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

LOG CABIN REPUBLICANS, Plaintiff, v. UNITED STATES OF AMERICA AND ROBERT M. GATES, Secretary of Defense, Defendants.	No. CV04-8425 VAP (Ex) DEFENDANTS' PRETRIAL MEMORANDUM OF CONTENTIONS OF FACT AND LAW Pretrial Conf.: June 28, 2010 Trial: July 13, 2010 Honorable Virginia A. Phillips

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Pursuant to Rule 16 of the Federal Rules of Civil Procedure, Local Rule 16-4 of the Rules of the Central District of California, and this Court's pretrial order, defendants United States and Secretary Robert M. Gates submit the following, Pretrial Memorandum of Contentions of Fact and Law. As set forth in defendants' supplemental brief addressing the standard of review (Doc. 172), the Court should stay proceedings in light of Congress' concrete steps toward a repeal of the "Don't Ask, Don't Tell" statute ("DADT"), 10 U.S.C. § 654. As also explained in defendants' supplemental brief, no trial is necessary or appropriate on plaintiff's facial challenge. To the extent the Court nonetheless proceeds to trial, defendants state the following:

I.

CLAIMS AND DEFENSES (16-4.1)

A. Summary of Plaintiff's Claims

The Log Cabin Republicans ("LCR"), a membership organization, challenges the constitutionality of the statute (10 U.S.C. § 654) and the Department of Defense's ("DoD's") implementing regulations prohibiting homosexual conduct in the military, commonly known as the DADT policy, under the Due Process Clause and the First Amendment.[1]

The Court has previously held that LCR's facial due process challenge is subject to rational basis review (Doc. 83 at 16:27-17:4), the most deferential form of constitutional review, and that determination is indisputably correct. Accordingly, LCR has the burden of establishing that, at the time of enactment, Congress could not rationally have concluded that DADT furthered the objectives Congress had identified. In addition, the Court previously has held that the DADT statute was consistent with the First Amendment to the extent it permitted the

[1] On June 9, 2009, the Court dismissed LCR's equal protection challenge to the statute (Doc. 83 at 18:16-20:17).

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military to use statements as admissions of a propensity to engage in homosexual conduct. (Doc. 83 at 21:4-22:27). The Court further held, however, that "[d]ischarge on the basis of statements not used as admissions of a propensity to engage in 'homosexual acts' would appear to be discharge on the basis of speech rather than conduct, an impermissible basis." *Id*. at 23:16-21. The Court therefore permitted plaintiff the opportunity to attempt to make out a First Amendment claim that the DADT policy permitted discharge on the basis of speech alone. *Id*. at 23:23-25.

The government has moved for summary judgment because LCR has failed to carry its threshold burden of establishing associational standing and because LCR's substantive due process and First Amendment claims fail as a matter of law. That motion is fully briefed, and the Court heard oral argument on April 26, 2010. On May 27, 2010, the Court denied defendants' motion as it relates to standing. (Doc. 170). The Court has yet to rule, however, on whether defendants are entitled to summary judgment on plaintiff's due process and First Amendment claims.

B. Elements Required to Establish Plaintiff's Claims

1. Associational Standing

Before the Court may proceed and consider the merits, it must first ensure that it has subject-matter jurisdiction. The power of federal courts extends only to Cases and Controversies, *see* U.S. Const. art. III, § 2, and a litigant's standing to sue is "'an essential and unchanging part of the case-or-controversy requirement.'" *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) (citation omitted).

"The party seeking to invoke the jurisdiction of the court has the burden of alleging specific facts sufficient to satisfy" the requirements of standing. *Schmier v. U.S. Court of Appeals*, 279 F.3d 817, 821 (9th Cir. 2002). And it must do so as

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of the "time of the lawsuit's commencement, and the [Court] must consider the facts as they existed at the time the complaint was filed." *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 850 (9th Cir. 2007) (citing *Lujan*, 504 U.S. at 569 n. 4); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Serv.*, 528 U.S. 167, 180, 145 L. Ed. 2d 610, 120 S. Ct 693 (2000).

As set forth in the government's summary judgment briefing and the government's supplemental brief regarding the question of standing, LCR lacks associational standing to pursue its challenge because it has failed to show as a threshold matter that any of its members "would otherwise have standing to sue in their own right," *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977), when it filed suit on October 12, 2004.

Defendants respectfully disagree with the Court's conclusions regarding standing in its Order of May 27, 2010. In particular, defendants disagree with the Court's ruling that plaintiff need not establish associational standing at the outset of the litigation and assert that the Court's ruling is contrary to established Supreme Court precedent.

Moreover, although LCR's articles of incorporation do not say that creating a class of honorary members is "prohibited," *see* Doc. 170 at 25, they clearly state that the organization "shall have one membership class." This statement connotes an ongoing condition; the articles do not merely say that "one membership class is hereby created" or that the organization "has one membership class," but that it "*shall* have one membership class." Thus, creating an additional class of membership (such as honorary membership) would require amending the articles of incorporation. Similarly, although the District of Columbia Nonprofit Corporation Act provides that membership classes and their qualifications "shall be set forth in the articles of incorporation or the bylaws," *see* D.C. Code § 29-301.12,

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that simply means that a corporation may choose to state such provisions in one document or the other, not that the bylaws can add other membership classes when the articles of incorporation provide for only one. *See* Doc. 170 at 25. Further, although the Act permits incorporators to "elect to set forth [provisions] in the articles of incorporation designating the class or classes of members," *see* D.C. Code § 29-301.30(5), that only means that no such provisions are required, not that they are non-binding if included. *See* Doc. 170 at 25. As noted in defendants' earlier filing, provisions in a nonprofit corporation's bylaws must not be "inconsistent with its articles of incorporation." *See* D.C. Code § 29-301.05(12).

Finally, by using the declaration of Martin Meekins to support its standing, plaintiff is necessarily using Mr. Meekins' testimony to "support its claims," *see* Doc. 170 at 8, such that plaintiff had an obligation to provide his identity under Fed. R. Civ. P. 26(a)(1)(A)(i). *See ESN, LLC v. Cisco Sys., Inc*., 685 F. Supp. 2d 631, 648 (E.D. Tex. 2009) (holding that document used to support standing should have been disclosed under Rule 26(a)(1)). To the extent the Court overlooks this deficiency, defendants accordingly renew the request made at the summary judgment hearing and in defendants' supplemental brief addressing standing (*see* Doc. 166, at 9-10 n. 5) to depose Mr. Meekins (and to receive all documents relating to the timing of "Lt. Col. Doe's" membership in LCR), so as to properly prepare for the cross-examination of Mr. Meekins, who has been identified as a trial witness by plaintiff.

Plaintiff has filed a witness list that identifies five witnesses in an attempt to carry its burden of establishing standing (Doc. 173). Standing is a fundamental, threshold requirement for plaintiff's causes of action, and it is the Court's institutional obligation to ensure that it has subject-matter jurisdiction before it proceeds to consider the merits. To the extent this case is not stayed and proceeds to trial, the Court should accordingly bifurcate proceedings and first require

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plaintiff to carry its burden of establishing associational standing before it proceeds to the merits.[2]

2. Burden of Proof Regarding Facial Due Process Claim

Even if LCR could establish standing, a "facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct 2095 (1987). Here, the Ninth Circuit has held that, based upon justifications offered by the military, Congress could have rationally determined in 1993 that the statute "further[ed] military effectiveness by maintaining unit cohesion, accommodating personal privacy and reducing sexual tension." *Philips v. Perry*, 106 F.3d 1420, 1429 (9th Cir. 1997). And for the reasons set forth in previous briefing and argument in this case, *Phillips* remains controlling authority even after the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003).

As noted above, moreover, the Court has ruled that LCR's challenge is governed by the most deferential form of review available – the rational basis test (Doc. 83 at 16:27-17:4). In determining whether a law satisfies rational basis review, the court "must answer two questions: (1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?" *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668, 68 L. Ed. 2d 514, 101 S. Ct. 2070 (1981).

The Ninth Circuit has recently reaffirmed that the DADT statute has a legitimate purpose. *See Witt v. Dep't of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008) ("applying heightened scrutiny to DADT in light of current Supreme Court

[2] While defendants do not at present anticipate calling witnesses on the question of standing, defendants reserve the right to call witnesses identified on plaintiff's witness list.

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precedents, it is clear that the government advances an important governmental interest"). And with respect to the second question, the Supreme Court has made it clear that "whether *in fact*" a law "will accomplish its objectives is not the question." *Western & Southern Life Ins. Co*., 451 U.S. at 671-72 (emphasis in original). The question, instead, is whether Congress "*rationally could have believed*" that the statute "would promote its objective." *Id*. (emphasis in original). The Ninth Circuit has already recognized in *Philips* that Congress could have rationally found in 1993 that the policy "further[s] military effectiveness by maintaining unit cohesion, accommodating personal privacy and reducing sexual tension." *Philips*, 106 F.3d at 1429. The Ninth Circuit in *Philips* concluded that the Court of Appeals could not say that "the Navy's concerns are based on 'mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable' by the military," nor could it say that the rationale for the policy "lacks any 'footing in the realities' of the Naval environment in which Philips served." *Id.* (*internal quotation to Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985)). The Court should likewise defer to Congress' findings.

"The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping," *United States v. O'Brien*, 391 U.S. 367, 377, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968), and that "'judicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies." *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 58, 164 L. Ed. 2d 156, 126 S. Ct. 1297 (2006) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70, 69 L. Ed. 2d 478, 101 S. Ct. 2646 (1981)). Indeed, the Supreme Court has recognized the judiciary's limitations in matters of military policy:

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> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.

Gilligan v. Morgan, 413 U.S. 1, 10, 37 L. Ed. 2d 407, 93 S. Ct. 2440 (1973). These principles mandate judgment in favor of defendants. To the extent the Court rules otherwise and proceeds to trial, these principles equally apply to any trial on the merits.[3]

3. Burden of Proof Regarding Facial First Amendment Claim

With respect to plaintiff's First Amendment challenge, the Court previously has held that the DADT statute and implementing regulations are consistent with the First Amendment to the extent they permit the military to use statements as admissions of a propensity to engage in homosexual acts. (Doc. 83 at 21:4-22:27). The Court further held, however, that "[d]ischarge on the basis of statements not used as admissions of a propensity to engage in 'homosexual acts' would appear to be discharge on the basis of speech rather than conduct, an impermissible basis." *Id*. at 23:16-21. The Court therefore permitted plaintiff the opportunity to attempt to make out a First Amendment claim that the DADT policy permits a discharge on the basis of speech alone. *Id*. at 23:23-25. As set forth in the government's motion for summary judgment, this claim should now be rejected.

As an initial matter, plaintiff has steadfastly maintained throughout this litigation that it brings facial constitutional claims, including a facial First Amendment claim. *See, e.g.*, Doc. No. 79, at 5 (representing that "Log Cabin

[3] Indeed, as explained in defendants' supplemental brief addressing the standard of review (Doc. 172), these principles would also apply under a heightened standard of review.

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Republicans has not advanced an 'as-applied' claim'"). The Court suggested that DADT might be unconstitutional to the extent it required the military to discharge service members based on statements alone, and stated that it could not "determine from the face of" LCR's complaint "whether Nicholson was, or Doe could yet be, discharged based on statements alone." (Doc. 83 at 23: 23-25). To the extent the Court was suggesting that LCR could assert an as-applied First Amendment claim on behalf of its members, LCR has said in any event that it is not bringing an as-applied claim. The claim should thus be rejected on that basis alone.

And even if LCR were to change its position (which it has not suggested it intends to do in any of its briefs filed to date, and which it should otherwise be estopped from doing), plaintiff has no standing to bring such a claim even if it wanted to. Plaintiff claims standing here on the basis of "associational standing," which requires plaintiff to demonstrate that (1) at least one of its members would have standing in his own right to challenge the policy; (2) the interests sought to be protected by the suit are germane to the organization's purpose; and (3) the claim asserted and the relief requested do not require the members to participate individually in the lawsuit. *See Hunt*, 432 U.S. at 343. An as-applied challenge would necessarily require the participation in the suit of the individuals–in this case Nicholson and Doe–to whom the policy was allegedly misapplied. *See Washington Legal Found.* v. *Legal Found. of Washington*, 271 F.3d 835, 849-50 (9th Cir. 2001). Neither individual makes any claim of misapplication of the statute or regulations in their affidavits or, in the case of Mr. Nicholson, at deposition, and no such allegation is contained in the Original Complaint or First Amended Complaint. That is because neither the statute nor the regulations implementing the DADT policy permit the use of a statement for a purpose other than as an admission of a propensity to engage in homosexual acts.

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Plaintiff appears to recognize this in its proposed findings of fact and law and now attempts to challenge DADT on overbreadth grounds. The Court, however, has already explicitly rejected LCR's overbreadth claim. In its June 9, 2009 order, the Court specifically addressed LCR's claim that DADT is overly broad: "Plaintiff's contention DADT is overbroad and over-inclusive, regulating even private speech, is unavailing: private speech can be employed as an admission." (Doc. 83 at 22:17-19). In fact, the Ninth Circuit has also already affirmatively rejected an overbreadth challenge to DADT. In *Holmes v. California Army Nat. Guard*, 124 F.3d 1126. (9th Cir. 1997), the Court was confronted with a claim that DADT "reaches constitutionally-protected speech, and covers expressive behavior that is likewise protected by the First Amendment." *Holmes*, 124 F.3d at 1136. The Court rejected the claim relying on the reasoning articulated in *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir.1991), a case that involved an overbreadth challenge to the homosexual conduct policy that preceded DADT. The *Holmes* Court explained that "[a]lthough *Pruitt* involved the old policy, its reasoning-'Pruitt's admission, like most admissions, was made in speech, but that does not mean that the [F]irst [A]mendment precludes the use of the admission as evidence of the facts admitted'-applies equally to the application of the "don't ask/don't tell" policy." *Holmes*, 124 F.3d at 1136 (quoting *Pruitt*, 963 F.2d at 1164). Because the same reasoning applies in this case, the Court was correct to reject LCR's overbreadth claim. The government is thus entitled to judgment as a matter of law with respect to Plaintiff's First Amendment claim.

C. <u>Key Evidence in Opposition to Plaintiff's Claims</u>

As stated, plaintiff has the initial burden of establishing associational standing and that issue must be proven before the Court proceeds to the merits. To the extent the Court reaches the merits at trial, the only appropriate material to consider with respect to plaintiff's due process claim is the statute and its findings,

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as well as the statute's legislative history, including the extensive hearings where Congress received testimony from dozens of individuals on a number of topics related to DADT, including, among other things, issues associated with unit cohesion, sexual tension, privacy and the experience of foreign militaries. It is well-established that the government has "no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller v. Doe*, 509 U.S. 312, 320, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993). Rather, it is the one challenging Congress' judgment that "must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111, 59 L. Ed. 2d 171, 99 S. Ct. 939 (1979). "Only by faithful adherence to this guiding principle of judicial review," the Supreme Court has cautioned, "is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365, 35 L. Ed. 2d 351, 93 S. Ct. 1001 (1973).[4]

Moreover, even if the Court were to apply a heightened level of scrutiny, the Supreme Court has rejected reliance upon evidence outside of the statute and legislative history to support a constitutional challenge that is governed by heightened review. *See Goldman v. Weinberger*, 475 U.S. 503, 509, 89 L.Ed.2d 478, 106 S. Ct. 1310 (1986) (rejecting expert testimony in context of constitutional challenge to military policy regarding the wearing of yarmulka, and holding that such evidence has no relevance in the context of a constitutional challenge to military policy).

Regardless of the level of scrutiny the Court ultimately adopts, moreover, because the facial constitutionality of DADT is a question of law, consideration of

[4] As noted in defendants' supplemental brief regarding the standard of review (Doc. 172 at 13), even under a heightened standard of review, evidence would be inappropriate.

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"facts" beyond the statute and legislative history is inappropriate. *See U.S. v. Lujan*, 504 F.3d 1003, 1006 (9th Cir. 2007) ("[T]he constitutionality of a federal statute [is] a question of law that we review *de novo*."); *Gable v. Patton*, 142 F.3d 940, 944 (6th Cir. 1998) ("Because the four provisions are challenged with regard to facial constitutionality, thus implicating only issues of law, neither plaintiff nor defendants contest the appropriateness of summary judgment."); *MDK, Inc. v. Village of Grafton*, 277 F. Supp. 2d 943, 947 (E.D. Wisc. 2003) ("A facial challenge alleges that the law cannot constitutionally be applied to anyone, ***no matter what the facts of the particular case may be***.") (emphasis added) (citing *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 n.10, 120 L. Ed. 2d 101, 112 S. Ct. 2395 (1992)); *Sanitation & Recycling Indust., Inc. v. City of New York*, 928 F. Supp. 407, 419 (S.D.N.Y. 1996) ("a facial challenge is made in a 'factual vacuum'; any factual determinations are ***irrelevant***") (emphasis added) (quoting *Gen. Offshore Corp. v. Farrelly*, 743 F.Supp. 1177, 1187 (D.V.I 1990)). Thus, a "facial challenge must challenge the ***language*** rather than the ***application and enforcement*** of a statute." *See Utah Women's Clinic, Inc. v. Leavitt*, 844 F. Supp. 1482, 1488 (D. Utah 1994) (emphasis added), *dismissed in part, reversed and remanded in part on other grounds*, 75 F.3d 564 (10th Cir. 1996).

Accordingly, in deciding LCR's facial claims, the Court "***must be careful not to go beyond the statute's facial requirements*** and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-450, 170 L. Ed. 2d 151, 128 S. Ct. 1184 (2008) (citing *U.S. v. Raines*, 362 U.S. 17, 22, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960)) (emphasis added). It is precisely for this reason that courts have rejected the submission of evidence in consideration of a facial constitutional challenge. *See McCullen v. Coakley*, 573 F. Supp. 2d 382, 386-87 (D. Mass. 2008) (rejecting parties' requests to adopt various findings of fact, and holding that "[w]hile this

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information may be important to plaintiffs' as-applied challenge, it is largely irrelevant to the facial challenge."); *Morgan v. Plano Independent School Dist.*, No. 04-447, 2007 WL 397494, *3 (E.D. Tex. Feb. 1, 2007) (rejecting on relevancy grounds affidavit in support of challenge to facial validity of policy).

There is, finally, no affirmative evidence for defendants to present on the First Amendment claim that the Court has permitted to proceed past a motion to dismiss. The First Amendment claim that the Court allowed to survive a motion to dismiss is based upon a purported misapplication of the statute and implementing regulations that can only be brought in an as-applied case–not a facial challenge, as here. And even if it could be brought, neither the statute nor implementing regulations permit the use of a statement for a purpose other than to show a propensity to engage in homosexual acts. Not surprisingly, therefore, neither Nicholson nor Doe have been or are threatened by such an alternative use of a statement and, thus, cannot confer associational standing upon plaintiff to challenge the policy on that basis.

Because LCR's associational standing is dependent upon the injury suffered by its "members," *Hunt*, 431 U.S. at 343, LCR lacks standing to bring this type of claim and the Court lacks jurisdiction to hear such a claim. Because neither the statute or regulations permit the use of a statement for a purpose other than to show a propensity to engage in homosexual acts, moreover, it fails as a matter of law.

D. Summary Statement of Affirmative Defenses

Not Applicable.

E. Elements Required to Establish Defendants' Affirmative Defenses

Not Applicable.

F. Brief Description of Evidence in Support of Affirmative Defenses

Not Applicable.

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G. Third Parties

Not Applicable.

H. Anticipated Evidentiary Issues

Defendants intend to file motions *in limine* regarding plaintiff's experts, trial exhibits, and the testimony of lay witnesses plaintiff intends to present at trial.

I. Issues of Law Which are Germane to the Case

These are explained above.

II.

BIFURCATION OF ISSUES (16-4.3)

Plaintiff has filed a witness list that identifies five witnesses in an attempt to carry its burden of establishing standing (Doc. 173). As explained above, to the extent this case is not stayed and proceeds to trial, the Court should bifurcate proceedings and first rule on this question before it proceeds to the merits. The Court should bifurcate proceedings and resolve the issue of standing before considering the merits of LCR's facial constitutional challenge. *See Sepulveda v. Pacific Maritime Assoc*., 878 F.2d 1137, 1138 (9th Cir. 1989) (bifurcating trial to resolve issue of plaintiffs' standing before addressing the merits of plaintiffs' claims); *Greener v. Cadle Co.*, 298 B.R. 82, 86 (N.D. Tex. 2003) (noting that bankruptcy court "bifurcated the underlying bankruptcy action, so that it could resolve the issue of standing before it tried the merits of the adversary claim."); *In re Allan S. Katz*, No. 98-C-4860, 1999 WL 14485, at *1 (N.D. Ill. Jan. 6, 1999) (holding evidentiary hearing on standing prior to adjudicating merits). A Court must first assure itself that Article III standing and subject-matter jurisdiction exists before addressing the merits. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998).

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III.

JURY TRIAL (16-4.4)

Not applicable

IV.

ATTORNEYS' FEES (16-4.5)

Not applicable.

V.

ABANDONMENT OF ISSUES (16-4.6)

Not applicable.

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Dated: June 21, 2010

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