the same sex, is self-explanatory.

6 127. Once Defendants find a service member has engaged in "homosexual
7 conduct," as defined above, Defendants will discharge him or her unless the service
8 member can demonstrate that, inter alia, such acts are not his or her usual or
9 customary behavior and that he or she has no propensity to engage in "homosexual
10 acts." 10 U.S.C. § 654(b)(1); DoDI 1332.14 at 18.

11
12 **E. DADT Since Enactment**

13 128. In each year from 1994 to 2003, Don't Ask, Don't Tell has ended the
14 careers of hundreds of patriotic Americans without any discernible benefit to the
15 U.S. Armed Forces.

16 129. At least 997 servicemembers were separated from the United States
17 Armed Forces pursuant to DADT in 1997.

18 130. At least 1,145 servicemembers were separated from the United States
19 Armed Forces pursuant to DADT in 1998.

20 131. At least 1,033 servicemembers were separated from the United States
21 Armed Forces pursuant to DADT in 1999.

22 132. At least 1,212 servicemembers were separated from the United States
23 Armed Forces pursuant to DADT in 2000.

24 133. At least 1,217 servicemembers were separated from the United States
25 Armed Forces pursuant to DADT in 2001.

26 134. At least 885 servicemembers were separated from the United States
27 Armed Forces pursuant to DADT in 2002.

28 135. At least 770 servicemembers were separated from the United States

1 Armed Forces pursuant to DADT in 2003.

2 136. At least 653 servicemembers were separated from the United States
3 Armed Forces pursuant to DADT in 2004.

4 137. At least 726 servicemembers were separated from the United States
5 Armed Forces pursuant to DADT in 2005.

6 138. At least 612 servicemembers were separated from the United States
7 Armed Forces pursuant to DADT in 2006.

8 139. At least 627 servicemembers were separated from the United States
9 Armed Forces pursuant to DADT in 2007.

10 140. At least 619 servicemembers were separated from the United States
11 Armed Forces pursuant to DADT in 2008.

12 141. At least 275 servicemembers were separated from the United States
13 Armed Forces pursuant to DADT in 2009.

14 142. Between 1994 and 2003, 9,488 servicemembers were separated from
15 the United States Armed Forces pursuant to DADT.

16 143. Between 1997 and 2003, 7,270 servicemembers were separated from
17 the United States Armed Forces pursuant to DADT.

18 144. Between 1997 and 2009, 10,935 servicemembers were separated from
19 the United States Armed Forces pursuant to DADT.

20 145. In every year since 1997, hundreds of servicemembers – in some years
21 more than 1,000 – have been separated from the United States Armed Forces
22 pursuant to DADT.

23
24 **i. Studies & Reports**

25 146. The U.S. Army Research Institute for the Behavioral and Social
26 Sciences studied the situation in Canada and concluded in a report released in 1994
27 that anticipated damage to readiness never materialized after the ban was lifted
28 there: “Negative consequences predicted in the areas of recruitment, employment,

1 attrition, retention, and cohesion and morale have not occurred since the policy was
2 changed.” Canadian Forces (“CF”) experienced “virtually no consequences of
3 lifting the ban on known homosexuals in the CF for all important dimensions.”

4 147. A 2001 Palm Center study of the San Diego Police Department echoed
5 the finding of the RAND study that integration of open homosexuals into U.S.
6 police and fire departments and the adoption of nondiscrimination policies did not
7 impair effectiveness, even though many departments were characterized as highly
8 homophobic.

9 148. A statistical analysis of United States military units in the Iraq and
10 Afghanistan conflicts showed no correlation between the presence of openly
11 homosexual servicemembers in the unit and the unit’s cohesion, quality, or combat
12 readiness.

13 149. In July 2008, a bipartisan panel of retired flag officers released a report
14 that represented what John Shalikashvili called “one of the most comprehensive
15 evaluations of the issue of homosexuals in the military since the Rand study” in
16 1993. The panel found that lifting the ban is “unlikely to pose any significant risk
17 to morale, good order, discipline, or cohesion.”

18 150. Also, the majority of researchers who have studied the issue have
19 concluded that there will be no change in the percentage of servicemembers that
20 openly reveal they are homosexual following repeal of DADT.

21
22 **ii. Deployment of Openly Homosexual Members to Foreign Theaters**
23 **of Combat**

24 151. A 2004 Palm Center study, entitled “Gays and Lesbians at War:
25 Military Service in Iraq and Afghanistan Under ‘Don’t Ask, Don’t Tell,’”
26 chronicled the experiences of homosexual troops who fought in Iraq and
27 Afghanistan. It found that, among the nearly three dozen service members studied
28 in-depth, most service members were out to some or most of their peers, often

1 including their superiors.

2 152. In 2005, Palm Center researchers obtained an Army Commander's
3 Handbook updated in 1999 and still in effect. In the handbook, entitled,
4 "Regulation 500-3-3 Volume III, Reserve Component Unit Commanders
5 Handbook, in Table 2.1 on "Personnel actions during the mobilization process," it
6 says under the criterion of "homosexuality": "if discharge is not requested prior to
7 the unit's receipt of alert notification, discharge isn't authorized. Member will enter
8 AD [active duty] with the unit."

9 153. Kim Waldron, spokesperson at the U.S. Army Forces Command at
10 Fort McPherson, acknowledged publicly that the Pentagon was sending openly
11 homosexual service members into combat in Iraq: "The bottom line is some people
12 are using sexual orientation to avoid deployment. So in this case, with the Reserve
13 and Guard forces, if a soldier 'tells,' they still have to go to war and the homosexual
14 issue is postponed until they return to the U.S. and the unit is demobilized."

15
16 **iii. Application in Times of Peace Versus War**

17 154. DADT has been applied more frequently in peacetime than in times of
18 war, when unit cohesion, as defendants posit the concept, is in theory most vital.

19 155. Studies, reports, and polls of servicemembers reveal a Pentagon
20 pattern of retaining homosexuals during war, and then discharging them once peace
21 returns.

22 156. The Congressional Research Service has acknowledged that suspected
23 homosexuals have been sent to war, noting that, "as a result of these policies and
24 laws, the situation that arises during a time of deployment place[s] homosexuals in
25 a no-win situation. They are allowed or ordered to serve at the risk of their own
26 lives with the probability of forced discharge when hostilities end if their sexuality
27 becomes an issue. By deploying suspected homosexuals with their units, the
28 services bring into question their own argument that the presence of homosexuals

1 seriously impairs the accomplishment of the military mission.”

2 157. The year 2001, during most of which the United States was not in a
3 state of war, yielded the highest number of discharges under Don’t Ask, Don’t Tell.

4 158. Since the commencement of Operation Enduring Freedom in
5 Afghanistan in October 2001 and Operation Iraqi Freedom in Iraq in March 2003,
6 discharges of homosexual members of the United States Armed Forces have
7 decreased dramatically. The Department of Defense separated 49% fewer
8 servicemembers under the Policy in fiscal year 2008 than it separated in fiscal year
9 2001.

10 159. Army officers are instructed not to discharge servicemembers based on
11 homosexuality from units on or about to be placed on active duty status. Their
12 discharge is to be postponed until their return to the United States.

13 160. Promulgated in 1999 and still in force today, Regulation 500-3-3
14 [FORSCOM] allows active duty deployment of Army reservists and National
15 Guard troops awaiting resolution of the allegation of homosexual conduct or
16 statements.

17 161. Col. Jamie Scott Brady, Defendants Fed. R. Civ. P. 30(b)(6) deponent,
18 admitted that “once [a] unit receives an alert notification, i.e., that they've been
19 alerted that they're going to deploy, and if the discharge has not been requested by
20 the time they receive that alert notification, they will not discharge the member at
21 that moment; however, they will allow the member to enter active duty with the
22 unit, and then continue the separations proceedings at that point.”

23
24 **iv. DADT’s Impact on Women**

25 162. In each year from 1994 through the present, Don’t Ask, Don’t Tell has
26 disproportionately impacted women in the Armed Forces.

27 163. Between 1994 and 2003, women constituted less than 20% of the
28 United States Armed Forces yet accounted for over 40% of the servicemembers

1 discharged under the Policy.

2 164. Between 1997 and 2003, 4,385 women were separated from the United
3 States Armed Forces pursuant to DADT, accounting for 40.36% of all separations
4 under DADT.

5 165. In 2008, women accounted for 14% of the Armed Forces but
6 accounted for 36% of those discharged under the Policy.

7 166. Don't Ask, Don't Tell uniquely impairs unit cohesion and military
8 effectiveness among female servicemembers.

9 167. Don't Ask, Don't Tell requires that female servicemembers avoid
10 appearing too strong, assertive, and masculine – and thus stereotypically lesbian –
11 although they are expected to operate in a male-dominated military environment.

12 168. Many female servicemembers, lesbian or not, must choose whether to
13 perform their duties with full competence and risk being labeled a lesbian or to
14 purposefully act in a more feminine but less competent manner. Effectiveness is
15 sacrificed.

16 169. By making homosexuality illegal, Don't Ask, Don't Tell encourages
17 allegations of lesbianism if female servicemembers refuse sexual advances by
18 males.

19 170. Don't Ask, Don't Tell discourages female servicemembers from
20 reporting sexual harassment, impairing the unit cohesion and morale of all female
21 servicemembers, not just those who are actually homosexual.

22 171. Between 1997 and 2003, 4,385 women were discharged under the
23 Policy, accounting for 40.36% of all separations under the Policy during that
24 period.

25 172. Between 1994 and 2003, servicewomen accounted for less than 20%
26 of all servicemembers in the United States Armed Forces.

27
28

1 **v. Application of DADT to Servicemembers in Non-Combat but**
2 **Critical Occupations**

3 173. Defendants admit that DADT applies to all members of the United
4 States Armed Forces regardless of whether they serve in combat or non-combat
5 positions.

6 174. Servicemembers in critical combat and non-combat occupations have
7 been and continue to be separated from service pursuant to “Don’t Ask, Don’t
8 Tell.”

9 175. According to the 2005 GAO report on “Don’t Ask, Don’t Tell,” 757
10 troops with “critical occupations, identified by DOD as those occupations worthy of
11 selective reimbursement bonuses,” were separated under the policy between fiscal
12 years 1994 and 2003. These include voice interceptors, interrogators, translators,
13 explosive ordinance disposal specialists, signal intelligence analysts, and missile
14 and cryptologic technicians, have been discharged under Don’t Ask, Don’t Tell.

15 176. 322 separated servicemembers had skills in what the military deemed
16 “an important foreign language such as Arabic, Farsi, or Korean.”

17 177. Between 1997 and 2003, the Department of Defense discharged 870
18 servicemembers with foreign language skills under DADT.

19 178. In just the two years following the attacks of September 11, 2001, the
20 U.S. Armed Forces discharged 71 linguists under DADT. This included 37
21 language experts with skills in Arabic, Korean, Farsi, Chinese, or Russian.

22 179. In fiscal year 2002, the Department of Defense separated 33 linguists
23 under the Policy.

24 180. In fiscal year 2003, the Department of Defense separated 38 linguists
25 under the Policy.

26 181. By 2003, the number of Arabic language specialists discharged under
27 Don’t Ask, Don’t Tell climbed to at least 54.

28 182. Discharging individuals with these language skills has demonstrable

1 negative effects on intelligence gathering, analysis, communications, force support,
2 and hence national security.

3 183. Among the thousands of others discharged under DADT are
4 servicemembers with skills in intelligence, combat engineering, medicine, JAG
5 Corps members, military police and security, nuclear, biological, and chemical
6 warfare, missile guidance and operation, and other skills and professions.

7 184. Defendants admit that medical personnel, dental care technicians,
8 ophthalmologists, and members of the JAG Corps have been separated from the U.S.
9 military under DADT.

10 185. Defendants admit that DADT applies equally to military judges.

11 186. Such discharges occurred despite shortages in such personnel and
12 despite force-wide recruitment and retention challenges.

13 187. For instance, during the first ten years of DADT, 244 medical
14 specialists were fired, including physicians, nurses, biomedical laboratory
15 technicians and other highly trained healthcare personnel. The military
16 acknowledged it has struggled with shortfalls in recruitment and retention of
17 medical personnel for the wars in Iraq and Afghanistan. The consequences of
18 shortfalls in military medical specialists are particularly grave. According to a
19 Senate report issued in 2003 by Senators Christopher Bond and Patrick Leahy,
20 hundreds of injured National Guard and Army reserve soldiers received
21 “inadequate medical attention” while housed at Fort Stewart because of a lack of
22 preparedness that included “an insufficient number of medical clinicians and
23 specialists, which has caused excessive delays in the delivery of care” and a
24 “negative impact on morale.”

25 188. These shortages harm troop morale by necessitating extended
26 deployments, an over-reliance on the National Guard and reserves (who on average
27 have less training, higher stress levels, and lower morale than full-time soldiers),
28 stop-loss orders delaying discharges, forced recalls, and more frequent combat duty

1 while the United States fought two wars and the global war on terror.

2 189. To meet recruitment targets, the Pentagon in 2004 began issuing
3 mandatory recalls to thousands of troops for deployment to Iraq and Afghanistan.
4 The Pentagon's recalls targeted specialists with needed skills in intelligence,
5 engineering, medicine, administration, transportation, security, and other key areas
6 that were being drained by the discharge of capable homosexual servicemembers.
7 Yet the military previously expelled competent homosexual troops in the very same
8 fields: from 1998-2003 the military recalled 72 soldiers in communication and
9 navigation but expelled 115 homosexual troops in that category; 33 in operational
10 intelligence but expelled 50 homosexuals; 33 in combat operations control but
11 expelled 106. In total, while the Army announced in 2004 it would recall 5,674
12 troops from the Individual Ready Reserve, 6,273 troops had been discharged for
13 being homosexual or bisexual since 1998. Further, Individual Ready Reserve units
14 are less well-prepared and less cohesive because their personnel have not been
15 training together while out of the service.

16 190. Military personnel in non-combat positions, for example instructors at
17 the service academies, are also subject to DADT and some voluntarily leave
18 military service because of the effects of the Policy.

19 191. These patriots possess critical skills and years of training and have
20 served this country well.

21
22 **vi. Statement Based Discharges**

23 192. Homosexual “conduct” is grounds for separation from the U.S.
24 Military under DADT. Homosexual “conduct” includes a statement that one is a
25 homosexual or bisexual, or words to that effect, or a statement by a person that
26 demonstrates a propensity or intent to engage in homosexual acts unless the
27 servicemember has “demonstrated that he or she is not a person who engages in,
28 attempts to engage in, has a propensity to engage in, or intends to engage in

1 homosexual acts.”

2 193. Pursuant to DADT, the statement “I am a homosexual” is grounds for
3 separation from the U.S. Military. Accordingly, while a servicemember’s status is
4 not a basis for discharge under DADT, a statement of that permissible status is
5 grounds for separation.

6 194. Though being homosexual is not wrongful conduct under DADT, and
7 the policy does not prohibit homosexuals from serving in the military, “conduct” is
8 defined so broadly, it effectively regulates, and in some cases punishes, people for
9 their status and not for homosexual conduct.

10 195. Discharges under DADT are categorized as discharges for
11 “homosexuality,” not “homosexual conduct.” This is the same nomenclature used
12 before DADT, when the Defense Department’s directives stated “**homosexuality** is
13 incompatible with military service.”

14 196. DADT prohibits statements indentifying a servicemember as
15 homosexual or bisexual “at all times that the member has a military status, whether
16 the member is on base or off base, and whether the member is on duty or off duty.”

17 197. An estimated 80% to 85% of discharges under DADT since 1993 have
18 been for “statements.” From fiscal years 1997 to 2003, 670 of 770 discharges
19 under DADT (87.0%) were for statements, as opposed to acts or conduct, and from
20 fiscal years 2004 to 2008, 9059 of 10,507 discharges (86.2%) were for statements.

21 198. While a servicemember who is to be separated under DADT for
22 commission of homosexual acts can in theory rebut the presumption that he or she
23 has a propensity or intent to engage in such acts, the number of cases in which a
24 servicemember has successfully done so has not been statistically significant. Only
25 9 servicemembers pending separation under DADT have been able to rebut the
26 presumption that his or her statement identifying him or herself as homosexual
27 indicated an intent to commit “homosexual acts.”

28 199. Private statements to civilian family and friends have served as the

1 basis for discharge proceedings under DADT.

2 200. DADT prohibits homosexual servicemembers from acknowledging
3 their homosexuality in court, to an elected representative, to the media, or in the
4 course of a political debate.

5 201. The government's training materials provide that a servicemember
6 who advocates, in a public, off-base forum for repeal of DADT is subject to
7 discharge on that basis alone.

8 202. A Log Cabin member was discharged for criticizing a general's biased
9 comments about homosexuals.

10 203. Other servicemembers, including at least two Log Cabin members
11 have been discharged under DADT for "statements" without their ever having
12 indicated a supposed "propensity to engage in 'homosexual acts'" to either their
13 superior officers or other servicemembers, or indeed without ever admitting during
14 separation proceedings they had committed such acts. In one of these cases, the
15 statement that launched the investigation was something akin to "I have a profile on
16 Myspace."

17
18 **vii. Examples of Homosexuals Discharged Under DADT**

19 204. The Williams Institute at the University of California, Los Angeles
20 estimated that approximately 5% of women and 2% of men currently serving in the
21 military, or 65,000 total people, are homosexual.

22 205. Persons who have identified themselves as homosexual have served
23 the Armed Forces bravely, even with distinction, and have received honorable
24 discharges from the United States Armed Forces.

25 206. However, DADT has required the discharge of many valuable
26 homosexual servicemembers. The following individuals discharged under DADT
27 represent examples of how DADT does not further its stated purposes. The
28 discharge of each of the following servicemembers actually undermined the goals

1 of unit cohesion, morale, good order and discipline, and military readiness.

2 **a. *Joseph Christopher Rocha***

3 207. Joseph Christopher Rocha is a US Navy veteran who served 28 months
4 in the Middle East as an explosive detection dog handler. His job was to train and
5 utilize dogs to keep explosives, narcotics, and insurgents out of Iraq and
6 Afghanistan.

7 208. Rocha proved his worth by excelling at his job performance. He was
8 selected to attend the United States Naval Academy Prep School (“NAPS”).

9 209. At NAPS he realized that a career of service under DADT would be a
10 forfeiture of his basic human rights. It would be a forfeiture of basic job security,
11 peace of mind, and meaningful relationships, particularly with his fellow straight
12 service members whom he was forced to deceive and betray by hiding his
13 homosexuality.

14 210. After completing a six-week officer candidate boot camp, his
15 commanders said they wanted to offer him a leadership role. Instead, he resigned
16 in a letter addressed to the NAPS legal officer.

17 211. His reasons: “I am a homosexual. I deeply regret that my personal
18 feelings are not compatible with Naval regulations or policy. I am proud of my
19 service and had hoped I would be able to serve the Navy and the country for my
20 entire career. However, the principles of honor, courage and commitment mean I
21 must be honest with myself, courageous in my beliefs, and committed in my action.
22 I understand that this statement will be used to end my Naval career.”

23 212. After his letter was received by NAPS, Rocha was encouraged by a
24 commanding officer to withdraw his letter. Moreover, he was told that if he
25 withdrew the letter, his admission into NAPS would not be affected (despite his
26 having granted the Navy an official statement disclosing that he was homosexual).
27 Rocha declined.

28 213. Rocha forfeited his dream of graduating from the Naval Academy

1 when he declared he was homosexual. This disclosure ended his military career as
2 he was discharged under DADT.

3 214. Since his discharge, he has worked for leaders from President Obama
4 to Congresswoman Susan Davis. He has testified before city, state, and federal
5 committees and was even arrested while demanding social justice and the repeal of
6 the “Don't Ask, Don't Tell” law. He has taken the fight to every media outlet as a
7 guest on NPR, CNN and even writing for the Washington Post.

8 215. In honor of those who did not come back from the Middle East, he has
9 dedicated his life to public service by fighting for human dignity, safety and basic
10 job security for all who serve.

11 **b. *Jenny L. Kopfstein***

12 216. Jenny L. Kopfstein joined the Navy in 1995 when she entered the
13 Naval Academy. She graduated from the Academy and was commissioned in 1999
14 as a Surface Warfare Officer.

15 217. In March 2000, Ms. Kopfstein began serving on the U.S.S. SHILOH,
16 in San Diego in March of '00. While on board, Kopfstein found it difficult to
17 answer casual questions about her personal life without lying or concealing the
18 whole truth. After a few months on board, Kopfstein gave her Commanding
19 Officer a letter (in July '00) in which she disclosed that she was a homosexual.

20 218. Despite having made this admission, the Navy did not immediately
21 seek to discharge Kopfstein during her first deployment.

22 219. In addition, after writing her letter, Ms. Kopfstein began to disclose
23 over time to her shipmates that she was a homosexual. She expected negative
24 responses, but received none. All of her shipmates reacted positively, and the
25 universal attitude of her colleagues was that DADT was dumb.

26 220. Thereafter, Kopfstein went on a second, six-month deployment in the
27 Western Pacific in support of Operation Enduring Freedom. She completed that
28 deployment, and still no discharge proceedings began. Although Kopfstein had

1 originally been scheduled for an 18-month tour of duty on the SHILOH, she was
2 retained on the ship for 22 months.

3 221. Admitting her sexual orientation to others did not harm Kopfstein's
4 job performance. To the contrary, during her deployment and in the months
5 following that deployment, Kopfstein continued to display a high degree of
6 professionalism and excellence. The Navy recognized this, and gave Kopfstein
7 several awards and honors, including qualifying Kopfstein as Officer of the Deck
8 Underway, which allowed her to take command of the entire ship in certain
9 situations. In 2002, her commanding officer wrote in her Fitness Report that her
10 "sexual orientation has not disrupted good order and discipline onboard USS
11 SHILOH."

12 222. Kopfstein was promoted to the rank of Lieutenant Junior Grade (O-2)
13 with a Surface Warfare Officer specialty after returning from deployment.

14 223. Nineteen months after she had disclosed her sexual orientation, a
15 Board of Inquiry finally convened to investigate whether grounds existed for
16 discharging Kopfstein under "Don't Ask, Don't Tell." During the Board of Inquiry
17 hearing, both of Kopfstein's Captains (command of the U.S.S. SHILOH changed
18 during her tour of duty) volunteered to testify on her behalf. Both Captains testified
19 that they understood that Kopfstein was a homosexual, but that Kopfstein was an
20 excellent officer and that she should ideally remain in the Navy.

21 224. The Board of Inquiry disregarded the recommendations of Kopfstein's
22 Captains. Concluding that Kopfstein's statement that she is a homosexual
23 constituted grounds for discharge under "Don't Ask, Don't Tell," the board voted in
24 February 2002 to discharge Kopfstein from the Navy.

25 225. After a delay, Kopfstein was honorably discharged from the Navy on
26 October 31, 2002. At the time of her discharge, Kopfstein had served in the Navy
27 for nearly three years, not counting her four years as a midshipman at the Academy.
28 Moreover, it had been 2 years and 4 months between when she gave the letter to her

1 commander and when she was discharged.

2 226. During her service, Kopfstein received numerous awards, including
3 the Navy Achievement Medal, Meritorious Unit Commendation (2), Battle "E"
4 Ribbon, National Defense Service Medal (2), Armed Forces Expeditionary Medal,
5 Sea Service Deployment Ribbon, Navy Expert Rifle Medal, Navy Expert Pistol
6 Shot Medal, and Surface Warfare Qualification Breast Insignia.

7 **c. Major Michael D. Almy**

8 227. Michael D. Almy ("Almy") joined the United States Air Force Reserve
9 Officers' Training Corps in 1988 and was awarded a scholarship.

10 228. In 1991, Almy earned a United States Parachutist Badge, commonly
11 referred to as "Jump Wings."

12 229. In 1992, Almy graduated from the United States Air Force Reserve
13 Officers' Training Corps in the top 10% of all graduates nationwide.

14 230. Almy served as an active duty member of the United States Air Force
15 from June 1993 to July 2006.

16 231. Almy was first assigned to Keesler Air Force Base in Mississippi for
17 Basic Communications-Electronics Officer Training. Almy was then stationed at
18 the Air Intelligence Agency at Kelly Air Force Base in Texas, where he remained
19 for approximately nine months when, in 1994, he was accepted for navigator
20 training at Randolph Air Force Base in Texas. Almy completed nearly nine months
21 of navigator school.

22 232. In July 1995, Almy was assigned to Scott Air Force Base in Illinois.
23 There, Almy worked on systems support for the J2 Directorate of the U.S.
24 Transportation Command and worked at the help desk for all Air Mobility
25 Command and control systems.

26 233. In 1998, Almy was stationed at the Third Combat Communications
27 Group at Tinker Air Force Base in Oklahoma. While stationed in Oklahoma, Almy
28 was named officer of the year for his unit of nearly 1,000 people.

1 234. In September 1998, Almy deployed to Eskan Village, Saudi Arabia as
2 the senior communicator from his unit with approximately 60 personnel from his
3 squadron. There, he and his squadron supported all the base-level communications
4 requirements during Operation Desert Fox.

5 235. In September 1999, Almy again deployed to Saudi Arabia to Prince
6 Sultan Air Base where he served as the executive officer for the 363rd
7 Expeditionary Operations Group.

8 236. In July 2001, Almy was stationed at Quantico Marine Corps Base in
9 Virginia as one of six Air Force officers attending the United States Marine Corps
10 C2 Systems School. This course has since become the United States Marine Corps
11 Expeditionary Warfare Course, and is the in-residence professional military
12 education that all Marine captains strive to attend.

13 237. In June 2002, Almy was stationed at Ramstein Air Base in Germany in
14 the Communications Directorate of the Headquarters of the United States Air
15 Forces in Europe. There, Almy worked on tactical communications and airborne
16 communications projects.

17 238. In December 2002, Almy again deployed to Prince Sultan Air Base to
18 work in the J6 directorate of the Combined Air and Space Operations Center during
19 the invasion of Iraq. As part of this assignment, Almy was directly responsible for
20 the communications activation of newly deployed sites. Almy also helped ensure a
21 smooth transition of all communications functions to the new Combined Air and
22 Space Operations Center at Al Udeid Air Base in Qatar.

23 239. Before Almy left Prince Sultan Air Base, he was contacted by his
24 leadership at Ramstein Air Base in Germany and asked if he wanted the Chief of
25 Maintenance position at the 606th Air Control Squadron at Spangdahlem Air Base,
26 Germany. He accepted.

27 240. In August 2003, Almy obtained the rank of U.S. Air Force Major.

28 241. In September 2003, Almy reported to his new assignment at the 52d

1 Fighter Wing at Spangdahlem Air Base in Germany. As part of his new
2 assignment, Almy was in charge of a 180 person directorate.

3 242. While he was stationed at Spangdahlem Air Base, Almy regularly
4 attended Christian chapel services and served as a mentor to younger airmen, their
5 spouses, and family members of deployed members that needed emotional support.

6 243. In September 2004, Almy's unit deployed to three locations in Iraq.
7 While in Iraq, his unit controlled the airspace over two-thirds of Iraq, and his troops
8 maintained the equipment necessary for that mission. This included Close Air
9 Support for the liberation of Fallujah. During this time, his unit sustained repeated
10 mortar and rocket attacks. When one of his troops was injured by rocket fire, he
11 rallied his troops, aided the wounded and restored damaged equipment to service,
12 thus avoiding the loss of the mission.

13 244. As a result of his leadership, Almy was nominated for and received the
14 2004 Lieutenant General Leo Marquez Award in the field grade officer category for
15 electronic maintenance. The Award is presented to maintainers who have
16 demonstrated the highest degree of sustained job performance, job knowledge, job
17 efficiency and results in the categories of aircraft, munitions and missile, and
18 communications-electronics maintenance. As a result of the Award, Almy was
19 regarded as the top Air Force Communications Officer in Europe.

20 245. While in Iraq, Almy used, with United States Air Force permission,
21 Air Force computers to send and receive electronic mail correspondence for
22 personal purposes from his government-issued electronic mail account.

23 246. Almy's unit remained in Iraq until the beginning of 2005. Thereafter,
24 Almy's unit returned to Spangdahlem Air Base, Germany.

25 247. In approximately February 2005, a search was conducted on the
26 computer Almy used while he was stationed in Iraq. The search resulted in the
27 discovery of emails Almy had sent to two men between December 2004 and
28 January 2005 wherein Almy discussed homosexual conduct. The emails were

1 forwarded to his Commander, and Almy was called into his Commander's office.
2 While in his Commander's office, Almy was read the Don't Ask, Don't Tell policy.
3 Thereafter, Almy was handed the emails and asked how he could explain their
4 content. At no point did Almy indicate to his Commander that he is homosexual.

5 248. Almy was relieved of his duties on March 14, 2005. As a result,
6 Almy's security clearance was suspended and a portion of his compensation was
7 terminated.

8 249. The members of Almy's unit were not told why he was relieved of his
9 duties.

10 250. The removal of Almy from his position resulted in tremendous
11 disruption to his unit and a loss of unit cohesion.

12 251. Almy was replaced with a junior officer with neither the training nor
13 expertise Almy possessed.

14 252. After he was relieved of his duties, Almy remained at Spangdahlem
15 Air Base in Germany for approximately sixteen months. During this time, Almy
16 was assigned to an administrative desk job.

17 253. Approximately a year after he was relieved of his duties, Almy's Wing
18 Commander recommended that he be promoted to Lieutenant Colonel, even though
19 the United States Air Force was actively pursuing his discharge.

20 254. In connection with his discharge proceeding, several servicemembers
21 with whom Almy served wrote character reference letters for him, including one of
22 his squadron Commanders. A chaplain at Spangdahlem Air Base also wrote a
23 character reference letter.

24 255. Almy was honorably discharged under Don't Ask, Don't Tell on July
25 21, 2006, even though he never made a statement that he is homosexual.

26 256. If Don't Ask, Don't Tell is overturned, Almy would rejoin the United
27 States Air Force.

28

1 **d. SSgt. Anthony Loverde**

2 257. Anthony Loverde served as an active duty member of the United
3 States Air Force from February 13, 2001 to July 13, 2008.

4 258. When Loverde enlisted in the United States Air Force in February
5 2001, he was 21-years-old. Loverde originally committed to remain in the Air
6 Force until February 2007.

7 259. Loverde was assigned to Lackland Air Force Base in Texas for basic
8 training where he remained until April 2001. Thereafter, Loverde was sent to
9 Keesler Air Force Base in Mississippi for further training where he remained until
10 December 2001.

11 260. In December 2001, Loverde was assigned to Ramstein Air Base in
12 Germany. While there, Loverde served as a member of the 86th Maintenance
13 Squadron. He worked as a Precision Measurement Equipment Laboratory
14 technician and was responsible for calibrating weapons systems in the United States
15 Air Forces in Europe, Southwest Asia, and the Continental United States.

16 261. While serving in Germany, Loverde did not tell any members of his
17 command that he is homosexual. But he also did not go to great lengths to conceal
18 his sexuality through his actions. For example, in December 2001, Loverde
19 attended an off base military holiday party in Germany wearing leather pants and
20 sporting spiked hair. At the party were approximately forty enlisted members that
21 he worked with, including superiors from the ranks of Major Sergeant (E7) to Chief
22 Master Sergeant (E9). Additionally, when members of his command asked him
23 what kind of girls he liked, he would say “rugged ones with broad shoulders.”

24 262. As a reward for his exceptional work at Ramstein Air Base, Loverde
25 was awarded early promotion to Senior Airman, garnered Distinguish Graduate
26 from the United States Air Force Airman Leadership School, and obtained a 7-level
27 craftsman proficiency badge within his first four years of service.

28 263. In August 2004, while at Ramstein Air Base, Loverde was also

1 promoted to Staff Sergeant.

2 264. From January 2005 to July 2007, Loverde was assigned to Edwards
3 Air Force Base in California as a Precision Measurement Equipment Laboratory
4 technician.

5 265. From September 2005 to January 2006, Loverde deployed to Al Udeid
6 Air Base in Qatar in support of Operation Enduring Freedom and Operation Iraqi
7 Freedom.

8 266. In January 2006, Loverde returned to Edward Air Force Base. Given
9 that Mr. Loverde's enlistment was to expire in February 2007, Loverde began
10 considering whether he would leave the United States Air Force in 2007. Although
11 Loverde desired to remain in the United States Air Force, Loverde found it
12 extremely difficult to not be able to declare that he is homosexual to his fellow
13 soldiers.

14 267. He weighed his options and decided that if he were to pursue a new
15 career field in the Air Force, he may be better able to serve his country by
16 concealing his sexuality. Loverde re-enlisted so that he would have the time to
17 receive additional training in a new career field.

18 268. In July 2006, Loverde applied to be trained as an aircrew member
19 (commonly known as a "loadmaster") on a Lockheed C-130 Hercules aircraft and
20 was accepted. In June 2007, Loverde completed his loadmaster training.

21 269. In July 2007, Loverde was assigned to serve with the 37th Airlift
22 Squadron at Ramstein Air Base in Germany.

23 270. In December 2007, Loverde deployed to Ali Al Salem Air Base in
24 Kuwait to serve with the 386th Expeditionary Operations Group in support of
25 Operation Iraqi Freedom. Loverde remained in Kuwait until April 2008. During
26 this deployment, Loverde flew sixty-one (61) combat missions into Iraq, during
27 many of which he faced small arms fire, surface to air missiles, and inclement
28 weather. As a result of these combat missions, Loverde was awarded two Air

1 Medals.

2 271. While he served in Kuwait and Iraq, Loverde endured the constant
3 harassment of his supervisor, who repeatedly made homophobic remarks to him
4 and his unit. Although Loverde strongly desired to speak out in defense of his
5 concealed sexuality in these instances, Loverde repeatedly resisted the urge to do so
6 to protect his career.

7 272. In April 2008, Loverde returned to Ramstein Air Base in Germany.
8 After years of concealing his sexuality and enduring a slew of homosexual remarks
9 made by his supervisor while he was in Kuwait and Iraq, Loverde decided he could
10 no longer conceal his sexuality from his command. Loverde sent an email to his
11 First Sergeant and later his Commander advising them that he is homosexual and
12 could no longer abide by Don't Ask, Don't Tell, but still wanted to serve. Although
13 Loverde had told a handful of members of the Air Force that he is homosexual, he
14 had never come out to anyone in his command.

15 273. Once news of Loverde's homosexuality spread to the members of his
16 command, they told him they were not surprised. They said it was an unspoken
17 truth that he is homosexual.

18 274. After Loverde came out, three servicemembers called him to apologize
19 for making homophobic comments prior to his revealing his sexual orientation.
20 One servicemember told Loverde that Loverde had changed the way he views
21 homosexual people. He told Loverde he would be honored to be deployed and
22 serve with Loverde any day and any time.

23 275. Loverde was removed from flying status in April 2008. Although
24 Loverde remained on active duty, he was assigned to an administrative desk job.

25 276. All of Loverde's supervisors from the ranks of Major Sergeant (E7) to
26 Chief Master Sergeant (E9) wrote character reference letters that requested his
27 retention.

28 277. Loverde served as an openly homosexual man for a couple of months.

1 During that time, Loverde made sure everybody knew he is homosexual and was
2 being forced to leave the Air Force because of it. During this time, no
3 servicemembers approached Loverde to tell him they had a problem with his sexual
4 orientation.

5 278. Loverde was honorably discharged from the United States Air Force
6 on July 13, 2008.

7 279. Within three weeks of separation, Loverde accepted employment in
8 Iraq to support the United States Army as a defense contractor. He held several
9 posts in Iraq and Afghanistan and was greatly respected by his military unit as an
10 openly homosexual contractor.

11 280. Loverde's contracting job was the same job that he had performed
12 when he was in the Air Force—he worked in the calibration lab. The only
13 difference was that Don't Ask, Don't Tell did not apply to his civilian work. As a
14 contractor, Loverde worked alongside the same Airmen he had worked with on
15 active duty in the Air Force, but this time, as an openly homosexual man. Everyone
16 Loverde worked with was very accepting of his openly homosexual status and it did
17 not impact the mission. Loverde's sexual orientation was a non-issue.

18 281. Loverde left his contracting job and returned to California in May
19 2009.

20 282. If Don't Ask, Don't Tell is overturned, Loverde would rejoin the
21 United States Air Force.

22 23 **viii. DADT's Effect Upon Retention & Recruitment**

24 283. In the years preceding and following the attacks of September 11,
25 2001, all four major service branches were plagued with recruitment and retention
26 shortfalls. This problem was exacerbated by the fact that recruiters' access to
27 schools and universities was hampered because of the military's discriminatory
28 policy and by the fact that thousands of troops had been expelled or never enlisted

1 because of the homosexual ban.

2 284. The difficulty of recruiting qualified officers and seamen has led the
3 Navy to expand the pool of prospects for that mission, even as it culls its ranks
4 elsewhere under Don't Ask, Don't Tell.

5 285. DADT is unpopular among the public and media and negatively
6 affects civilian perception of the Military.

7 286. Many heterosexual individuals who would otherwise enlist view the
8 military as out of touch as a result of Don't Ask, Don't Tell.

9 287. An additional 41,000 homosexual Americans might join the military if
10 the ban were lifted, and an additional 4,000 personnel might remain in uniform each
11 year if they could do so without having to conceal their identities.

12 288. Don't Ask, Don't Tell has deterred heterosexual and homosexual
13 Americans who are able, committed, and patriotic from enlisting to fight for their
14 country during a time of two wars.

15 289. Because of recruitment shortfalls, the U.S. military now recruits less
16 qualified servicemembers rather than admitting openly homosexual individuals.

17 290. The executive branch has the authority to suspend application of Don't
18 Ask, Don't Tell if separation would not be in the best interest of the armed forces,
19 to ensure the nation's combat effectiveness.

20 291. The military has recruited thousands of servicemembers despite low
21 scores on military aptitude tests, despite felony and serious misdemeanor
22 convictions, and despite substance abuse that would normally prohibit service.

23 292. Many veterans of the wars in Iraq and Afghanistan believe that DADT
24 impairs their ability to bond with their fellow service members.

25
26 **ix. Recruitment of Convicted Felons**

27 293. Rather than hiring or retaining competent homosexual troops, the
28 military began to hire less competent recruits, including those who scored poorly on

1 the military aptitude test and enlistees who were granted “moral waivers” –
2 invitations to enlist despite a prior record of criminal activity or substance abuse
3 that would normally prohibit entry.

4 294. Congress has authorized the enlistment in the United States Armed
5 Forces of persons convicted of a felony under the “moral waiver” provisions of 10
6 U.S.C. § 504.

7 295. The United States Army includes kidnapping, child abuse, making
8 terrorist threats, hate crimes, rape, and murder among its offenses permissible under
9 the “moral waiver” program for new recruits.

10 296. The military has issued moral waivers for servicemembers convicted
11 of murder, kidnapping, assault, illegal drug use, and making terrorist threats, and
12 currently counts 4,000 or more felons among its ranks.

13 297. Research shows that servicemembers enlisted as a result of moral
14 waivers pose greater risks to unit cohesion, morale, and good order than do
15 homosexual servicemembers serving openly.

16 298. In 2006, Private Steven Green shot and killed the parents and sister of
17 a young Iraqi girl in Mahmudiya, Iraq. He raped and murdered the girl, and then
18 set her body on fire. Nineteen-year-old Green was a high-school dropout with three
19 misdemeanor convictions and a history of drug and alcohol abuse. He had been
20 admitted into the army on a moral waiver.

21 299. The Department of Defense cannot accurately determine the number of
22 felons who enlisted in the United States Armed Forces using “moral waivers”
23 between 2003 and 2007.

24 300. The Department of Defense cannot accurately determine the number of
25 persons convicted of a serious misdemeanor who enlisted in the United States
26 Armed Forces using “moral waivers” between 2003 and 2007.

27 301. The Department of Defense cannot accurately determine the number of
28 known illicit narcotic abusers who enlisted in the United States Armed Forces using

1 “moral waivers” between 2003 and 2007.

2 302. However, evidence shows that between 2003 and 2006, 4,230
3 convicted felons, 43,977 individuals convicted of serious misdemeanors, including
4 assault, and 58,561 illegal drug abusers were allowed to enlist.

5 303. In 2005 the United States Army increased by nearly 50 percent the
6 number of new recruits it granted moral waivers. In the spring of 2005, the Army
7 reported it was recruiting higher numbers of ex-convicts, drug addicts, and high
8 school dropouts, acknowledging that they were being advanced even when they had
9 failed basic training, “performed poorly,” and become a “liability.”

10 304. In 2005, the army hired 667 soldiers who scored in the lowest third of
11 the military aptitude test – 14 more than the military discharged the previous year
12 under Don’t Ask, Don’t Tell.

13 305. Evidence shows that high school dropouts also have higher dropout
14 rates from the military, are more difficult to train, are more prone to disciplinary
15 problems, and are less likely to serve out their contracts.

16 306. According to one GAO study, those soldiers who are granted moral
17 waivers are more likely to be discharged for misconduct than those who are not.

18
19 **x. Homosexuals in Other Government Agencies**

20 307. Members of the United States Armed Forces work closely with
21 personnel from other agencies, such as the United States Central Intelligence
22 Agency, National Security Agency, Department of Defense, and Federal Bureau of
23 Investigation, all of which prohibit discrimination on the basis of sexual orientation.

24 308. No analogous domestic agency, such as police or fire departments, that
25 allows homosexuals to serve openly has reported any negative impact on cohesion,
26 readiness, morale, or discipline.

27 309. The experiences of police and fire departments are diagnostic of what
28 would happen if the U.S. Military allowed homosexuals to serve openly and

1 demonstrate that, at least in the short run, very few homosexual servicemembers
2 would reveal their sexual orientation as a result of repeal of DADT.

3 310. Despite fears that homosexuals could turn fighting forces into
4 homosexual pride floats, the majority of homosexuals serving in American police
5 and fire departments conform to expected norms of their organizations. This means
6 either they do not reveal their sexual orientation, or they do so only to selected
7 peers or supervisors but succeed at fitting in with their units in dress, appearance,
8 and comportment.

9 311. The Commander in Chief can be openly homosexual without
10 repercussion.

11
12 **xi. Opinion Polls**

13 312. Congress justified DADT in 1993 in part on the basis of opinion polls
14 that purportedly demonstrated anti-homosexual sentiment among the American
15 public and the military.

16 313. Polling since enactment of DADT, however, demonstrates that public
17 and military opinion has become more tolerant towards homosexuals than it was in
18 1993. Those polls also show an erosion of support for DADT and little and
19 diminishing concern that the presence of openly homosexual servicemembers on
20 will negatively impact issues of privacy, sexual tension, and the like.

21 314. In a 2003 Fox News poll, 64% of respondents supported homosexual
22 service in the military.

23 315. In a 2003 Gallup poll, 79% of total respondents supported homosexual
24 service in the military and 91% of respondents between ages eighteen and twenty-
25 nine favored lifting DADT.

26 316. In a May 2005 national poll conducted by the Boston Globe, 79% of
27 respondents said openly homosexual people should be allowed to serve in the
28 military.

1 317. In a 2008 Washington Post-ABC News poll, 75% of respondents said
2 that openly homosexual people should be allowed to serve in the military.

3 318. A 2006 Zogby International poll of current and/or former United
4 States servicemembers reported that:

- 5 a. Roughly two thirds of servicemembers returning from Iraq and
6 Afghanistan knew or suspected a homosexual person had served
7 in their unit, suggesting that a significant number of homosexual
8 troops are out to their peers.
- 9 b. 66% of respondents who had experience with homosexuals in
10 their units said that the presence of homosexual unit members
11 had no impact on their personal morale.
- 12 c. Servicemembers who had served with a homosexual were less
13 likely to think it was disruptive to the unit than people who said
14 they had not served with a homosexual.
- 15 d. The poll sought to provide data to test the unit cohesion
16 rationale by measuring and comparing the “outness” and quality
17 of a unit while controlling for other causes of unit quality.

18
19 **xii. Foreign Militaries Since 1993**

20 319. At least 23 countries allow homosexual individuals to serve openly in
21 their respective armed forces; these countries include Australia, Austria, Belgium,
22 Canada, the Czech Republic, Denmark, Estonia, Finland, France, Ireland, Israel,
23 Italy, Lithuania, Luxembourg, the Netherlands, New Zealand, Norway, Slovenia,
24 South Africa, Spain, Sweden, Switzerland, and the United Kingdom.

25 320. No such nation has reported any detriment to any metric of military
26 effectiveness, including unit cohesion, readiness, morale, retention, good order, or
27 discipline.

28 321. In closely allied nations such as Britain and Israel, homosexuals serve

1 openly in the highest positions. Even in those situations where homosexuals have
2 received unequal treatment in practice, the differences have been rare and
3 inconsequential. There is no evidence that these infrequent and minor cases of
4 differential treatment undermined performance, cohesion, or morale.

5 322. The nations that allow open homosexuals to serve have a wide range
6 of different cultures and deployment obligations. Thus some countries are more
7 socially liberal than the United States, but some, like Israel, are not.

8 323. In 2000, a comprehensive study regarding several foreign militaries'
9 experience after removing the ban on homosexual servicemembers reported no
10 observed impact on military effectiveness, unit cohesion, recruitment, or retention.

11 324. In both Afghanistan and Iraq, members of the United States Armed
12 Forces have fought and continue to fight side by side with coalition forces from
13 such nations, including Great Britain and Australia.

14 325. Such forces include openly homosexual commanding officers.

15 326. The Department of Defense has no record of any adverse effects
16 arising from the cooperation in Afghanistan and Iraq of United States
17 servicemembers with homosexual servicemembers from Great Britain and
18 Australia, or with the servicemembers of any other country that permits
19 homosexual servicemembers to serve openly.

20 327. Social tolerance is not required for such a change to work effectively.
21 Many of the nations that ended their homosexual bans since the early 1990s faced
22 enormous resistance beforehand, reflecting widespread homophobia, but none of
23 the doomsday predictions were realized after the bans were lifted. The military's
24 hierarchical, bureaucratic organizational structure makes it the ideal institution to
25 implement a policy on homosexual servicemembers serving openly, despite great
26 intolerance around it.

27 328. The experiences of other nations demonstrate the importance of the
28 centrality of leadership. Michael Codner, the assistant director for military sciences

1 at the Royal United Services Institute, noted that one reason for the British
2 military's success was that those at the very top lined up behind the policy change.
3 Research shows that controversial new rules are most effective when top leaders
4 make their genuine support absolutely clear so that the next layer of leaders, those
5 who actually must implement the new rules, come to identify enforcement of the
6 new policy with their own self-interest as leaders of the institution.

7 329. In the British military, servicemembers were polled prior to the repeal
8 of the ban on homosexual military service, and roughly two thirds stated they
9 would not work with homosexuals post-repeal.

10 330. However, a study conducted by the British military six months
11 following repeal revealed that very few people resigned from the military

12 331. However, a 2000 report from the United Kingdom Ministry of Defence
13 said the lifting of the ban on openly homosexual servicemembers was "hailed as a
14 solid achievement" that was "introduced smoothly with fewer problems than might
15 have been expected."

16 332. The military's own analysis of the effects of the repeal process
17 indicated there was no detriment to cohesion, readiness, morale, retention, or
18 recruitment.

19 333. There was "widespread acceptance of the new policy," and military
20 members generally "demonstrated a mature and pragmatic approach" to the change.

21 334. There were no reported problems with homosexuals harassing
22 heterosexuals, and there were "no reported difficulties of note concerning
23 homophobic behavior amongst Service Personnel."

24 335. The report concluded that "there has been a marked lack of reaction"
25 to the change.

26 336. In 2000, after Britain lifted its ban, the Palm Center at the University
27 of California, Santa Barbara, conducted exhaustive studies to assess the effects of
28 openly homosexual service in Britain, Israel, Canada, and Australia. Researchers

1 there reviewed over six hundred documents and contacted every identifiable
2 professional with expertise on the policy change, including military officers,
3 government leaders, academic researchers, journalists who covered the issue,
4 veterans, and nongovernmental observers. Palm found that not one person had
5 observed any impact or any effect at all that “undermined military performance,
6 readiness, or cohesion, led to increased difficulties in recruiting or retention, or
7 increased the rate of HIV infection among the troops.”

8 337. Palm researchers found that in each case, although many heterosexual
9 soldiers continued to object to homosexuality, the military’s emphasis on conduct
10 and equal standards was sufficient for encouraging servicemembers to work
11 together as a team without undermining cohesion.

12 338. A study of several hundred combat soldiers in Israel found that
13 approximately the same percentage of Israeli soldiers know a homosexual person in
14 their unit as do U.S. servicemembers. The study found no evidence that knowledge
15 of serving with a homosexual servicemember undermined the performance,
16 cohesion, readiness, or morale of Israel’s military units.

17 339. In February 2010, the Chairman of the Joint Chiefs of Staff, Admiral
18 Mullen, testified before the Senate Armed Services Committee that his counterparts
19 in countries that allow homosexuals to serve openly report “no impact on military
20 effectiveness.”

21 340. The Chairman of the North Atlantic Treaty Organization (“NATO”)
22 recently acknowledged that most NATO allies allow homosexuals to serve openly
23 in the military and that that is “working out quite well.”

24 341. Chairman Di Paola further stated, “In the end, fundamentally, ...
25 sexual orientation is not an issue insofar as you being a soldier or whatever you
26 would be in the environment you are working for, that is not a problem. Sexual
27 orientation is a personal matter, not a matter for state policy.”

28 342. Finally, according to Chairman Di Paola, allowing homosexuals to

1 serve openly in the military has “absolutely not” undermined unit cohesion or
2 combat readiness. He commented, “If there is misconduct, applied to a gay or non-
3 gay, that would be treated as misconduct. So your sexual orientation does not have
4 to influence the environment in which you work.”

5 343. Despite fears that homosexuals could turn fighting forces into
6 homosexual pride floats, the majority of homosexuals serving in foreign militaries
7 conform to expected norms of their organization. This means either they do not
8 reveal their sexual orientation, or they do so only to selected peers or supervisors
9 but succeed at fitting in with their units in dress, appearance, and comportment.

10
11 **xiii. DADT’s Effect on Unit Cohesion, Troop Morale, and Military**
12 **Readiness**

13 344. Don’t Ask Don’t Tell undermines unit cohesion, troop morale, and
14 military readiness.

15 345. Rape and violence occur as a result of DADT.

16 346. Mental health implications arise as a result of DADT, ranging from
17 depression to suicide.

18 347. In allowing the military to investigate the sexual orientation of its
19 servicemembers, DADT permits interrogation of servicemembers’ unit, lovers,
20 partners, friends, parents, etc., many of whom are heterosexual. These incursions
21 into heterosexual servicemember’s privacy can involve privacy injuries.

22 348. DADT weakens America’s national security by preventing patriotic
23 Americans from serving their country.

24 349. DADT makes it more difficult for homosexual servicemembers to
25 perform their duties.

26 350. The DADT policy forces members of the armed services to lie about
27 who they are in order to defend their fellow citizens.

28 351. A witch hunt started at West Point Academy when an academy

1 counselor read and the army seized Cadet Nikki Galvan's journal, in which Galvan
2 confided private emotions about her sexuality. Feeling "violated and humiliated,"
3 and facing a discharge, Galvan resigned. The investigation expanded to over thirty
4 other women at West Point.

5 352. After assaulting and threatening to rape a female soldier, a group of
6 male soldiers spread lies that she was a lesbian. Her commander threatened to
7 imprison her if she did not admit being homosexual and identify other service
8 members suspected of being homosexual. Even after a military judge dismissed the
9 case for lack of evidence, her commander continued to pursue her discharge until
10 the Servicemembers Legal Defense Network intervened and she obtained a transfer.

11 353. Accused of raping another man and other charges, Airman Bryan
12 Harris faced life in prison. Air force lawyers reduced his sentence in exchange for
13 the names of all of the men he had had sex with in the military. These men were
14 promptly investigated, and the five who served in the Air Force were fired or court-
15 martialed.

16 354. In 1998, Midshipman Robert Gaige wore a red ribbon in solidarity
17 with AIDS victims, a gesture that is purportedly protected under DADT. Gaige's
18 instructor, Major Richard Stickel, began to harass him and encouraged others to do
19 so as well. Eventually Gaige acknowledged his sexual orientation and was fired.

20 355. After a shipmate's wife discovered Senior Chief Officer Timothy
21 McVeigh's sexual orientation through his AOL profile, investigators sought and
22 obtained private information from AOL. A federal judge concluded that the Navy
23 had deliberately violated federal law and stopped McVeigh's discharge; McVeigh
24 was allowed to retire with benefits intact.

25 356. After Airman Jennifer Dorsey reported an incident during which two
26 women punched her repeatedly in the stomach while yelling, "You sick fucking
27 dyke," her commander, Major Richard Roche, did not discipline the attackers but
28 instead threatened an investigation into Dorsey's sexual orientation. Dorsey made a

1 “voluntary” statement that she was homosexual and left the Armed Forces pursuant
2 to a Don’t Ask Don’t Tell discharge.

3 357. Coworkers of a certain Coast Guard member routinely accused him of
4 being homosexual. One member of his unit threatened, “If I ever find out for sure
5 you’re a fag, I’ll kick your ass.” The victim had little recourse to end the torment
6 besides leaving the Coast Guard.

7 358. Airman Sean Fucci “voluntarily” left the air force at the end of his
8 service after facing extreme harassment, including notes that said, “Die fag” and
9 “You can’t hide, fag.” Torn between protecting his safety and facing a possible
10 discharge investigation, Fucci reported the events. An investigation into the threats
11 was opened, but to no avail; Fucci was unable to provide sufficient evidence for the
12 search to go anywhere because he was still in the closet and carefully had to watch
13 what he said.

14 359. Suspecting that Private First Class Barry Winchell was homosexual,
15 Calvin Glover goaded Winchell into a fist fight and lost. After suffering derision
16 from his peers for having “his ass kicked by a faggot” (who was dating a
17 transsexual at the time), Glover took a baseball bat to the bed of Winchell and
18 bludgeoned him to death as he slept.

19 360. During Operation Iraqi Freedom and Operation Enduring Freedom,
20 Fred Fox, an infantry soldier, was unable to speak openly with army counselors due
21 to “Don’t Ask, Don’t Tell” and was later diagnosed with post-traumatic stress
22 disorder.

23 361. When Captain Monica Hill’s partner was diagnosed with lung cancer,
24 Hill explained certain minimal details in connection with her request for a deferred
25 report date. The Air Force investigated her sexual orientation and discharged her a
26 year after her partner died. The Air Force also attempted to force Hill to repay the
27 cost of her medical school scholarship.

28 362. Lieutenant Colonel Peggy Laneri took an early retirement to adopt a

1 daughter with her wife and look after the needs of her family without putting her
2 job and future retirement benefits at risk.

3 363. Brian Hughes, army ranger, who was part of the team that rescued
4 Jessica Lynch, decided not to reenlist in the Army because his partner was unable to
5 come to events or participate in support networks that others took for granted.

6 364. After hearing other commanders say “All fags should get AIDS and
7 die” and trying to maintain a forbidden relationship, Brian Muller, army staff
8 sergeant, decided to reveal his sexual orientation. Muller, who had earned twenty-
9 one medals during the wars in Bosnia and Afghanistan, said he was driven to leave
10 by fear and uncertainty about the homosexual conduct policy.

11 365. Stephen Benjamin, cryptologic interpreter, was open about his sexual
12 orientation with nearly all of his coworkers. He was called in for questioning
13 because he made a comment on the government computer system: “That was so
14 gay—the good gay, not the bad one.” Benjamin stated that, when he was
15 discharged, “the only harm to unit cohesion that was caused was because I was
16 leaving.”

17 366. During medical school, a male civilian began to stalk and harass Beth
18 Schissel, an Air Force officer and physician. The civilian threatened to reveal
19 Schissel’s sexual orientation as a tool of vengeance against someone they both
20 knew well. Terrified, Schissel came out in hopes of blunting the stalker’s weapon,
21 and was discharged on September 10, 2001.

22
23 **xiv. Heterosexual Attitudes During DADT**

24 367. Heterosexual servicemembers’ expressed attitudes about
25 homosexuality frequently do not predict how they will actually behave. This
26 discrepancy is consistent with social science data that show a poor correlation
27 between stated intentions and actual behavior in paramilitary organizations. Polls
28 on attitudes toward homosexuals in the military show that most respondents believe

1 their peers are less tolerant of homosexual service than they, themselves, are. An
2 article in *Armed Forces and Society* concludes from this data that there is a cultural-
3 organizational pressure within the armed forces to appear as though “one is either
4 uncomfortable or intolerant of homosexuality” and indeed to “pretend to be
5 uncomfortable” with homosexuals, which belies greater actual comfort than what is
6 stated.

7 368. Stephen J. Vossler is a straight man from southeastern rural Nebraska.
8 He enlisted in the United States Army in November 2000. Vossler served as an
9 active duty member of the United States Army from June 2001 to June 2006 and
10 was highly decorated. He was awarded the Army Commendation Medal, the Army
11 Achievement Medal, the National Defense Service Medal, Global War on
12 Terrorism Service Medal, the Korea Defense Service Medal, the Army Service
13 Ribbon, and the Overseas Service Ribbon.

14 369. Vossler trained as a Korean language cryptologic linguist at the
15 Defense Language Institute of the Presidio in Monterey, California, from
16 September 7, 2001 to February 25, 2003. At the Defense Language Institute,
17 Vossler shared a room with a homosexual soldier who was in the process of being
18 discharged under DADT. Vossler observed that the process of being discharged
19 was emotionally draining on his roommate, and caused his roommate to be
20 alienated from his unit because it gave him the stigma of being a bad soldier.
21 Before joining the Army, Vossler had not extensively interacted with an individual
22 he knew to be homosexual.

23 370. During his training at the Defense Language Institute, Vossler also
24 developed a close friendship with a colleague in his unit, Jarrod Chlapowski.
25 Chlapowski was also a decorated and accomplished member of the Armed Forces.
26 He finished second in his class at the Defense Language Institute. He supported
27 more than 300 sensitive reconnaissance operation missions. Chlapowski was
28 awarded both the Army Achievement Medal and the Army Commendation Medal.

1 371. Approximately five (5) months after meeting Chlapowski, Vossler
2 learned that Chlapowski is homosexual. Chlapowski did not try to deny his sexual
3 orientation. Rather, Chlapowski admitted his sexual orientation with full
4 knowledge it could potentially result in his discharge from the military under Don't
5 Ask, Don't Tell.

6 372. Vossler served with Chlapowski at several bases in the United States
7 and in the Republic of Korea. While at Fort Lewis, Chlapowski and Vossler were
8 in an all male combat unit. Chlapowski was dating a civilian man at the time.
9 Chlapowski spoke to Vossler about the man he was dating when he and Vossler
10 were alone. However, when other members of the unit were present, Vossler and
11 Chlapowski used a girl's name to refer to the man to conceal Chlapowski's
12 homosexuality.

13 373. Members of their unit often told homosexual jokes. These jokes made
14 Vossler and Chlapowski very uncomfortable, given that they were the only two
15 members of the unit aware of Chlapowski's homosexuality.

16 374. At one time, Vossler and Chlapowski were roommates at Fort Lewis
17 but Chlapowski's homosexuality was not an issue for Vossler. At times, the two
18 men would sit and talk in their room after they had taken their respective showers
19 wearing nothing except towels around their waists. Vossler never felt that
20 Chlapowski acted inappropriately. To the contrary, Chlapowski acted as any other
21 heterosexual soldier would.

22 375. Chlapowski chose not to reenlist because of the burden of the Don't
23 Ask, Don't Tell policy.

24
25 **xv. Financial Costs**

26 376. As a result of DADT, U.S. taxpayers have spent hundreds of millions
27 of dollars to separate thousands of capable, needed servicemembers and to recruit
28 and train replacements.

1 377. The total cost of the Defense Department’s homosexual conduct policy
2 cannot be estimated because the Department does not collect relevant cost data on
3 inquiries and investigations, counseling and pastoral care, separation functions, and
4 discharge reviews.

5 378. The Defense Department does collect data on recruitment and training
6 costs for the force overall. Using these data, in February 2005, the GAO estimated
7 that, over a 10-year period, it could have cost the Defense Department
8 approximately \$95 million in constant fiscal year 2004 dollars to recruit
9 replacements for servicemembers separated under Don’t Ask, Don’t Tell.

10 379. The Navy, Air Force, and Army estimated that the cost to train
11 replacements for servicemembers separated under Don’t Ask Don’t Tell was
12 approximately \$48.8 million, \$16.6 million, and \$29.7 million, respectively.

13 380. In its estimate the GAO did not offset any of these costs with the value
14 recovered by the military through the time troops served prior to their discharge.
15 This likely resulted in a higher cost estimate than the actual number.

16 381. GAO also appeared to underestimate costs by not including, for
17 instance, the amount spent to train replacement officers, and by using inconsistent
18 figures for the training costs they did include.

19 382. The Palm Center at the University of California at Santa Barbara
20 organized a Blue Ribbon Commission to study the GAO’s 2005 report. The
21 Commission comprised high-level military officials and academic experts in
22 military affairs and finance. The Commission found that errors in GAO’s
23 methodology, including its failure to include length-of-training data and its
24 misrepresentation of cost-of-training data, led to both over- and under-estimations
25 of the total cost of implementing “don’t ask, don’t tell.” When these over- and
26 under-estimations were reconciled, the Commission found that the “don’t ask, don’t
27 tell” policy cost the Pentagon at least \$363.8 million to implement during its first
28 ten years, or 91 percent more than originally reported by GAO. Because the

1 Commission used conservative assumptions, even its finding should be seen as a
2 lower-bound estimate.

3
4 **xvi. Admissions By Military Commanders & Elected Officials**

5 383. Since Don't Ask, Don't Tell was enacted, numerous senior military
6 commanders and civilian elected officials, among them some who supported the
7 Policy at the time of its enactment, have criticized the Policy and/or called for its
8 abandonment or repeal. The criticisms and statements by these individuals include:

9 384. On December 11, 1999, President Clinton stated, "What I'd like to do
10 is focus on making the policy we announced back in 1993 work the way it's
11 intended to, because it's out of whack now, and I don't think any serious person
12 could say it's not."

13 385. Former NATO Supreme Allied Commander and 2004 Democratic
14 presidential candidate Wesley Clark has advocated for the repeal of DADT. On
15 June 15, 2003, he said that "[p]eople were much more irate about [homosexual
16 service in the military] in the early nineties, for whatever reason, [perhaps because
17 of] younger people coming into the military. It just didn't seem to be the emotional
18 hot button issue by ninety-eight, ninety-nine, than it had been in ninety-two, ninety-
19 three."

20 386. In a 2003 article in the National Law Review, Rear Admiral John
21 Hutson (ret.) described the Policy as "odious" and "virtually unworkable in the
22 military."

23 387. In a New York Times essay dated January 2, 2007, General John
24 Shalikashvili (ret.), former chairman of the Joint Chiefs of Staff, wrote: "When [the
25 repeal of DADT] comes, [homosexuals] will no longer have to conceal who they
26 are, and the military will no longer need to sacrifice those whose service it cannot
27 afford to lose."

28 388. Former Vice President Dick Cheney described the security risk

1 rationale underlying policies banning homosexuals from service in the United
2 States Armed Forces as “a bit of an old chestnut.”

3 389. In a 2007 Wall Street Journal essay, former Republican Congressman
4 Bob Barr wrote: “The bottom line here is that, with nearly a decade and a half of
5 the hybrid ‘don’t ask, don’t tell’ policy to guide us, I have become deeply
6 impressed with the growing weight of credible military opinion which concludes
7 that allowing gays to serve openly in the military does not pose insurmountable
8 problems for the good order and discipline of the services.”

9 390. In December 2007, 28 retired generals and admirals urged Congress to
10 repeal the Policy, citing evidence that 65,000 homosexual men and women were
11 currently serving and that there were over 1 million homosexual veterans at that
12 time.

13 391. In November 2008, 104 retired generals and admirals signed a
14 statement urging Congress to repeal the Policy.

15 392. On July 5, 2009, General Colin Powell said, “this is a policy and a law
16 that should be reviewed,” in reference to the Don’t Ask, Don’t Tell Policy. On
17 February 3, 2010, Gen. Powell formally reversed his previous position and
18 announced his support for the repeal of DADT.

19 393. In September 2009, Joint Forces Quarterly published an article by Air
20 Force Colonel Om Prakash titled “The Efficacy of ‘Don’t Ask, Don’t Tell’” which
21 won the Secretary of Defense National Security Essay Competition for 2009. The
22 article concluded that no scientific basis exists for the proposition that unit cohesion
23 would be compromised by homosexuals serving openly in the military. The article
24 also concluded that DADT exacts tremendous costs to the U.S. Armed Forces and
25 its members. The article finishes by stating “it is not time for the administration to
26 reexamine the issue; rather it is time for the administration to examine how to
27 implement the repeal of the ban.”

28 394. Alan Simpson, Republican Senator from Wyoming from 1979 to 1997

1 who originally voted in favor of DADT has since stated that “[t]his policy has
2 become a serious detriment to the readiness of America's forces as they attempt to
3 accomplish what is arguably the most challenging mission in our long and
4 cherished history.”

5 395. Former Secretary of Defense William Cohen, in office during the
6 enactment of DADT, has since advocated for its repeal.

7 396. On June 29, 2009, President Obama admitted that “‘don’t ask, don’t
8 tell’ doesn’t contribute to our national security”; that “preventing patriotic
9 Americans from serving their country weakens our national security”; that the
10 Policy has resulted in the discharge of “patriots who often possess critical language
11 skills and years of training and who’ve served this country well”; and that
12 “reversing this policy [is] the right thing to do [and] is essential for our national
13 security.”

14 397. On October 10, 2009, President Obama stated: “We should not be
15 punishing patriotic Americans who have stepped forward to serve this country. We
16 should be celebrating their willingness to show such courage and selflessness on
17 behalf of their fellow citizens, especially when we’re fighting two wars. We cannot
18 afford to cut from our ranks people with the critical skills we need to fight any more
19 than we can afford – for our military’s integrity – to force those willing to do so
20 into careers encumbered and compromised by having to live a lie.”

21 398. In February 2010, the current Chairman of the Joint Chiefs of Staff,
22 Admiral Mike Mullen, testified to the Senate Armed Services Committee that he
23 was unaware of any evidence suggesting repeal of DADT would undermine unit
24 cohesion, and that there had been no thorough or comprehensive study of that since
25 1993.

26 399. Admiral Mullen also informed the U.S. Sentate on February 2, 2010:
27 “No matter how I look at this issue, I cannot escape being troubled by the fact that
28 we have in place a policy which forces young men and women to lie about who

1 they are in order to defend their fellow citizens.”

2 400. The Secretary of Defense, defendant Robert M. Gates, also testified to
3 the Senate Armed Services Committee, with regard to whether repealing DADT
4 would undermine unit cohesion, that the Defense Department needed “to address a
5 number of assertions that have been made for which we have no basis in fact.”

6 401. In February 2010, defendant Gates notified Congress that, reversing a
7 policy of over 100 years’ standing, the Navy intends to permit women to serve on
8 submarines.

9
10 **F. Recent Developments**

11 402. Though Congress and the Defense Department are considering a repeal
12 of DADT, there has been no stay in the application or enforcement of the Policy.
13 Moreover, there has been no stay of investigations pursuant to the Policy.

14 403. If a homosexual servicemember discloses his or her sexual orientation
15 to the task force currently studying repeal of DADT, the Defense Department is
16 almost certainly required to initiate a formal investigation that could lead to
17 discharge.

18 404. Without a change in DADT, the Department of Defense will continue
19 to authorize the separation of servicemembers for homosexual acts, for statements
20 that demonstrate a propensity or intent to engage in homosexual acts, or for
21 homosexual marriage or attempted homosexual marriage.

22
23 **G. Defendants’ Evidence**

24 405. Defendants did not produce any witnesses at trial.

25 406. Defendants did not produce any witnesses to testify that, since its
26 enactment, DADT has actually furthered its stated purposes.

27 407. Defendants did not produce any witnesses to testify that DADT was
28 not the result of animus and prejudice against homosexuals.

1 408. Defendants did not produce any study, report, analysis, or other
2 document which shows that, since its enactment, DADT has furthered its stated
3 purposes.

4 409. Defendants did not produce any study, report, analysis, or other
5 document which shows that maintenance of DADT was not the result of animus
6 and prejudice against homosexuals.

7 410. The assertion contained in 10 U.S.C. § 654 that Don't Ask, Don't Tell
8 advances morale, good order and discipline, and unit cohesion in the United States
9 Armed Forces was at the time of its enactment, and is today, without factual
10 support. In addition, no research has ever shown that open homosexuality impairs
11 military readiness.

12 411. Documentation, research, academic or sociological studies supporting
13 such assertions are lacking.

14 412. No evidence exists that homosexual servicemembers are more likely
15 than heterosexual servicemembers to reveal classified or otherwise confidential
16 information.

17 413. No evidence exists that homosexual servicemembers are more likely to
18 violate military codes of conduct, the UCMJ, or Department of Defense regulations.

19 414. No evidence exists that homosexual servicemembers possess a
20 physical or psychological defect that renders them unfit for service.

21 415. No evidence exists to support the proposition that the presence in the
22 Armed Forces of persons who demonstrate a propensity or intent to engage in
23 homosexual acts creates an unacceptable risk to the standards of morale, good order
24 and discipline, and unit cohesion that are the essence of military capability.

25 416. Despite years of experience having homosexuals in the military,
26 including during the Vietnam War, Korean War, and World War II when the U.S.
27 imposed a draft and when there were reported instances of units with open
28 homosexuals, there has been no systematic evidence presented that open

1 homosexuality has impaired performance during those conflicts.

2
3 **II.**

4 **CONCLUSIONS OF LAW**

5
6 **A. Log Cabin Has Standing**

7 417. To satisfy Article III's standing requirement, a plaintiff must
8 demonstrate: (1) they suffered or will suffer an 'injury in fact' that is concrete,
9 particularized, and actual or imminent; (2) the injury is fairly traceable to
10 defendant's challenged action; and (3) the injury is likely, not merely speculative,
11 and will be redressed by a favorable decision.” Biodiversity Legal Found. v.
12 Badgley, 309 F.3d 1166, 1171 (9th Cir. 2002); see also Lujan v. Defenders of
13 Wildlife, 504 U. S. 555, 560-61 (1992).

14 418. An association has standing to sue on behalf of its members when “(a)
15 its members would otherwise have standing to sue in their own right; (b) the
16 interests it seeks to protect are germane to the organization's purpose; and (c)
17 neither the claim asserted nor the relief requested requires the participation of
18 individual members in the lawsuit.” Hunt v. Wash. State Apple Adver. Comm’n,
19 432 U.S. 333, 343 (1977).

20 419. Log Cabin has demonstrated it has representational standing because it
21 satisfies the standard articulated in Hunt.

22 420. First, Log Cabin Republicans’ stated mission is to advocate equal
23 rights for all Americans, including homosexuals. Thus, Log Cabin Republicans
24 satisfies the second prong of Hunt because its lawsuit challenging DADT is
25 consistent with this mission.

26 421. Second, Log Cabin Republicans seeks injunctive relief, not damages
27 for individual servicemembers affected by DADT. Therefore, the third prong of
28 Hunt is satisfied.

1 422. Third, members of Log Cabin Republicans, including, specifically,
2 Alex Nicholson and Lt. Col. Doe, would otherwise have standing to challenge the
3 DADT policy.

4 423. Mr. Nicholson and Lt. Col. Doe are both members of Log Cabin
5 Republicans and both have been injured by the application of DADT. Mr.
6 Nicholson was discharged from the United States Armed Services pursuant to
7 DADT; Lt. Col. Doe is subject to DADT so long as he continues to serve, and is
8 injured by DADT on a daily basis (e.g., he cannot communicate the core of
9 emotions and identity to others in the same manner as his heterosexual comrades,
10 nor can he exercise his constitutionally protected right to engage in private,
11 consensual homosexual conduct without intervention of the United States
12 government).

13 424. As noted above, Lt. Col. Doe was a member of Log Cabin Republicans
14 prior to October 12, 2004, the day Log Cabin Republicans filed the initial
15 Complaint in this action. Thus, Lt. Col. Doe alone confers standing on Log Cabin
16 Republicans.

17 425. In addition, as noted above, Lt. Col. Doe and Mr. Nicholson were both
18 members of Log Cabin Republicans as of the date Log Cabin Republicans filed its
19 Amended Complaint. While as a general matter, standing is determined at the time
20 a lawsuit is commenced, this rule is not absolute. For example, when a complaint is
21 dismissed and plaintiff is granted leave to file an amended complaint, the dismissal
22 of the original complaint and the filing of the amended complaint renders the
23 original complaint of no legal effect and obsolete. See County of Riverside v.
24 McLaughlin, 500 U.S. 44 (1991).

25 426. Such is the case here and the Court concludes that an alternative,
26 equally appropriate, date to use for purposes of evaluating standing is the date Log
27 Cabin Republicans filed its Amended Complaint.

28 427. Therefore, under either date (the date the original Complaint was filed,

1 or the date the Amended Complaint was filed), Log Cabin Republicans has
2 standing.

3
4 **B. Don't Ask Don't Tell Violates Substantive Due Process**

5 **i. The Standard of Review Announced in Witt v. Air Force Applies**

6 **a. Lawrence v. Texas Demands Heightened Constitutional Scrutiny**

7 428. Lawrence v. Texas held that “[l]iberty presumes an autonomy of self
8 that includes freedom of thought, belief, expression, and certain intimate conduct.”
9 539 U.S. 558, 562, 156 L. Ed. 2d 508, 123 S. Ct. 2472 (2003). The Ninth Circuit,
10 in Witt v. Dep’t of Air Force, 527 F.3d 806, 816 (9th Cir. 2008), made clear that
11 Lawrence controls the scrutiny applied to DADT and concluded it could not
12 “reconcile what the Supreme Court did in Lawrence with the minimal protections
13 afforded by traditional rational basis review.” Rather than picking through
14 Lawrence to find talismanic language of rational basis, intermediate or strict
15 scrutiny, however, Witt simply realized that it and other courts must follow what
16 the Lawrence court “actually did.” Id. (emphasis in original).

17 429. Witt recognized that the Supreme Court in Lawrence investigated the
18 extent of the liberty interest at stake, grounded its decision in cases which applied
19 heightened scrutiny, and sought more than merely a hypothetical state interest to
20 justify the challenged law. Id. at 816-17.

21 430. Witt noted Lawrence’s reliance on Griswold v. Connecticut, Roe v.
22 Wade, Carey v. Population Servs. Int’l, and Planned Parenthood of Southeastern
23 Pa. v. Casey. 527 F.3d at 817. Lawrence also reviewed Eisenstadt v. Baird, 405
24 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972), in which heightened scrutiny
25 also applied. 539 U.S. at 565.

26 431. In sum, Witt held, the Supreme Court applied a heightened level of
27 scrutiny – “something more than traditional rational basis review.” Id. at 817.

28 432. Faced with Major Witt’s as-applied challenge to DADT, the Ninth

1 Circuit defined the level of heightened scrutiny Lawrence demands in such cases.
2 Id. at 818-19. But, nothing in Witt bars a facial challenge to DADT. It is simply
3 silent on the issue.

4 433. It is also evident that Lawrence requires more than the most deferential
5 form of constitutional review here because Lawrence itself was a facial challenge.
6 Lawrence reviewed the Texas sodomy statute on its face, generally examining “the
7 validity of ... making it a crime for two persons of the same sex to engage in certain
8 intimate sexual conduct.” 539 U.S. at 562. The question was whether the statute
9 was unconstitutional as to any two persons, not just the two specific men involved.

10 434. The lower court opinion in Lawrence confirms that that case was a
11 facial challenge. “[B]ecause [the individuals] entered pleas of *nolo contendere*, the
12 facts and circumstances of the offense are not in the record. Thus, the narrow
13 issue presented here is whether Section 21.06 is facially unconstitutional.”
14 Lawrence v. State of Texas, 41 S.W.3d 349, 350 (Tex. App.-Houston [14th Dist.]
15 2001).

16
17 **b. *The Witt Intermediate Scrutiny Standard Applies***

18 435. Because Lawrence mandates a heightened level of scrutiny here, the
19 Court will apply the standard of review forth in Witt – that “when the government
20 attempts to intrude upon the personal and private lives of homosexuals, in a manner
21 that implicates the rights identified in Lawrence, the government must advance an
22 important governmental interest, the intrusion must significantly further that
23 interest, and the intrusion must be necessary to further that interest.” 527 F.3d at
24 819.

25 436. It is appropriate to apply a heightened or intermediate scrutiny
26 substantive due process test, such as that announced in Witt, even in the context of
27 a facial challenge to a statute. See, e.g., Planned Parenthood of Southeastern Pa. v.
28 Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed.2d 674 (1992) (applying undue

1 burden test to facial substantive due process abortion challenge). Heightened
2 scrutiny is additionally required given that sexual intimacy is recognized as
3 important in U.S. society and given that servicemembers are not expected to remain
4 forever celibate.

5 437. Moreover, as with the active rational basis test described below,
6 application of the Witt standard places the burden on the government to
7 demonstrate that each element of the test is satisfied.

8
9 ***c. Even if the Witt Standard Does Not Apply, the Court Must Apply***
10 ***Active Rational Basis***

11 438. If the Witt intermediate scrutiny standard does not apply, this Court
12 must analyze DADT under what the Ninth Circuit has termed “active rational
13 basis.” See Pruitt v. Cheney, 963 F.2d 1160, 1165-66 (9th Cir. 1992). Several
14 cases illustrate the application of this standard.

15 439. First is City of Cleburne v. Cleburne Living Center, 473 U.S 432, 87
16 L. Ed. 2d 313, 105 S. Ct. 3249 (1985), from which the Ninth Circuit derived this
17 heightened level of rational basis scrutiny. See Pruitt, 963 F.2d at 1165-66.
18 Cleburne requires examination of the government’s actual – not hypothetical –
19 bases for the challenged legislation. 473 U.S. at 448-50. This includes examining
20 the record and delving behind the government’s stated justifications to determine
21 whether the legislation is based upon and furthers any such actual purpose or
22 whether its relationship to the “asserted goal is so attenuated as to render the
23 distinction arbitrary or irrational.” Id. at 446.

24 440. Romer v. Evans also employed a heightened rational basis review in
25 examining the constitutionality of Colorado’s Amendment 2, which precluded the
26 state from enacting legislation designed to protect homosexuals from
27 discrimination. 514 U.S 620, 629, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996). The
28 Supreme Court found Amendment 2 unconstitutional because “its sheer breadth

1 [was] so discontinuous with the reasons offered for it that the amendment seems
2 inexplicable by anything but animus toward the class it affects.” Id. at 632. Romer
3 requires that legislation must be “grounded in a sufficient factual context” for the
4 Court to ascertain some relationship between the legislation and its asserted
5 purposes. Id. at 632-33.

6 441. Colorado claimed it enacted Amendment 2 to preserve its citizens’
7 freedom of association and to preserve resources to fight discrimination against
8 other groups. Id. at 635. The Court did not accept these rationales at face value.
9 Rather, it examined the factual context of Amendment 2’s enactment and
10 determined its actual purpose was to disadvantage a politically unpopular group.
11 Id. at 634-35. Importantly, Romer, like Lawrence, applied this standard to a facial
12 challenge. See id. at 643 (Scalia, J., dissenting) (identifying the challenge as
13 facial).

14 442. These cases also dictate that, even in a facial challenge under rational
15 basis review, the government may not enact legislation based merely upon
16 animosity to those it would affect. Romer, 517 U.S. at 634-35; Cleburne, 473 U.S.
17 at 448. “Private biases may be outside the reach of the law, but the law cannot,
18 directly, or indirectly, give them effect.” Cleburne, 473 U.S. at 448. “The
19 Constitution cannot control such prejudices but neither can it tolerate them. ...
20 [T]he law cannot, directly or indirectly,” give effect to private biases. Palmore v.
21 Sidoti, 466 U.S. 429, 433, 80 L. Ed. 2d 421, 104 S. Ct. 1879 (1984). “A bare desire
22 to harm a politically unpopular group cannot constitute a legitimate governmental
23 interest.” Romer, 517 U.S. at 634 (emphasis in original) (citation and quotation
24 omitted).

25 443. The Supreme Court in Lawrence employed the more searching review
26 it employed in Cleburne and Romer. Indeed, Lawrence identified Romer as among
27 the principal authorities that eroded the foundations of Bowers v. Hardwick, 478
28 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986). 539 U.S. at 574-76.

1 444. The Court rejected Texas’ proffered legitimate governmental interest
2 and held that restrictions on homosexuals’ liberty interests cannot be justified
3 merely on the basis of society’s moral preferences. *Id.* at 571. Its investigation of
4 the stated rationale and its factual context was searching, even including
5 examination of foreign sources. *Id.* at 572, 576-77. Following Lawrence and Witt,
6 this heightened level of scrutiny is the test the Court, at a minimum, must apply in
7 evaluating the constitutionality of DADT.

8
9 **d. *Judicial Deference to Military Affairs Does Not Rescue DADT***

10 445. The Supreme Court has refined the judicial deference afforded to
11 military-effectiveness rationales – a foundational basis of Philips. See 106 F.3d at
12 1425, 1429. Since that decision, the Supreme Court has upheld a constitutional
13 challenge to the government’s policy of denying procedural due process to an
14 American citizen classified as an enemy combatant. Hamdi v. Rumsfeld, 542 U.S.
15 507, 533, 159 L. Ed. 2d 578, 124 S. Ct. 2633 (2004). It rejected the government’s
16 argument that federal courts should only review that policy under a “very
17 deferential ‘some evidence’ standard” in light of the grave threat terrorism poses to
18 the Nation and the “dire impact” due process would have on the central functions of
19 war-making. *Id.* at 527, 534. In Hamdan v. Rumsfeld, 548 U.S. 557, 588, 165 L.
20 Ed. 2d 723, 126 S. Ct. 2749 (2006), the Supreme Court likewise held that “the duty
21 rests on the courts, in time of war as well as in time of peace, to preserve
22 unimpaired the constitutional safeguards of civil liberty.”

23 446. Military commanders are professionals but they are not a priestly caste
24 whose judgment is immune from oversight. Civilian control of the military has
25 been a fundamental principle since the first days of the Republic, and the Ninth
26 Circuit has not hesitated to subject military-related legislation to a heightened
27 “active” rational basis review. Pruitt, 963 F.2d at 1165-66. Pruitt made clear that
28 courts of this circuit must scrutinize military rationales in the same manner

1 employed by the Supreme Court in Cleburne. Id. Indeed, “deference does not
2 mean abdication” and Congress cannot subvert the guarantees of the Due Process
3 Clause merely because it is legislating in the area of military affairs. Witt, 527 F.3d
4 at 821.

5
6 ***e. Post-Enactment Evidence is Relevant to the Constitutional***
7 ***Analysis of DADT***

8 447. Constitutional review of Congressional legislation is not limited to
9 examination of evidence available at the time of enactment. The Court may
10 scrutinize post-enactment evidence and evidence of changed circumstances.

11 448. If legislation once considered to have been enacted with a rational
12 basis were forever immunized from review, the nation would still, for example,
13 have laws in place for forced sterilization. See, e.g., Buck v. Bell, 274 U.S. 200, 71
14 L. Ed. 1000, 47 S. Ct. 584 (1927), the infamous “three generations of imbeciles are
15 enough” case. No law, once found constitutional under rational-basis review,
16 would ever be subject to a second challenge, no matter how odious or irrational it
17 later is seen to be.

18 449. More importantly, “changed circumstances” do not alone demonstrate
19 that DADT is unconstitutional. Changed circumstances are indeed relevant in
20 evaluating the continuing interpretation of a legislative enactment. See Northwest
21 Austin Mun. Util. Dist. No. 1 v. Holder, ___ U.S. ___, 174 L. Ed. 2d 140, 129 S.
22 Ct. 2504, 2512 (2009). This is equally true in evaluating legislation under rational
23 basis review:

24 Those who drew and ratified the Due Process Clauses ...
25 knew times can blind us to certain truths and later
26 generations can see that laws once thought necessary and
27 proper in fact serve only to oppress. As the Constitution
28 endures, persons in every generation can invoke its

1 principles in their own search for greater freedom.
2 Lawrence, 539 U.S. at 578-79. That DADT lacks a rational basis is proved by
3 evidence of new or changed circumstances, such as polling data showing the lack of
4 support for the policy both in the military and in the public at large.

5 450. But even without consideration of changed circumstances, the Court
6 may re-examine the rationality of the statute based on evidence not previously
7 presented or considered, such as the expert opinion testimony proffered here
8 explaining that there was no rational basis for Congress’s original determination at
9 the time of the enactment of DADT. It is not simply the “wisdom” of DADT that is
10 lacking, but the very rational basis for the policy.

11

12 **ii. Don’t Ask Don’t Tell Violates the Constitution’s Guarantee of**
13 **Substantive Due Process**

14 451. The evidence presented by plaintiff herein establishes that DADT,
15 while purportedly addressed to the significant governmental interests of military
16 “morale, good order and discipline, and unit cohesion that are the essence of
17 military capability” (10 U.S.C. § 654(a)(15)), does not significantly further those
18 interests, nor is it necessary to further those interests. It therefore violates the
19 substantive due process guarantee of the Constitution (U.S. Const., Amdt. V). The
20 enactment and implementation of DADT violates substantive due process because:

- 21 a. No objective studies, reports, or data, either pre- or post-
22 enactment, support the rationality of DADT and its congruence
23 to Congress’s stated objectives. In fact, at the time of the
24 enactment of DADT, the only objective studies showed that
25 DADT would not further unit cohesion and troop morale. Those
26 studies were either ignored by or hidden from Congress;
- 27 b. The enactment of DADT was motivated by animus, prejudice,
28 hostility, ignorance, or fear of homosexuals;

- 1 c. The enactment of DADT was based on the private biases of
2 influential leaders about homosexuals rather than military
3 judgment;
- 4 d. The military itself recognizes that sexual orientation is not
5 germane to military service, inasmuch as DADT is applied more
6 frequently in time of peace than in time of war, and the military
7 has knowingly deployed openly homosexual members to foreign
8 theaters of combat;
- 9 e. DADT has had a disproportionate impact on women, and
10 rationales for the policy based on considerations of privacy and
11 sexual tension do not apply to female servicemembers;
- 12 f. When DADT was enacted, some comparable foreign militaries,
13 e.g., Canada, had already changed their policies to allow open
14 service by homosexuals without any negative impact on unit
15 cohesion, a factor ignored by Congress, and many comparable
16 foreign countries' militaries have, both before and since the
17 enactment of DADT, changed their policies to permit open
18 service by homosexuals without any negative impact on unit
19 cohesion. In addition, U.S. troops fight side-by-side with openly
20 homosexual members of the armed forces of foreign militaries
21 without any impact on unit cohesion and, in some instances, are
22 commanded by openly homosexual officers from other
23 countries;
- 24 g. Service members in non-combat but critical occupations such as
25 doctors, nurses, teachers, ophthalmologists, dentists, lawyers,
26 linguists, translators, and others have been discharged under
27 DADT;
- 28 h. Open homosexuals are not allowed to serve in the armed forces

1 but are allowed to work alongside our armed forces in the FBI,
2 CIA, NSA, Department of Defense, private contracting firms
3 performing military functions, and civilian paramilitary
4 organizations such as police and fire departments. Indeed, the
5 Commander-in-Chief of the Armed Forces could be openly
6 homosexual;

- 7 i. The available objective evidence establishes that DADT
8 undermines military effectiveness, military readiness, and
9 national security; undermines unit cohesion; undermines troop
10 morale; and impairs recruitment and retention in the military;
11 j. DADT particularly undermines task cohesion, a goal more
12 germane to military effectiveness than unit cohesion;
13 k. DADT violates First Amendment rights of speech and
14 association.

15 452. Even if the constitutionality of DADT is not governed by the Witt
16 standard, discussed above, it fails the more deferential active rational basis and
17 traditional rational basis tests for the same reasons. It additionally fails all
18 constitutional scrutiny because Defendants have submitted zero evidence
19 demonstrating DADT's rational relationship to its stated purposes and because Log
20 Cabin has shown that DADT actually impairs those interests.

21
22 **C. Don't Ask Don't Tell Violates The First Amendment**

23 453. The First Amendment to the U.S. Constitution provides that "Congress
24 shall make no law . . . abridging the freedom of speech . . . or right to petition the
25 government for a redress of grievances." U.S. Const. am. 1.

26 454. Laws that chill constitutionally protected speech are presumptively
27 invalid and must withstand the strictest constitutional scrutiny. See Simon &
28 Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105,

1 116, 118, 123, 116 L.Ed.2d 476, 112 S.Ct. 501 (1991).

2 455. A law that discriminates against speech on the basis of its content
3 constitutes a content-based violation of the First Amendment. Simon & Schuster,
4 Inc., 502 U.S. 105, 116 (1991).

5 456. Content-based restrictions on speech are “laws that by their terms
6 distinguish favored speech from disfavored speech on the basis of the ideas or
7 views expressed. Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 643, 129
8 L.Ed.2d 497, 114 S.Ct. 2445 (1994).

9 457. Restrictions which permit the government to discriminate on the basis
10 of the content of the message cannot be tolerated under the First Amendment and
11 are “presumptively invalid.” Simon & Schuster, 502 U.S. 105, 116 (1991); R.A.V.
12 v. City of St. Paul, 505 U.S. 377, 382, 120 L.E.2d 305, 223 S.Ct. 2538 (1992).

13 458. DADT represents a content-based restriction on speech. One of the
14 bases for Log Cabin’s associational standing is the ongoing harm to its military
15 members that is caused by DADT’s requiring those individuals to capitulate to the
16 threat of discharge by concealing the expression of their identity. That implicates
17 their First Amendment rights, because DADT’s inhibition of speech targets only
18 speech and expression that states that a servicemember is homosexual.

19 459. DADT does not constrain servicemembers from stating, or expressing
20 nonverbally, their heterosexuality: a servicemember may without fear of
21 consequence express affection to an opposite-sex partner, display a family
22 photograph of his or her opposite-sex partner and their children, and so forth.

23 460. “Notwithstanding the great deference owed to the military, regulations
24 restricting speech on military installations may not discriminate against speech
25 based on its viewpoint.” Cornelius v. NAACP Legal Defense & Educ. Fund, 473
26 U.S. 788, 806 (1985); Shopco Dist. Co. v. Commanding Gen. of Camp Lejeune,
27 885 F.2d 167, 174 (4th Cir. 1989). Regulations that “selectively grant[] safe
28 passage to speech of which [officials] approve while curbing speech of which they

1 disapprove” are impermissible, Berner v. Delahanty, 129 F.3d 20, 28 (1st Cir.
2 1997), even in the military, Bryant v. Gates, 532 F.3d 888, 897 (D.C. Cir. 2008);
3 Shopco, 885 F.2d at 172.

4 461. Thus, regardless of any considerations of deference owed to military
5 judgment, “regulations restricting speech on military installations may not
6 discriminate against speech based upon its viewpoint...a regulation is viewpoint
7 based if it suppresses the expression of one side of a particular debate.” Nieto v.
8 Flatau, No. 7:08-CV-185 (E.D.N.C. March 31, 2010) at 12 (citations omitted)
9 (opinion available at
10 [http://ia311020.us.archive.org/0/items/gov.uscourts.nced.96700/
11 gov.uscourts.nced.96700.33.0.pdf](http://ia311020.us.archive.org/0/items/gov.uscourts.nced.96700/gov.uscourts.nced.96700.33.0.pdf)). The military may not restrict speech “in a
12 manner that allows one message while prohibiting the messages of those who can
13 reasonably be expected to respond.” Id. at 14-15. DADT does just that, and
14 therefore causes First Amendment harm to members of the military by
15 unconstitutionally restricting their speech and expression, not simply their conduct.

16 462. To justify a content-based restriction on speech, the government “must
17 show that its regulation is necessary to serve a compelling state interest and is
18 narrowly drawn to achieve that end.” Simon & Schuster, Inc., 502 U.S. 105, 118,
19 123 (1991).

20 463. The government must choose the least restrictive means to achieve the
21 compelling interest. Sable Commc’ns of Cal., Inc. v. F.C.C., 492 U.S. 115, 126,
22 106 L.Ed.2d 93, 109 S.Ct. 2829 (1989).

23 464. The “curtailing of expression” which the government may “find
24 abhorrent or offensive cannot provide the important governmental interest upon
25 which impairment of First Amendment freedoms must be predicated.” Gay Student
26 Orgs. of Univ. of New Hampshire v. Thomson, 509 F. 2d 652, 662 (1st Cir. 1974).

27 465. DADT prohibits all public and private speech that would tend to
28 identify a servicemember as homosexual on the basis of the content and viewpoint

1 of such speech.

2 466. Punishing, restricting, or chilling speech which tends to identify a
3 servicemember as homosexual has no rational connection to a compelling,
4 governmental interest.

5 467. By its express terms, DADT impermissibly restricts, punishes, and
6 chills all public and private speech identifying a servicemember as homosexual by
7 requiring the separation of a servicemember who “has stated that he or she is a
8 homosexual or bisexual, or words to that effect,” unless the servicemember can
9 meet its undefined burden of demonstrating “that he or she is not a person who
10 engages in, attempts to engage in, has a propensity to engage in, or intends to
11 engage in homosexual acts.”

12 468. The showing that a law punishes a substantial amount of protected free
13 speech, judged in relation to the statute’s plainly legitimate speech, suffices to
14 invalidate all enforcement of that law, until or unless a limited construction or
15 partial invalidation so narrows it as to remove the seeming threat or deterrence to
16 constitutionally protected expression. Virginia v. Hicks, 539 U.S. 113, 118-19,
17 156 L.Ed.2d 148, 123 S.Ct. 2191 (2003); Broadrick v. Oklahoma, 413 U.S. 601,
18 614, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973). This remedy exists to address the
19 concern that the threat of enforcement of an overbroad law may deter
20 constitutionally protected speech. Virginia, 539 U.S. 113, 119 (2003); Broadrick,
21 413 U.S. 601, 613 (1973).

22 469. DADT is overbroad in violation of the First Amendment because it
23 punishes and restricts speech that does no more than acknowledge a permissible
24 status.

25 470. DADT is overbroad in violation of the First Amendment because it
26 restricts not only public but also private speech of homosexual servicemembers,
27 levying categorical, content-based restrictions against a limited class of speakers
28 that are applicable 24 hours a day, “at all times that the member has a military

1 status, whether the member is on base or off base, and whether the member is on
2 duty or off duty,” whether speaking to family members and friends, as well as
3 military personnel. 10 U.S.C. § 645(a).

4 471. Restricting a statement of a homosexual identity in civilian life has no
5 rational connection to a compelling governmental interest.

6 472. The government may regulate areas of freedom of speech “only with
7 narrow specificity.” Hynes v. Mayor and Counsel of the Borough of Oradell, 425
8 U.S. 610, 620, 48 L.Ed.2d 243, 96 S.Ct. 1755 (1976). The general test of
9 vagueness applies with particular force in review of laws dealing with speech. Id.;
10 NAACP v. Button, 371 U.S. 415, 432, 9 L.Ed.2d 40, 83 S.Ct. 3285 (1963). A
11 statute is objectionably vague if it susceptible to “sweeping and improper
12 application,” and if “men of common intelligence must necessarily guess at its
13 meaning.” Hynes, 425 U.S. 610, 620 (1976); Button, 371 U.S. 415, 433 (1963).

14 473. DADT is unconstitutionally vague because it is unclear as to what
15 language is prohibited by the policy. The term “words to that effect” is vague and
16 does not explain what statements made by a servicemember might subject him or
17 her to separation under DADT.

18 474. DADT is unconstitutionally vague because it does not sufficiently
19 specify the type or amount of proof sufficient to demonstrate that a servicemember
20 “is not a person who engages in, attempts to engage in, has a propensity to engage
21 in, or intends to engage in homosexual acts.”

22 475. By failing to identify the type or amount of proof sufficient to rebut the
23 “presumption” that a self-identified homosexual servicemember “engages in,
24 attempts to engage in, has a propensity to engage in, or intends to engage in
25 homosexual acts,” DADT effectively eliminates the distinction between speech and
26 conduct.

27 476. DADT’s vagueness and overbreadth improperly permits enforcers of
28 the policy to conflate homosexual status and homosexual conduct and allows the

1 U.S. Military to circumvent the First Amendment by regulating speech as if it were
2 conduct.

3 477. A “major purpose” of the First Amendment is “to protect the free
4 discussion of governmental affairs.” Ariz. Right to Life Political Action Comm. V.
5 Bayless, 320 F. 3d 1002, 1008 (9th Cir. 2003) (citing Mills v. Alabama, 384 U.S.
6 214, 218, 16 L.Ed.2d. 484, 86 S.Ct. 1434 (1966)). This includes “discussion of
7 candidates, structures and forms of government, the manner in which government is
8 operated or should be operated, and all such matters relating to the political
9 process.” Mills, 384 U.S. 214, 218-19 (1966).

10 478. “Any restriction on expressive activity because of its content would
11 completely undercut the ‘profound national commitment to the principle that debate
12 on public issues should be uninhibited, robust, and wide-open.’” Police Dep’t of the
13 City of Chicago v. Mosley, 408 U.S. 92, 96, 33 L.Ed.2d 212, 92 S.Ct. 2286 (1972)
14 (internal citations omitted); Ariz. Right to Life Political Action Comm., 320 F. 3d
15 1002, 1008 (9th Cir. 2003).

16 479. “Selective exclusions from a public forum may not be based on
17 content alone, and may not be justified by reference to content alone.” Mosley, 408
18 U.S. 92, 97 (1972).

19 480. The First Amendment right to petition the government for a redress of
20 grievances “is an assurance of a particular freedom of expression.” McDonald v.
21 Smith, 472 U.S. 479, 482, 86 L.Ed.2d 384, 105 S.Ct. 2787 (1985). This right is
22 “implicit in the very idea of government, republican in form” and exists so that
23 “people may communicate their will through direct petitions to the legislature and
24 government officials.” Id. (internal citations omitted).

25 481. “[U]nder the conditions of modern government, litigation may well be
26 the sole practicable avenue open to a minority to petition for redress of grievances.”
27 NAACP v. Button, 371 U.S. at 430.

28 482. By prohibiting homosexual servicemembers from stating they are

1 homosexual or words to that effect, DADT impermissibly prohibits homosexuals
2 from participating meaningfully and freely in discussion of governmental affairs
3 and improperly inhibits their ability to debate on public issues.

4 483. By prohibiting homosexual servicemembers from stating they are
5 homosexual or words to that effect, DADT prevents them from describing their
6 distinctive needs and interests to elected officials in order to advocate for changes
7 in those legislative policies that affect them personally.

8 484. By prohibiting homosexual servicemembers from stating they are
9 homosexual or words to that effect, DADT prevents them from participating in
10 litigation against the government, such as this action.

11 485. DADT impermissibly prohibits homosexual servicemembers from
12 participating meaningfully in their protected right to petition the government for a
13 redress of grievances.

14 486. The U.S. Supreme Court has long recognized that “effective advocacy
15 of both public and private points of view, particularly controversial ones, is
16 undeniably enhanced by group association” and that it is “beyond debate that
17 freedom to engage in an association for the advancement of beliefs and ideas is an
18 inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the
19 Fourteenth Amendment, which embraces freedom of speech.” NAACP v.
20 Alabama, 357 U.S. 449, 460, 2 L.Ed.2d 1488, 78 S.Ct. 1163 (1958). State action
21 “which may have the effect of curtailing the freedom to associate is subject to the
22 closest scrutiny.” Id. at 460-61.

23 487. “[E]fforts to organize the homosexual minority, ‘educate’ the public as
24 to its plight, and obtain for it better treatment from individuals and from the
25 government thus represent but another example of the associational activity
26 unequivocally singles out for protection in the very ‘core’ of association cases
27 decided by the Supreme Court.” Gay Student Orgs. of Univ. of New Hampshire,
28 509 F. 2d 652, 660 (1st Cir. 1974) (citing Button, 371 U.S. 415, 428-31 (1963)).

1 488. By prohibiting homosexual servicemembers from stating they are
2 members of homosexual interest groups, and thereby making a statement that tends
3 to identify them as homosexuals, DADT impermissibly prohibits homosexual
4 servicemembers from contributing to “effective public advocacy . . . enhanced by
5 group association.” Alabama, 357 U.S. 419, 460 (1958).

6 489. DADT, which provided grounds for Mr. Nicholson’s discharge based
7 solely on his statement that he was homosexual, violated Mr. Nicholson’s First
8 Amendment right to freedom of speech.

9 490. DADT’s imposed restraint on Lt. Col. Doe’s speech infringes his First
10 Amendment right to freedom of speech.

11 491. DADT’s imposed restraint on Lt. Col. Doe’s ability to meaningfully
12 participate in governmental affairs or a public political debate related to DADT,
13 violates his First Amendment right to petition the government for redress of
14 grievances.

15 492. DADT’s imposed restraint on Lt. Col. Doe’s ability to participate in
16 this, or any other litigation, violates his First Amendment right to petition the
17 government for redress of grievances.

18 493. DADT’s imposed restraint on Lt. Col. Doe’s ability to publicly state he
19 is a member of Log Cabin violates his First Amendment associational rights.
20
21

22 Dated: June ____, 2010

WHITE & CASE LLP

24 By: _____
25 Dan Woods
26 Attorneys for Plaintiff
27 Log Cabin Republicans
28