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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' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW Judge: Hon. Virginia A. Phillips Trial Date: July 13, 2010

Having come on for trial, and the Court having considered the pleadings, evidence presented, and memoranda of points and authorities, the Court makes the following Findings of Fact and Conclusions of Law:

Dockets.Justia.com

I.

FINDINGS OF FACT REGARDING PLAINTIFF'S ASSOCIATIONAL STANDING

1. To become a member of Plaintiff, Log Cabin Republicans ("LCR"), an individual must pay dues to the national organization or to a local chapter.

2. Mr. Nicholson was not a member of LCR at the time of the original complaint, which was filed on October 12, 2004, or the time of the amended complaint, which was filed on April 28, 2006.

3. Mr. Nicholson has never been a bona fide or active member of LCR and thus was not an active member when LCR submitted Mr. Nicholson's declaration to the Court in connection with the filing of LCR's amended complaint; at that point, and only at that very point, Mr. Nicholson had merely signed up to be a part of LCR's database.

4. Mr. Nicholson did not pay dues as required by LCR's own articles of incorporation and bylaws.

5. There is no record evidence as to when John Doe became a dues-paying member of LCR.

6. John Doe, moreover, remains a member of the military, and thus has not been discharged – whether because of a statement or for any other reason.

7. Nor is there any record evidence to demonstrate that the Don't Ask, Don't Tell ("DADT") policy has ever been applied to John Doe, or that any statement he has made has been used by the military for any purpose, let alone for any purpose in connection with its application of the DADT policy.

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II.

CONCLUSIONS OF LAW REGARDING PLAINTIFF'S STANDING

8. 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).

9. "Standing is determined as of the commencement of litigation." *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1171 (9th Cir. 2002).

10. "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).

11. An organization may have standing to bring suit on behalf of its members, but must demonstrate, among other requirements, that those members "would otherwise have standing to sue in their own right." *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977).

12. The persons whose interests an organization seeks to pursue must actually be members of the organization. *Cf. Washington Legal Found. v. Leavitt*, 477 F. Supp. 2d 202, 208 (D.D.C. 2007) (listing the "indicia of membership" in an organization without formal members as "(i) electing the entity's leadership, (ii) serving in the entity, and (iii) financing the entity's activities") (*citing Hunt*, 432 U.S. at 344-45).

13. In addition, an organization's claim to associational standing is "weakened" if the members on which it relies were "manufactured . . . after the fact" for purposes of the litigation. *Washington Legal Found*, 477 F. Supp. 2d at 211.

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14. It is, of course, an irreducible requirement that a plaintiff have a personal interest in a case sufficient to confer standing from the commencement of litigation and throughout its existence. *See Friends of the Earth v. Laidlaw Envir. Servs.*, 528 U.S. 167, 189, 145 L. Ed. 2d 610, 120 S. Ct 693 (2000). This is especially so in cases based on associational standing. *See Biodiversity*, 309 F.3d at 1171.

15. The record demonstrates that Mr. Nicholson was not an active member of LCR when this action was commenced in 2004 or upon amendment.

16. Indeed, Mr. Nicholson has never been a bona fide or active member of LCR and thus was not an active member even when LCR submitted Mr. Nicholson's declaration to the Court at the time it filed its amended complaint; at that point, and only at that very point, had Mr. Nicholson merely signed up to be a part of LCR's database.

17. Even if Mr. Nicholson had been signed up at the time this action was commenced, or even if he was signed up when the Court directed LCR to submit a declaration from "an active member," Mr. Nicholson was not, nor has he ever been, a bona fide or active member of LCR sufficient to permit the organization to qualify for associational standing.

18. Mr. Nicholson did not pay dues as required by the organization's own bylaws and articles of incorporation. *Cf. Washington Legal Found.*, 477 F. Supp. 2d at 208 (listing "financing the entity's activities" as one "indicia of membership").

19. Merely entering Mr. Nicholson's name into LCR's "database" did not make him a member under the bylaws or article of incorporation.

20. Indeed, LCR's claim to associational standing is dramatically "weakened" to the extent it was "manufactured . . . after the fact" for purposes of the litigation. *Washington Legal Found*, *id.* at 211.

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21. But under no circumstances can LCR demonstrate, based on the record, that through Mr. Nicholson it has met the "irreducible requirement" that it demonstrate standing from the commencement of the litigation and throughout its existence. *Friends of the Earth*, 528 U.S. at 189.

22. LCR cannot establish standing based upon the anonymous John Doe. LCR has wholly failed to show that John Doe paid dues at the time of the outset of this litigation in October 2004.

23. Nor is there any record evidence that Doe has been aggrieved by the statute LCR challenges. John Doe is a member of the military and has never been discharged, let alone by application of the DADT policy.

24. There is no evidence to demonstrate that the DADT policy has ever been applied to John Doe, or that any statement he has made has been used by the military for any purpose, let alone for any purpose in connection with its application of the DADT policy.

25. Doe's asserted harm is based solely upon some future, possible, conjectural, or hypothetical application of the policy to him. But an injury must be "both 'concrete' and 'actual or imminent, not conjectural or hypothetical'" to confer standing. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771, 146 L. Ed. 2d 836, 120 S. Ct. 1858 (2000) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 109 L. Ed.2d 135, 110 S. Ct. 1717 (1990)).

26. An allegation of injury that is "remote, contingent and speculative," and that consists of "nothing more than the bare possibility of some injury in the future," fails to present a justiciable question. *Gange Lumber Co. v. Rowley*, 326 U.S. 295, 305, 90 L. Ed. 85, 66 S. Ct. 125 (1945).

27. This is especially so here where the relief sought is declaratory and injunctive relief. Where such relief is sought, a plaintiff must first show that "the

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injury or threat of injury" resulting from official conduct is both "'real and immediate,' not 'conjectural' or 'hypothetical.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983); *see Nat'l Treasury Employees Union v. Dep't of the Treasury*, 25 F.3d 237 (5th Cir. 1994) (rejecting assertion of organizational standing where allegation of any injury to members is "only hypothetical and conjectural"); *see also Hodgers-Durgin v. de la Viña*, 199 F.3d 1037, 1039 (9th Cir. 1999) (finding lack of standing due to "insufficient likelihood of future injury").

28. It is LCR's burden to establish standing, and it has failed to do so here through its presentation of speculative allegations about an anonymous "member."

29. Because this Court lacks subject-matter jurisdiction, Defendants are entitled to judgment as a matter of law and there is no need to reach the merits.

III.

FINDINGS OF FACT REGARDING PLAINTIFF'S FACIAL SUBSTANTIVE DUE PROCESS CLAIM

30. Because resolution of LCR's facial substantive due process claim is a pure question of law, findings of fact outside the plain language of the statute, legislative history, and implementing regulations – facts which the Court properly may take notice – are legally inappropriate.

IV.

CONCLUSIONS OF LAW REGARDING PLAINTIFF'S FACIAL SUBSTANTIVE DUE PROCESS CLAIM

31. LCR cannot carry its burden in a facial challenge of negating each and every constitutional application of the statute. 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,

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accommodating personal privacy and reducing sexual tension." *Philips v.* Perry, 106 F.3d 1420, 1429 (9th Cir. 1997).

32. 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, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985)).

33. In light of that finding, LCR now has the burden of showing that these legitimate applications of the policy, as already found by the Ninth Circuit, are invalid.

34. LCR has failed to make that showing. "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).[1]

35. In reviewing such a challenge, courts must be "careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases," and should act with caution because "facial challenges threaten to short circuit the democratic process." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-51, 170 L. Ed. 2d 151, 128 S. Ct. 1184 (2008).

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[1] The Ninth Circuit has made clear that "[o]ur court adheres to [the *Salerno*] standard, notwithstanding the plurality opinion in the *City of Chicago v. Morales*, [527 U.S. 41 (1999)]." *United States v. Inzunza*, 580 F.3d 896, 904 n.4 (9th Cir. 2009).

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1 36. Plaintiff's burden is particularly high here, because the Court has
2 ruled already that LCR may not "rely upon [the] heightened scrutiny standard
3 [adopted in *Witt v. Dep't of Air Force,* 527 F.3d 806 (9th Cir. 2008)] as the Ninth
4 Circuit limited this standard to as-applied challenges," and that this challenge is
5 thus governed instead by the most deferential form of review available – the
6 rational basis test (Doc. 83 at 17).

7 37. Under that standard, the only question presented is whether Congress
8 "rationally *could have believed*" that the conditions of the statute would promote
9 its objective. *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451
10 U.S. 648, 671-72, 68 L. Ed. 2d 514, 101 S. Ct. 2070 (1981) (emphasis in original).

11 38. The Supreme Court has held that the rational basis test "is not subject
12 to courtroom fact-finding," and rational basis review "is not a license for courts to
13 judge the wisdom, fairness, or logic of legislative choices." *Fed. Commuc'ns*
14 *Comm'n v. Beach Commc'ns*, 508 U.S. 307, 314-15, 124 L. Ed. 2d 211, 113 S. Ct.
15 2096 (1993).

16 39. The Government, therefore, has "no obligation to produce evidence to
17 sustain the rationality of a statutory classification." *Heller v. Doe*, 509 U.S. 312,
18 320, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993). Rather, "those challenging the
19 legislative judgment must convince the court that the legislative facts on which the
20 classification is apparently based could not reasonably be conceived to be true by
21 the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111, 59 L. Ed.
22 2d 171, 99 S. Ct. 939 (1993).

23 40. "Only by faithful adherence to this guiding principle of judicial
24 review," the Supreme Court has cautioned, "is it possible to preserve to the
25 legislative branch its rightful independence and its ability to function."
26 *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365, 35 L. Ed. 2d 351, 93
27 S. Ct. 1001 (1973).
28

41. In *Philips*, 106 F.3d at 1429, the Ninth Circuit already has determined that "circumstances exist[] under which the [DADT policy] would be valid." *Salerno*, 481 U.S. at 745. Indeed, the Ninth Circuit has found that Congress could have rationally found in 1993 that the DADT policy was valid under any of the following circumstances – to preserve unit cohesion, to accommodate personal privacy, and to reduce sexual tension so as to enhance military preparedness and effectiveness. *Philips*, 106 F.3d at 1429.

42. LCR, moreover, has failed to carry its burden of showing that Congress could not have relied upon these considerations when it enacted the statute, as LCR is required to do under rational basis review.

V.

FINDINGS OF FACT REGARDING PLAINTIFF'S FIRST AMENDMENT CHALLENGE

43. The Court already has recognized that the DADT policy is consistent with the First Amendment to the extent it permits the military to use statements as admissions of a propensity to engage in homosexual acts.

44. The Court nonetheless ruled in its June 9, 2009 Order 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." (Doc. 83 at 23).

45. The Court suggested in that regard that LCR could pursue this claim only by showing that the military discharges service members based upon the use of a statement for a purpose other than as an admission of a propensity to engage in homosexual acts, but concluded that it could not "determine from the face of" LCR's complaint "whether Nicholson was, or Doe could yet" be discharged on a such a basis. *Id*.

47. The record has now confirmed that:

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a). Mr. Nicholson was discharged because his statement that he was gay constituted an admission of his propensity to engage in homosexual acts, a presumption that he chose not to rebut: Mr. Nicholson gave his commander a letter stating that after considerable thought, he had come to the decision to make the very difficult disclosure that he was gay. Mr. Nicholson stated in the letter, moreover, that he knew this disclosure would require his involuntary discharge, but that he chose to simply tell the truth and come out. Further, Mr. Nicholson's attorney stated in his own letter to the commander that Mr. Nicholson had asked the attorney to assist him in disclosing his sexual orientation to the Army. The attorney's letter also stated that Mr. Nicholson was aware that this disclosure created a rebuttable presumption that he had the propensity to engage in homosexual acts, but that Mr. Nicholson elected not to rebut this presumption. Mr. Nicholson was thus discharged from the Army as a result of his admission of a likelihood of engaging in homosexual acts, which he chose not to rebut.

b). As for the anonymous John Doe on whom LCR also seeks to rely, he remains a member of the military, and thus has not been discharged – whether because of a statement or for any other reason. No statement has thus been used as the basis to discharge John Doe under the challenged statute or otherwise.

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VI.

CONCLUSIONS OF LAW REGARDING PLAINTIFF'S FIRST AMENDMENT CHALLENGE

48. The undisputed facts put forth by LCR establish that service members who state that they are homosexual are discharged under the policy solely because such statements establish the service members' propensity to engage in homosexual acts, which the Court already has recognized in its June 9, 2010 order fully comports with the requirements of the First Amendment.

49. And given that LCR has presented no member to whom the policy has been applied based upon a statement of homosexuality, where that statement was used for a purpose other than as an admission of a propensity to engage in homosexual acts, LCR also lacks associational standing to pursue its remaining First Amendment claim. *See Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 477 n.14, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982) (where organization relies entirely on associational standing, "its claim to standing can be no different from those of the members it seeks to represent").

If any proposed finding of fact is a conclusion of law or if any proposed conclusion of law is properly be a finding of fact, the Court deems them so.

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DATED:

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Hon. Virginia A. Phillips
United States District Judge

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