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9 UNITED STATES DISTRICT COURT
 10 CENTRAL DISTRICT OF CALIFORNIA
 11 EASTERN DIVISION

13 LOG CABIN REPUBLICANS, a non-
 14 profit corporation,

15 Plaintiff,

17 v.

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

22 Defendants.
 23

Case No. ED CV 04-8425-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

Pretrial Conf: June 28, 2010
 2:30 p.m.

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 submits the following Proposed Findings of Fact and Conclusions of Law in the
4 action brought by Log Cabin Republicans against the United States of America and
5 Robert Gates, Secretary of Defense, in his official capacity (hereinafter collectively
6 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 Republicans 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 (hereinafter, “Log Cabin”) is a
21 nonprofit corporation organized under the laws of the District of Columbia, is
22 associated with the Republican Party, and is dedicated to the interests of the
23 homosexual community.

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

1 who are residents of California.

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

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

13 **a. *John Alexander Nicholson***

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

17 6. John Alexander Nicholson is a member of Log Cabin.

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

21 8. In addition, Mr. Nicholson addressed Log Cabin's national convention
22 in 2006.

23 9. Mr. Nicholson joined Log Cabin's membership rolls in April 2006.

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

26 11. Mr. Nicholson enlisted in the United States Army just days after the
27 September 11, 2001 attacks. He already was conversant in four languages when he
28 began his Army training as a human intelligence collector

1 12. In February 2002, Mr. Nicholson's sexual orientation became known
2 to members of the Army when a fellow servicemember intercepted and read a
3 personal letter from Mr. Nicholson to another man in Portuguese and revealed the
4 contents of the letter to other servicemembers.

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

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

14 **b. Lt. Col. John Doe**

15 15. Lt. Col. "John Doe" is a Log Cabin member. Lt. Col. Doe joined Log
16 Cabin prior to October 12, 2004.

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

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

23 18. As a result of DADT, Lt. Col. Doe (and all homosexual members of
24 the United States Armed Services) may not communicate the core of emotions and
25 identity to others in the same manner as his heterosexual servicemembers, nor can
26 he exercise his constitutionally protected right to engage in private, consensual
27 homosexual conduct without intervention by the government.

28 19. Lt. Col. Doe is unable to identify himself publicly as a member of Log

1 Cabin. Lt. Colonel Doe believes that if he were to identify himself and his role in
2 this case, he would be subject to investigation and discharge under DADT.

3 20. Lt. Col. Doe’s fears are valid as DADT would require mandatory
4 separation upon disclosure of his homosexuality. See 10 U.S.C. § 654(b)(2) (“A
5 member of the armed forces shall be separated from the armed forces...if...the
6 member has stated that he or she is a homosexual...”) (emphasis added).

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

9 22. Lt. Col. Doe is unable to participate fully in this litigation and testify at
10 any proceeding, including trial, for fear he will be discharged.

11 **ii. Defendants**

12 23. Defendants are the United States of America and the Secretary of
13 Defense, Robert M. Gates, in his official capacity.

14
15 **B. History of Service by Homosexuals**

16 24. Before the 20th century, homosexual conduct was viewed as
17 something people were prone to engage in during moments of moral weakness; the
18 concept that certain people have an enduring or innate homosexual identity, as in a
19 characteristic behavior of one type of person called a homosexual, did not exist.

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

24 26. During the period surrounding World War I, homosexuals were
25 screened out of the military only when homosexual behavior manifested itself in
26 overt conduct or glaring nonconformity.

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

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

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

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

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

18 32. On January 16, 1981, President Jimmy Carter’s deputy secretary of
19 defense implemented a service-wide ban on homosexuals in uniform, removing any
20 discretion previously enjoyed by different branches or individual commanders.
21 Prior to 1981, a loophole existed whereby homosexual servicemembers could avoid
22 discharge by demonstrating an exemplary service record.

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

26 34. Two studies commissioned in 1988 by the military’s Personnel
27 Security Research and Education Center (“PERSEREC”) found that the ban on
28 homosexual service was unnecessary and damaging, and found that sexual

1 orientation had no relationship to job performance or unit cohesion.

2 35. The first PERSEREC Report, dated December 1988, and titled,
3 “Nonconforming Sexual Orientation in the Military and Society,” pointed to
4 growing tolerance of homosexuality and concluded that “the military cannot
5 indefinitely isolate itself from the changes occurring in the wider society, of which
6 it is an integral part.” It found that “having a same-gender or an opposite gender
7 orientation is unrelated to job performance in the same way as being left- or right-
8 handed.”

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

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

20 38. The second PERSEREC Report, dated January 1989, found that “the
21 preponderance of the evidence presented indicates that homosexuals show pre-
22 service suitability-related adjustment that is as good [as] or better than the average
23 heterosexual,” a result that appeared to “conflict with conceptions of homosexuals
24 as unstable, maladjusted persons.”

25 39. The U.S. Military suspended the discharge proceedings of a number of
26 homosexual troops during the 1991 Gulf War and sent those troops to the Middle
27 East to fight in the war.

28 40. In the six months following the 1991 Gulf War, over one thousand

1 homosexuals were discharged from the U.S. Armed Forces, including many whose
2 superiors knew about their sexual orientation.

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

6 42. One such servicemember, Margarethe Cammermeyer, was discharged
7 in 1992 for admitting that she was a lesbian after 26 years of service, including
8 service as the Chief Nurse of the 352nd Evacuation Hospital in Oakland, CA.
9 Cammermeyer v. Aspin, 850 F. Supp. 910, 912-913 (W.D. Wash. 1994). The court
10 determined that her discharge from the National Guard constituted government-
11 sponsored discrimination against homosexuals as a class solely on the basis of
12 prejudice, violating Cammermeyer's equal protection and due process rights. Id. at
13 927-928.

14 43. Another servicemember, Dusty Pruitt, served in the U.S. Army and
15 Army Reserve as a Methodist minister, but was discharged in 1986 for her
16 homosexual orientation after she publicly declared she was a lesbian. The U.S.
17 Court of Appeals for the Ninth Circuit held that the circumstances of Pruitt's
18 separation stated an equal protection claim. Pruitt v. Cheney, 963 F.2d 1160, 1167
19 (9th Cir. 1991).

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

28 45. In 1992, the GAO conducted a study of the homosexual exclusion

1 policy. Its researchers looked at seventeen different countries and eight police and
2 fire departments in four U.S. cities and reviewed military and non-military polls,
3 studies, legal decisions, and scholarly research on homosexual service. The GAO
4 recommended in an early draft of its report that Congress “may wish to direct the
5 Secretary of Defense to reconsider the basis” for homosexual exclusion. The GAO
6 deleted this suggestion from its final report only because Congress had introduced
7 legislation “to prohibit discrimination by the armed forces on the basis of sexual
8 orientation.”

9
10 **C. Enactment of Don’t Ask Don’t Tell**

11 46. On January 29, 1993, President Bill Clinton signed a memorandum
12 directing Secretary of Defense Les Aspin to develop a policy “ending
13 discrimination on the basis of sexual orientation in determining who may serve in
14 the Armed Forces of the United States” and requesting submission of a draft
15 Executive Order that embodied a new, non-discriminatory policy.

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

18 48. Secretary Aspin then commissioned a study by the National Defense
19 Research Institute of the RAND Corporation (the “RAND Study”), asking it to
20 provide “information and analysis that would be useful in helping formulate the
21 required draft Executive Order.”

22 49. The RAND Study was a large interdisciplinary effort prepared by over
23 70 social scientists including, among others, a sociologist, psychologist,
24 anthropologist, two physicians, a statistician, and a lawyer, as well as invited
25 representatives from each of the branches of the U.S. Military.

26 50. The RAND Study was framed as a response to Secretary Aspin’s
27 request and responded to President Clinton’s memorandum to the Secretary of
28 Defense asking for an executive order that would end discrimination on the basis of

1 sexual orientation “in a manner that is practical, realistic, and consistent with the
2 high standards of combat effectiveness and unit cohesion our armed forces must
3 maintain.” The RAND researchers’ mission was to determine whether it was
4 possible to end discrimination in a manner that would be consistent with those
5 criteria.

6 51. At the onset of the RAND Study, RAND researchers identified a
7 variety of research tasks, including studying foreign militaries, unit cohesion
8 literature, police and fire departments, public health related issues, and
9 organizational issues. The work was divided among separate teams.

10 52. In preparing the RAND report, researchers visited toilet and shower
11 facilities of submarines, battleships, and barracks to make sure they understood the
12 conditions under which people in the military work in forming their conclusions.
13 The RAND researchers were informed that the facilities they visited were
14 representative of the toilet and shower facilities throughout the world for the U.S.
15 Military.

16 53. In conducting the RAND Study, researchers learned from their
17 military focus groups, cohesion experts, and from anecdotal evidence provided by
18 servicemembers that incidents of sexual tension, romantic relationships, sexual
19 assaults, and favoritism in the chain of command commonly occurred among
20 heterosexuals serving in the U.S. Military

21 54. The RAND researchers also gathered evidence from six countries and
22 data analyses from hundreds of studies of cohesion. In researching foreign
23 militaries, the RAND team visited various members at different ranks in foreign
24 military organizations. In each interview, RAND asked the foreign military
25 members if they could recall incidents involving openly homosexual
26 servicemembers causing disruption to the unit. These interviews revealed that, to
27 the extent any problems arose from allowing homosexuals to serve openly, they had
28 not risen to a level of serious concern.

1 55. Part of the RAND Study examined police and fire departments in
2 several U.S. cities, which it regarded as “the closest possible domestic analog” to
3 the military setting.

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

6 57. The RAND Study resulted in a report titled “Sexual Orientation and
7 U.S. Military Personnel Policy: Options and Assessments” (the “RAND Report”).
8 The RAND Report ultimately concluded that sexual orientation alone was “not
9 germane” to determining whether an individual was fit for military service, that
10 permitting openly homosexual servicemembers to serve would not impair the way
11 the U.S. Military functioned, and that sexual orientation was irrelevant to
12 determining whether an individual was fit for military service.

13 58. The RAND Report proposed that should a servicemember’s sexual
14 orientation become known to his or her unit, it should have no bearing on the
15 member’s status in the U.S. Military.

16 59. Dr. MacCoun authored the chapter in the RAND Report that addressed
17 the effect on unit cohesion from allowing homosexuals to serve openly in the
18 military. Based on his review of the cohesion literature, Dr. MacCoun concluded
19 that to the extent an association between unit cohesion and performance existed, the
20 correlation was stronger between task cohesion (shared goals among individuals)
21 and performance than between social cohesion (whether people like each other) and
22 performance. Dr. MacCoun also cited evidence that high levels of social cohesion
23 could actually interfere with a group’s performance.

24 60. Dr. MacCoun’s research revealed that if homosexuals were allowed to
25 serve openly, the most likely negative outcome was ostracism, not a breakdown in
26 unit cohesion.

27 61. The RAND Report also found that permitting openly homosexual
28 servicemembers to serve did not impair or reduce the functioning or effectiveness

1 of numerous foreign militaries. In Canada, where the ban had just ended, RAND
2 found “no resignations (despite previous threats to quit), no problems with
3 recruitment, and no diminution of cohesion, morale, or organizational
4 effectiveness.” The same conclusions were reached in the case of Israel. The
5 Study reported that even in those countries where homosexuals were allowed to
6 serve, “in none of these societies is homosexuality widely accepted by a majority of
7 the population.”

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

11 63. The RAND Study concluded that circumstances could exist under
12 which the ban on homosexuals could be lifted with little or no adverse
13 consequences for recruitment or retention.

14 64. In 1993, the GAO reported in a separate study that permitting openly
15 homosexual servicemembers to serve did not impair the functioning of numerous
16 foreign militaries. The GAO studied twenty-five foreign militaries, with special
17 focus on Israel, Canada, Germany, and Sweden. According to its final report,
18 “Military officials in all four countries said that the presence of homosexuals in the
19 military [was] not an issue and ha[d] not created problems in the functioning of
20 military units.” A key factor, said the report, was that homosexuals were reluctant
21 to openly admit their sexual orientation, even after the ban was lifted.

22 65. Secretary Aspin directed the Deputy Assistant Secretary of Defense to
23 form a working group (“the Military Working Group”) to address the same issue he
24 had asked RAND to consider.

25 66. The Military Working Group, which was charged with submitting
26 recommendations to Congress on the U.S. Armed Forces’ homosexuality policy,
27 ignored evidence regarding the relevance of sexual orientation to military service in
28 its report.

1 67. The Military Working Group did not review the final RAND Report.

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

4 69. The Military Working Group decided to retain the ban on openly
5 homosexual servicemembers before ever convening.

6 70. The Military Working Group ultimately reached a conclusion contrary
7 to that of the RAND Report and found that DADT would be best for the U.S.
8 military.

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

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

18 73. The Senate Armed Services Committee recognized that, among both
19 heterosexuals and homosexuals, “[s]exual behavior is one of the most intimate and
20 powerful forces in society.” The Committee also recognized that “the armed forces
21 do not presume that service members will remain celibate or that they will not be
22 attracted to members of the opposite sex.” The Committee also stated that it would
23 be “irrational ... to develop military personnel policies on the basis that all gays and
24 lesbians will remain celibate or that they will not be sexually attracted to others.”

25 74. On June 19, 1993, Attorney General Janet Reno wrote a memorandum
26 to President Clinton describing the defensibility of DADT. Attorney General
27 Reno’s memorandum argued that DADT did not constitute a violation of the First
28 Amendment on the rationale that the servicemembers were not being punished for

1 their speech, rather their speech constituted evidence of prohibited conduct.

2 75. On July 19, 1993, Secretary Aspin wrote another letter to the military
3 branches that changed the policy instituted in his February letter and which
4 approximated the ultimate DADT policy. Secretary Aspin directed the branches of
5 the military to suspend asking questions regarding sexual orientation at time of
6 enlistment.

7 76. Subsequently, DADT became law. 10 U.S.C. § 654.

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

15 78. The U.S. Military suppressed the 1957 Crittenden report, discussed
16 above, which found that no data supported the concept that “homosexual
17 individuals and those who have indulged in homosexual behavior cannot acceptably
18 serve in the military,” and that there is no “sound basis in fact ... that homosexuals
19 necessarily pose a security risk.”

20 79. The Military also suppressed the PERSEREC reports, which
21 considered whether homosexuals serving in the Military were vulnerable to
22 blackmail and concluded that homosexuals did not pose a security risk to the armed
23 forces. The Pentagon later disavowed the PERSEREC reports on the basis that they
24 were drafts.

25 80. The rhetoric during the national debate over whether to lift the ban on
26 homosexual servicemembers in 1992 and 1993 was characterized by a well-
27 organized and effective campaign by religious conservatives to stigmatize
28 homosexuals and cast them as a threat to the military’s effectiveness and core

1 values.

2 81. Influencing passage of DADT were unfounded and unsupported
3 assertions with no evidentiary support. Those assertions included, for example,

- 4 a. that homosexuality is a moral virus,
- 5 b. that the homosexual lifestyle is unhealthy,
- 6 c. that homosexuals are perverted and promiscuous,
- 7 d. that homosexual servicemembers are rife with disease,
- 8 e. that homosexuals would increase transmission of sexually
9 transmitted diseases, including AIDS,
- 10 f. that homosexuals are abnormal and mentally unstable,
- 11 g. that homosexuals are more prone to criminal activity,
- 12 h. that homosexuals are sexual predators and pedophiles,
- 13 i. that servicemembers could not respect and take orders from
14 individuals who enjoy anal sex, and
- 15 j. that homosexuals are cowards and thieves.

16 82. Behind the scenes, members of the Pentagon acknowledged that the
17 ban on homosexuality in the military was motivated primarily by moral concerns,
18 not concerns for unit cohesion, but recognized that such rationale would not be
19 accepted by the public.

20 83. The Military Working Group reached its conclusions on the basis of
21 fear, politics, prejudice, stereotypes, and resistance to any change in military
22 tradition.

23 84. The Military Working Group's June 1993 report, which served as the
24 basis for the ultimate DADT policy, stated:

- 25 a. "[L]ifting the ban would leave the military's image 'tarnished'"
26 and that "[t]he homosexual lifestyle has been clearly
27 documented as being unhealthy."
- 28 b. "Due to their sexual practices, active male homosexuals in the

1 military could be expected to bring an increased incidence of
2 sexually transmitted diseases, including AIDS, which could
3 create the perception of an ‘enemy within’.”

4 c. “The core values of the military profession would be seen by
5 many to have changed fundamentally if homosexuals were
6 allowed to serve,” and that “this would undermine institutional
7 loyalty and the moral basis for service, sacrifice, and
8 commitment” for the bulk of heterosexual soldiers. This
9 statement suggests it was the opinion of the military that the
10 “core values” of the armed forces are, and properly should be,
11 anti-homosexual.

12 85. In enacting DADT, Congress relied on three influential leaders:
13 General Colin Powell, Senator Sam Nunn, and Professor Charles Moskos. Each of
14 these leaders argued against lifting the ban for what were actually personal, not
15 military, reasons.

16 86. Gen. Colin Powell, then Chairman of the Joint Chiefs of Staff, said
17 repeatedly that the service of open homosexuals would harm “order and discipline,”
18 and would be “difficult to accommodate.” While some observers compared the
19 homosexual ban to racial segregation in the military, Powell rejected the analogy,
20 leaning on his stature as a top African-American general to bolster his moral
21 authority. Rear Admiral John Hutson, a high-ranking JAG officer, who was
22 engaged in the U.S. Military’s internal debate over whether to lift the homosexual
23 ban, recalled that “Powell put a hole in the analogy to racial integration, not
24 particularly logically, but just by force of his personality and who he was.” Hutson
25 said it allowed the rest of the military leadership to “hide” behind Powell. It
26 allowed other champions of anti-homosexual discrimination to say, “this isn’t the
27 same as racial integration. This is different, and General Powell says so.”

28 87. Senator Sam Nunn, who oversaw Congressional hearings on

1 homosexual troops as Chairman of the Senate Armed Services Committee, had a
2 record of anti-homosexual actions and sentiment. He had backed Senator John
3 Glenn's bid for the White House in 1984 citing his "courage" in expressing his
4 "strongly held moral belief that homosexuals should not be the role models for our
5 children." Nunn had also dismissed two political aides because they were
6 homosexual. In a television appearance in 1993, Nunn said it was important not to
7 "put individual rights above the mission," thus framing months of hearings as if
8 homosexual service was an inherent trade-off with military effectiveness, despite a
9 total absence of evidence to that effect. He said the government should not
10 "endorse the sex behavior of people that are lesbian and gay" even though the
11 current separate standard for straight soldiers does precisely that, while a policy of
12 equal treatment would be the opposite of endorsing one kind of behavior over
13 another. Asked if he was "saying the heterosexual lifestyle is superior, is morally
14 superior, to the homosexual lifestyle," Nunn answered that he was "not only saying
15 that," but that "the American family deterioration is one of the biggest problems we
16 face in our culture, and government programs cannot solve that," implying
17 homosexuality was somehow responsible for this decline. At field hearings, Nunn
18 directed hostile questioning to a homosexual naval officer, saying, "You decided
19 that you had to come out in the open. Could you tell us why you felt that you had
20 to come out in the open. And did you take into account by doing so, whether they
21 are right or wrong, you were really making an awful lot of other people feel very
22 uncomfortable in their surroundings?" Nunn also removed certain witnesses from
23 the roster of those who would testify at the Armed Services Committee hearings
24 because he believed they would testify in favor of allowing homosexual serviceman
25 to serve openly, including Barry Goldwater.

26 88. Professor Charles Moskos, known as the academic architect of DADT
27 acknowledged that he defended his policy in part because he worried he would
28 disappoint his friends if he "turncoated." Moskos also admitted that "unit

1 cohesion” was not the real reason he opposed openly homosexual service; he stated,
2 “Fuck unit cohesion; I don’t care about that.” Despite rooting his public opposition
3 to openly homosexual service in unit cohesion, Moskos stated that the real reason
4 was the “moral right” of heterosexuals not to serve with known homosexuals.
5 Moskos told lawmakers that the principal reason for the homosexual ban was to
6 repress the homoerotic desire that was an inherent part of military culture.
7 Recalling the hearings, a colleague of Moskos’ claimed they were “all rigged.
8 Moskos and Nunn had already found an agreement” and the hearings proceeded in
9 an effort to bolster the pre-determined conclusion that a ban ought to remain in
10 place.

11 89. Lieutenant Colonel Robert Lee Maginnis, an advisor to the Military
12 Working Group and later vice president of the Family Research Council, authored a
13 paper entitled, “The Homosexual Subculture,” which indicted the mental health of
14 homosexuals. “Homosexuals are a very unstable group,” he wrote, whose lifestyle
15 “breeds enormous amounts of guilt” over their promiscuity, dishonesty, and failed
16 relationships. “They are restless in their contacts, lonely, jealous, and neurotic
17 depressive.” He concluded that, “As a category of people, homosexuals have a
18 greater indiscipline problem than heterosexuals.”

19 90. This and several other of Maginnis’ articles were included among the
20 library resources that were available to the Military Working Group.

21 91. Retired Marine Brigadier General William Weise released a report
22 saying that “the real goal of [homosexuals] in the military fight was to change
23 society’s behavior, indoctrinate children, stop HIV screening, repeal age-of-consent
24 laws, secure federal funding for explicitly sexual art, and protect abortion rights.”
25 Weise was allowed to testify before Congress on the homosexual ban, where he
26 said that letting homosexuals serve would turn the military into a “wishy-washy
27 force” that would “needlessly cost thousands of American lives,” because militant
28 activists were demanding “special rights.” He said that his report found there was

1 “much higher criminal activity among the homosexual than the heterosexual
2 population in the military,” even though his evidence consisted exclusively of
3 homosexual court-martial records and a manufactured figure for how large the
4 homosexual population was in the military.

5 92. Brigadier General Weise’s testimony was included among the library
6 resources that were available to the Military Working Group.

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

12 94. Commander Gomulka’s position paper and at least one other of his
13 writings were included among the library resources that were available to the
14 Military Working Group.

15 95. The Chaplaincy of Full Gospel Churches wrote to President Clinton in
16 January 1993 to say that allowing homosexuals to serve in the military “would do
17 more than just undermine discipline and morale, although they would do that as
18 well.” The letter added: “Homosexuals are notoriously promiscuous.” They are
19 “perverted,” “aggressive recruiters,” and “going for the young—pedophiles.” It
20 went on to ask whether “innocent soldiers” should be forced to serve “with
21 someone lusting after them?” or should they be required to aid injured comrades
22 “whose body fluids may be spilling out, without the benefit of latex gloves?”

23 96. Other statements and related documents from various faith groups
24 were included among the library resources that were available to the Military
25 Working Group.

26 97. In his book *Military Necessity and Homosexuality*, Colonel Ronald
27 Ray (ret’d.) contended that homosexuals were addicted to sex, that they engaged in
28 practices that “are inherently degrading or humiliating and are rarely practiced by

1 heterosexuals,” that pedophilia was “close to the heart of homosexuality,” and that
2 homosexuals acted compulsively to obtain sex, especially once they come out of the
3 closet. “The gay community,” he wrote, was “seized by a deadly fatalism that sees
4 life as absurd and short.” They do not care about the future or about others, only
5 about the pleasures of the moment. “They have no direct links with the next
6 generation, no reason to invest in the future, no reason to defer gratification. Their
7 lives consist of little more than having an exciting time while life lasts and seeking
8 ‘self-fulfillment,’ a modern euphemism for selfish gratification and ambition.”

9 98. Colonel Ray’s book and other writings were included among the
10 library resources that were available to the Military Working Group.

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

16 100. Colonel John Ripley (ret’d.) of the U.S. Marine Corps called
17 homosexual people “walking depositories of disease.” Under the “queers, cowards,
18 and thieves” rule, which according to Ripley was a mainstay of the Marine Corps,
19 anyone falling into any of these categories would be alienated from the group.

20 101. Col. Ripley’s statement was included among the library resources that
21 were available to the Military Working Group.

22 102. Also included among the library resources that were available to the
23 Military Working Group was a “bulletin” from the North American Man Boy Love
24 Association.

25 103. Brigadier General James Hutchens, the associate director of the
26 National Association of Evangelical’s Commission on Chaplains, testified before
27 the U.S. House of Representatives that homosexuality was a dangerous “moral
28 virus” that must be stopped. He gave Congress a list summarizing the Bible’s

1 views on homosexuality: (i) the wrath of God is being revealed against it; (ii) it is
2 based on a refusal to honor God; (iii) it is based on ingratitude toward God; (iv) it is
3 based on a willful choice; (v) God has lifted his restraining hand; (vi) what starts as
4 a choice becomes all-consuming; (vii) those who practice it know full well God's
5 decree, yet continue to aggressively promote this behavior; and (viii) condoning
6 homosexuality is wrong, and is a further step away from God.

7 104. 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.

11 105. 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.

15 106. 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.

18 107. Religious military officials said 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.

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

27 109. 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 added that Navy officers “declined” to discuss the issue in terms of
4 morality even though moral animus against homosexuality was the real reason they
5 resisted the change. Hutson, who now opposes DADT, called the policy a “moral
6 passing of the buck” because senior military and political leaders tried to blame the
7 supposed intolerance of young recruits for the ban. None of the Navy officials
8 responsible for helping formulate the policy “had much of a sense of what was
9 going on,” he said, and “decisions were based on nothing. It wasn’t empirical. It
10 wasn’t studied, it was completely visceral, intuitive.” The policy was created
11 entirely “by the seat of our pants.”

12 110. General Robert Alexander, the first head of the Military Working
13 Group, a panel of generals and admirals that essentially wrote DADT,
14 acknowledged that its members did not understand the meaning of “sexual
15 orientation,” 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 allowing
17 homosexuals to serve, he was quickly removed from his position. General
18 Alexander admitted that the Military Working Group “thought they knew the
19 results of what was going to happen” before they met, and that it was “going to be
20 very difficult to get an objective, rational review” of the policy. “Passion leads and
21 rationale follows,” he says, adding that his group “didn’t have any empirical data”
22 about homosexual service and the Military Working Group position was based on
23 fear, politics, and prejudice.

24 111. Vince Patton, the highest-ranking enlisted person in the Coast Guard,
25 and a member of the Military Working Group staff, has said that the members of
26 the Military Working Group “had already made a decision about what they were
27 going to do” before the meetings. He added that the group’s leaders did not weigh
28 research and instead met “behind closed doors” and made decisions based on “anti-

1 gay stereotypes and resistance to any outside forces that challenged military
2 tradition.”

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 African Americans in previous decades caused such ill effects.

7 113. During the Congressional deliberations regarding DADT, there was
8 little to no discussion regarding the unique disproportionate impact the law would
9 have upon women servicemembers.

10 114. In enacting DADT, Congress and the President ignored the nation’s
11 experience integrating African-Americans in the U.S. Military.

12 115. The arguments and fears of those who have historically opposed
13 openly homosexual service have precisely echoed the arguments and fears of those
14 who opposed racial integration in the military during and following World War II.

15 116. While the experience of being an African-American soldier is distinct
16 from that of being a homosexual soldier, the similarity of sentiment shared by those
17 who have opposed each suggests that resistance is rooted in prejudice and fear of
18 the unfamiliar, rather than in relevant evidence of how either group would impact
19 military effectiveness.

20 117. In the 1940s, the commonly held view was that Caucasian
21 servicemembers would not respect or obey commands by an African-American; that
22 integration would prompt violence against a despised minority that the military
23 would be helpless to stop; that integration would diminish public acceptance of the
24 military and the federal government; that the military should not be used for “social
25 experimentation”; that military integration was being used to further a larger
26 minority rights agenda, which would ultimately break the armed forces; that the
27 military was unique, and was not a democracy; and that God’s plan was to keep
28 Caucasians above African Americans, and thus integration would thwart God’s will.

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

6 119. In 1948, Senator Richard Russell said racial integration would
7 “increase the rate of crime committed by servicemen,” since “Negro troops”
8 committed rape thirteen times more often than whites. In 1993, a general testified
9 that homosexuals might sexually assault heterosexuals, who would be “physically
10 coerced to engage in [homosexual] acts.”

11 120. In 1948, Senator Richard Russell cast African Americans as disease-
12 riddled outsiders who threatened innocent young Caucasian boys with sexually
13 transmitted diseases. Syphilis, gonorrhea, chancre, and tuberculosis, he said, were
14 “appallingly higher among the members of the Negro race than among the members
15 of the white race.” In 1993, opponents of homosexual service in the U.S. Armed
16 Forces complained that lifting the ban could spread AIDS and other sexually
17 transmitted diseases.

18 121. In 1942, a Naval officer insisted that “the white man [was] more
19 adaptable and more efficient in the various conditions which [were] involved in the
20 making of an effective man-of-war.” A colonel claimed in 1993 that “it has been
21 proven in the scientific literature that homosexuals are not able-bodied.”

22 122. Decades ago, a Korean War commander said that racial integration
23 would weaken the armed forces and that “there is no question in my mind of the
24 inherent difference in races. This is not racism—it is common sense and
25 understanding.” Senator Sam Nunn said in 1993 that, “when the interests of some
26 individuals bear upon the cohesion and effectiveness of an institution upon which
27 our national security depends, we must, in my view, move very cautiously. This
28 caution is not prejudice; it is prudence.”

1 123. Clear, consistent rules governing behavior is what makes homosexual
2 inclusion work. Palm Center researchers concluded that if people are seen as
3 working hard and contributing to the team effort, “individual differences in opinion
4 or in their personal lives are not considered relevant.” During racial integration of
5 the U.S. Military, researchers found that the sensitivity training and educational
6 programs designed to reduce discriminatory behavior against blacks caused
7 resentment and even hostility and so failed to solve the problems. Instead, better
8 results were achieved when outward behavior was the focus. These changes
9 amounted to an endorsement of fair and equal treatment as a principle embraced by
10 the larger group.

11 124. In considering DADT, Congress ignored existing studies showing that
12 several comparable militaries from Western nations had already changed their
13 policies to allow open service by homosexuals without any negative impact on unit
14 cohesion.

15 125. The Report of the Senate Armed Services Committee on the 1994
16 National Defense Authorization Act included the statement: “There is little actual
17 experience in foreign nations with open homosexuality in military service.” That
18 statement was incorrect. The experiences of at least seven other nations that permit
19 homosexuals to serve openly were then available.

20 126. Foreign military experiences are predictive of what would happen if
21 the U.S. Military were to allow homosexuals to serve openly.

22 127. According to Defendants Fed. R. Civ. P. 30(b)(6) witness, Paul Gade,
23 Ph.D., in terms of combat experience, the Israeli military is most comparable to the
24 United States military, and the United Kingdom and Canadian militaries are most
25 comparable in terms of culture and society. Dr. Gade acknowledged that the United
26 States could follow lessons of other nation in repealing DADT.

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

1 orientation as a result of the repeal of DADT.

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

4 130. The Canadian experience demonstrated that the inclusion of openly
5 homosexual servicemembers in combat units was 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
9 **D. The Don't Ask Don't Tell Policy**

10 131. The DADT Policy includes both the statutory language appearing at 10
11 U.S.C. section 654 and the implementing instructions appearing as Department of
12 Defense Instruction Numbers (“DoDI”) 1332.14, 1332.30, and 1304.26.

13 132. Under DADT, homosexual servicemembers may serve in the U.S.
14 Armed Forces.

15 133. DADT can be triggered by three kinds of “homosexual conduct:” (1)
16 “homosexual acts”; (2) statements that one “is a homosexual”; or (3) marriage to, or
17 an attempt to marry, a person of one’s same biological sex. 10 U.S.C. § 654 (b);
18 DoDI 1332.14 at 17–18; 1332.30 at 9–10.

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

26 135. Second, Defendants may initiate separation if a service member makes
27 a statement “he or she is a homosexual or bisexual, or words to that effect.” 10
28 U.S.C. § 654(b)(2). These words create a presumption the service member is a

1 “person who engages in, attempts to engage in, has a propensity to engage in, or
2 intends to engage in homosexual acts.” 10 U.S.C. § 654(b)(2). A propensity is
3 “more than an abstract preference or desire to engage in homosexual acts; it
4 indicates a likelihood that a person engages or will engage in homosexual acts.”
5 DoDI 1332.14 at 18.

6 136. The third route to separation under DADT, marriage or attempted
7 marriage to a person of the same sex, is self-explanatory.

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

13 14 **E. DADT Since Enactment**

15 **a. *Discharges under DADT***

16 138. In every year from 1994 to 2009, DADT has ended the careers of
17 hundreds of patriotic Americans – and in some years more than 1,000 – without any
18 discernible benefit to the U.S. Armed Forces.

19 139. At least 615 servicemembers were separated from the United States
20 Armed Forces pursuant to DADT in 1994.

21 140. At least 757 servicemembers were separated from the United States
22 Armed Forces pursuant to DADT in 1995.

23 141. At least 858 servicemembers were separated from the United States
24 Armed Forces pursuant to DADT in 1996.

25 142. At least 997 servicemembers were separated from the United States
26 Armed Forces pursuant to DADT in 1997.

27 143. At least 1,145 servicemembers were separated from the United States
28 Armed Forces pursuant to DADT in 1998.

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

3 145. At least 1,212 servicemembers were separated from the United States
4 Armed Forces pursuant to DADT in 2000.

5 146. At least 1,217 servicemembers were separated from the United States
6 Armed Forces pursuant to DADT in 2001.

7 147. At least 885 servicemembers were separated from the United States
8 Armed Forces pursuant to DADT in 2002.

9 148. At least 770 servicemembers were separated from the United States
10 Armed Forces pursuant to DADT in 2003.

11 149. At least 653 servicemembers were separated from the United States
12 Armed Forces pursuant to DADT in 2004.

13 150. At least 726 servicemembers were separated from the United States
14 Armed Forces pursuant to DADT in 2005.

15 151. At least 612 servicemembers were separated from the United States
16 Armed Forces pursuant to DADT in 2006.

17 152. At least 627 servicemembers were separated from the United States
18 Armed Forces pursuant to DADT in 2007.

19 153. At least 619 servicemembers were separated from the United States
20 Armed Forces pursuant to DADT in 2008.

21 154. At least 275 servicemembers were separated from the United States
22 Armed Forces pursuant to DADT in 2009.

23 155. Between 1994 and 2003, 9,488 servicemembers were separated from
24 the United States Armed Forces pursuant to DADT.

25 156. Between 1997 and 2003, 7,270 servicemembers were separated from
26 the United States Armed Forces pursuant to DADT.

27 157. Between 1997 and 2009, 10,935 servicemembers were separated from
28 the United States Armed Forces pursuant to DADT.

1 158. Between 1994 and 2009, over 13,000 servicemembers were separated
2 from the United States Armed Forces pursuant to DADT.

3
4 **ii. Studies & Reports**

5 159. In January 1994, the U.S. Army Research Institute for the Behavioral
6 and Social Sciences released a research report titled, “Perspectives on
7 Organizational Change in the Canadian Forces.” The report studied the transition
8 from a ban on homosexual servicemembers serving in the Canadian Forces to the
9 cancellation of Canada’s exclusionary policy in October 1992. The report
10 concluded that anticipated damage to readiness never materialized after the
11 homosexual ban was lifted in Canada: “The impact of the policy change has been
12 minimal. Negative consequences predicted in the areas of recruitment,
13 employment, attrition, retention, and cohesion and morale have not occurred since
14 the policy was changed.” Canadian Forces experienced “virtually no consequences
15 of lifting the ban on known homosexuals in the [Canadian Forces] for all important
16 dimensions.”

17 160. The January 1994 U.S. Army Research Institute for the Behavioral and
18 Social Sciences report regarding the lifting of the ban on homosexual
19 servicemembers in the Canadian Forces stated: “Although these findings are
20 specific to the [Canadian Forces], they should help inform the current debate on
21 homosexual exclusion policy in the U.S. Armed Forces.

22 161. A 2001 Palm Center study of the San Diego Police Department echoed
23 the finding of the RAND Study that integration of open homosexuals into U.S.
24 police and fire departments and the adoption of nondiscrimination policies did not
25 impair effectiveness, even though many departments were characterized as highly
26 homophobic.

27 162. A statistical analysis of United States military units in the Iraq and
28 Afghanistan conflicts showed no correlation between the presence of openly

1 homosexual servicemembers in the unit and the unit's cohesion, quality, or combat
2 readiness.

3 163. In July 2008, a bipartisan study group of senior retired military officers
4 released a report that represented what U.S. Army General and former Chairman of
5 the Joint Chiefs of Staff John Shalikashvili called "one of the most comprehensive
6 evaluations of the issue of homosexuals in the military since the Rand study" in
7 1993. The study group "examin[ed] the key academic and social science literature
8 on [DADT] and interview[ed] a range of experts on leadership, unit cohesion and
9 military law, including those who [were] training ... future military leaders at the
10 [U.S.] service academies." The study group found that lifting the ban is "unlikely
11 to pose any significant risk to morale, good order, discipline, or cohesion."

12 164. The majority of researchers who have studied the issue have concluded
13 that there will be no change in the percentage of servicemembers that openly reveal
14 they are homosexual following repeal of DADT.

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

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

19 166. Studies, reports, and polls of servicemembers reveal a Pentagon
20 pattern of retaining homosexuals during war, and then discharging them once
21 hostilities end.

22 167. 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.”

2 168. 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 DADT.

4 169. 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 DADT in fiscal year 2008 than it separated in fiscal year
9 2001.

10 170. Promulgated in 1999 and still in force today, FORSCOM Regulation
11 500-3-3 allows active duty deployment of homosexual servicemembers awaiting
12 resolution of the allegation of homosexual conduct or statements. The Regulation
13 instructs Army officers not to discharge Army reservists and National Guard troops
14 based on homosexuality from units on or about to be placed on active duty status.
15 Their discharge is to be postponed until the servicemembers’ return to the United
16 States.

17 171. Table 2.1: Criteria for Personnel Action in FORSCOM Regulation
18 500-3-3 states: “c. If discharge is not requested prior to the unit’s receipt of alert
19 notification, discharge is not authorized. Member will enter AD [active duty] with
20 the unit.”

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

28 173. A 2004 Palm Center study, entitled “Gays and Lesbians at War:

1 Military Service in Iraq and Afghanistan Under ‘Don’t Ask, Don’t Tell,’”
2 chronicled the experiences of homosexual troops who fought in Iraq and
3 Afghanistan. The study found that, among the nearly three dozen servicemembers
4 analyzed in-depth, most servicemembers had identified themselves as homosexual
5 to some or most of their peers, often including their superiors.

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

13 **iv. DADT’s Impact on Women**

14 175. In each year from 1994 through the present, DADT has
15 disproportionately impacted women in the U.S. Armed Forces.

16 176. Between 1994 and 2003, women constituted less than 20% of all
17 servicemembers in the United States Armed Forces yet accounted for over 40% of
18 the servicemembers discharged under DADT.

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

22 178. In 2008, women accounted for 14% of the U.S. Armed Forces but
23 accounted for 36% of those discharged under DADT.

24 179. DADT uniquely impairs unit cohesion and military effectiveness
25 among female servicemembers.

26 180. DADT requires that female servicemembers avoid appearing too
27 strong, assertive, and masculine – and thus stereotypically lesbian – although they
28 are expected to operate in a male-dominated military environment.

1 181. Many female servicemembers, lesbian or not, must choose whether to
2 perform their duties with full competence and risk being labeled a lesbian or to
3 purposefully act in a more feminine but less competent manner. Effectiveness is
4 sacrificed.

5 182. By making homosexuality illegal, DADT encourages allegations of
6 lesbianism if female servicemembers refuse sexual advances by males.

7 183. DADT discourages female servicemembers from reporting sexual
8 harassment, impairing the unit cohesion and morale of all female servicemembers,
9 not just those who are actually homosexual.

10
11 **v. Application of DADT to Servicemembers in Critical Non-Combat**
12 **Occupations**

13 184. DADT applies to all members of the United States Armed Forces
14 regardless of whether they serve in combat or non-combat positions.

15 185. Servicemembers in both critical combat and non-combat occupations
16 have been and continue to be separated from service pursuant to DADT.

17 186. According to the 2005 GAO report on DADT, 757 troops with
18 “critical occupations, identified by DOD as those occupations worthy of selective
19 reimbursement bonuses,” were separated under the policy between fiscal years
20 1994 and 2003. These included voice interceptors, interrogators, translators,
21 explosive ordinance disposal specialists, signal intelligence analysts, and missile
22 and cryptologic technicians, have been discharged under DADT.

23 187. 322 separated servicemembers had skills in what the military deemed
24 “an important foreign language such as Arabic, Farsi, or Korean.”

25 188. Between 1997 and 2003, the Department of Defense discharged 870
26 servicemembers with foreign language skills under DADT.

27 189. In just the two years following the attacks of September 11, 2001, the
28 U.S. Armed Forces discharged 71 linguists under DADT. This included 37

1 language experts with skills in Arabic, Korean, Farsi, Chinese, or Russian.

2 190. In fiscal year 2002, the Department of Defense separated 33 linguists
3 under DADT.

4 191. In fiscal year 2003, the Department of Defense separated 38 linguists
5 under DADT.

6 192. By 2003, the number of Arabic language specialists discharged under
7 DADT climbed to at least 54.

8 193. Discharging individuals with these language skills has demonstrable
9 negative effects on intelligence gathering, analysis, communications, force support,
10 and hence national security.

11 194. Among the thousands of others discharged under DADT are
12 servicemembers with skills in intelligence, combat engineering, medicine, JAG
13 Corps members, military police and security, nuclear, biological, and chemical
14 warfare, missile guidance and operation, and other skills and professions.

15 195. Defendants admit that medical personnel, dental care technicians,
16 ophthalmologists, and members of the JAG Corps have been separated from the
17 U.S. military under DADT.

18 196. Defendants admit that DADT applies equally to military judges.

19 197. Such discharges occurred despite shortages in such personnel and
20 despite force-wide recruitment and retention challenges.

21 198. For instance, during the first ten years of DADT, 244 medical
22 specialists were fired, including physicians, nurses, biomedical laboratory
23 technicians and other highly trained healthcare personnel. The military
24 acknowledged it has struggled with shortfalls in recruitment and retention of
25 medical personnel for the wars in Iraq and Afghanistan. The consequences of
26 shortfalls in military medical specialists are particularly grave. According to a
27 Senate report issued in 2003 by Senators Christopher Bond and Patrick Leahy,
28 hundreds of injured National Guard and Army reserve soldiers received

1 “inadequate medical attention” while housed at Fort Stewart because of a lack of
2 preparedness that included “an insufficient number of medical clinicians and
3 specialists, which has caused excessive delays in the delivery of care” and a
4 “negative impact on morale.”

5 199. These shortages harm troop morale by necessitating extended
6 deployments, an over-reliance on the National Guard and reserves (who on average
7 have less training, higher stress levels, and lower morale than full-time soldiers),
8 stop-loss orders delaying discharges, forced recalls, and more frequent combat duty
9 while the United States fought two wars and the global war on terror.

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

25 201. Military personnel in non-combat positions, for example instructors at
26 the service academies, are also subject to DADT and some voluntarily leave
27 military service because of the effects of DADT.

28 202. These patriots possess critical skills and years of training, and have

1 served this country well.

2
3 **vi. Statement Based Discharges**

4 203. Homosexual “conduct” is grounds for separation from the U.S.
5 Military under DADT. Homosexual “conduct” includes a statement that one is a
6 homosexual or bisexual, or words to that effect, or a statement by a person that
7 demonstrates a propensity or intent to engage in homosexual acts unless the
8 servicemember has “demonstrated that he or she is not a person who engages in,
9 attempts to engage in, has a propensity to engage in, or intends to engage in
10 homosexual acts.”

11 204. Pursuant to DADT, the statement “I am a homosexual” qualifies as
12 conduct that demonstrates a propensity or intent to engage in homosexual acts and
13 is grounds for separation from the U.S. Military.

14 205. Though a statement of homosexual orientation constitutes “conduct”
15 that is grounds for separation, DADT regulations provide that “sexual orientation is
16 considered a personal and private matter.”

17 206. DADT is circular in that the fact of a servicemember’s status as a
18 homosexual is supposedly not a basis for discharge, but a statement acknowledging
19 one’s homosexuality is a basis for initiation of separation proceedings.

20 207. Though being homosexual is not wrongful conduct under DADT, and
21 the policy does not prohibit homosexuals from serving in the military, “conduct” is
22 defined so broadly that it effectively regulates, and in some cases punishes, people
23 for their status and not for homosexual conduct.

24 208. In a memorandum dated August 18, 1995, Judith A. Miller, General
25 Counsel of the Department of Defense, acknowledged that, under DADT
26 regulations, “although ‘sexual orientation’ in itself is not a basis for discharge
27 ‘unless manifested by homosexual conduct,’ the Directives make clear that a
28 statement that one has a ‘homosexual orientation’ is treated like any other statement

1 that one is a homosexual.”

2 209. The vast majority of discharges under DADT since its enactment have
3 been for “statements,” not conduct. From fiscal years 1997 to 2003, 670 of 770
4 discharges under DADT (87.0%) were for statements, as opposed to acts or
5 conduct. From fiscal years 2004 to 2008, 9,059 of 10,507 discharges (86.2%) were
6 for statements, as opposed to acts or conduct.

7 210. While a servicemember who is to be separated under DADT for
8 commission of homosexual acts in theory can rebut the presumption that he or she
9 has a propensity or intent to engage in such acts, the number of cases in which a
10 servicemember has successfully done so has not been statistically significant. Only
11 9 servicemembers pending separation under DADT have been able to rebut the
12 presumption that their statement identifying themselves as homosexual indicated an
13 intent to commit “homosexual acts.”

14 211. In a letter dated July 27, 1995, Judith A. Miller, General Counsel of
15 the Department of Defense, explained to certain members of Congress that a
16 homosexual servicemember cannot rebut the presumption that he or she has as
17 propensity to engage in homosexual acts by promising to remain celibate in the
18 future.

19 212. DADT prohibits statements indentifying a servicemember as
20 homosexual or bisexual “at all times that the member has a military status, whether
21 the member is on base or off base, and whether the member is on duty or off duty.”

22 213. Private statements to civilian family and friends have served as the
23 basis for discharge proceedings under DADT.

24 214. DADT prohibits homosexual servicemembers from acknowledging
25 their homosexuality in any public forum, including in court, to an elected
26 representative, to the media, or in the course of a political debate.

27 215. The government’s training materials provide that a servicemember
28 who advocates, in a public, off-base forum for repeal of DADT is subject to

1 discharge on that basis alone.

2 216. A Log Cabin member was discharged for criticizing a general's biased
3 comments about homosexuals.

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

11 218. Discharges under DADT are categorized as discharges for
12 "homosexuality," not "homosexual conduct." This was the same nomenclature
13 used before DADT, when the Defense Department's directives stated
14 "**homosexuality** is incompatible with military service."

15
16 **vii. Examples of Homosexuals Discharged Under DADT**

17 219. In January 2010, the Williams Institute at the University of California,
18 Los Angeles estimated that approximately 5% of women and 2% of men currently
19 serving in the military, or 65,000 total people, are homosexual.

20 220. Persons who have identified themselves as homosexual have served
21 bravely in the Armed Forces, even with distinction, and have received honorable
22 discharges from the United States Armed Forces.

23 221. However, DADT has required the discharge of many valuable
24 homosexual servicemembers. The following individuals discharged under DADT
25 represent examples of how DADT does not further its stated purposes. The
26 discharge of each of the following servicemembers actually undermined the goals
27 of unit cohesion, morale, good order and discipline, and military readiness.
28

1 **a. *Joseph Christopher Rocha***

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

6 223. Rocha trained as a master at arms – a Navy security specialist who
7 performs antiterrorism, force protection, physical security, and law enforcement
8 duties on land and at sea. Masters at arms are the Navy’s security and force
9 protection professionals. They operate force protections watercrafts, direct
10 investigations, control base access points, or supervise K-9 assets.

11 224. Early in his career, Rocha served at a U.S. Navy base in the Kingdom
12 of Bahrain, where the U.S. Naval Forces Central Command and the U.S. Fifth Fleet
13 are based. The base is the primary base in the region for the naval and marine
14 activities supporting Operation Enduring Freedom and Operation Iraqi Freedom.

15 225. While serving in Bahrain, Rocha was deemed a good candidate for
16 military working dog school. He completed that training at Lackland Air Force
17 Base in San Antonio, Texas and was then sent back to Naval Support Activity
18 Bahrain. Rocha earned a position as a dog handler in an elite and small community
19 of K-9 handlers.

20 226. Approximately one month into his tour of duty in the Middle East,
21 Rocha’s commander and other servicemembers began to continually harass him,
22 repeatedly asking if he was homosexual. Rocha refused countless times to answer
23 with a “yes” or a “no,” but his refusal was deemed a “yes” answer. Rocha’s
24 commander and other servicemembers repeatedly made graphic homophobic
25 remarks and comments that were clearly directed to Rocha. Their remarks made
26 him incredibly uncomfortable and were very hurtful.

27 227. One day, Rocha was ordered by a superior to get down on his hands
28 and knees and simulate oral sex on a person working in the kennel. They were to

1 pretend that the dogs were catching them in the act. Over and over, with each of
2 the dogs in the unit, Rocha was forced to endure this treatment, much of which was
3 captured on video.

4 228. In other instances: (a) Rocha was hosed down in full uniform,
5 (b) Rocha was tied to a chair, fed dog food and left in a kennel with feces, (c)
6 Rocha was spanked for his birthday, (d) homosexual pornography was saved on
7 Rocha's computer as the screensaver, and (e) a standing rule was established that
8 Rocha was to kneel before dogs and tell them he was not worthy.

9 229. With the exception of his first month, Rocha was harassed for the
10 entire duration of his time in the Middle East. Despite this, Rocha proved his worth
11 by excelling at his job performance. His written evaluations described him as a
12 model servicemember. He ultimately earned a Navy Marine Corps Achievement
13 Medal for his time as a handler.

14 230. After his time in the Middle East, Rocha received a significant honor
15 in being selected to attend the United States Naval Academy Preparatory School in
16 Newport, Rhode Island ("NAPS"). Rocha had dreamed of attending the U.S. Naval
17 Academy, and graduation from the NAPS one-year program would guarantee
18 Rocha's admission.

19 231. Rocha remained at NAPS for only approximately five months. After
20 reflecting on the abuse he endured as a result of adhering to DADT, he realized
21 DADT had endangered his life in the past and would probably continue to do so in
22 the future. DADT prevented Rocha from disclosing his homosexuality and
23 standing up for himself if, and when, the abuse continued at the Naval Academy.
24 At NAPS, Rocha realized that a career of service under DADT would require
25 forfeiting his basic human rights, fundamental job security, peace of mind, and
26 meaningful relationships, particularly with his fellow heterosexual servicemembers
27 whom he was forced to deceive and betray by hiding his homosexuality.

28 232. After completing a six-week officer candidate boot camp at NAPS,

1 Rocha's commanders said they wanted to offer him a leadership role. Instead, he
2 asked to be removed from NAPS in a statement addressed to the NAPS legal officer
3 dated September 18, 2007.

4 233. Rocha stated: "I am a homosexual. I deeply regret that my personal
5 feelings are not compatible with Naval regulations or policy. I am proud of my
6 service and had hoped I would be able to serve the Navy and the country for my
7 entire career. However, the principles of honor, courage, and commitment mean I
8 must be honest with myself, courageous in my beliefs, and committed in my action.
9 I understand that this statement will be used to end my Naval career."

10 234. After NAPS received his statement, Rocha was encouraged by a
11 commanding officer to withdraw it. Rocha was told that if he withdrew the
12 statement, his admission into the Naval Academy would not be affected (despite his
13 having given the Navy an official statement disclosing that he was homosexual).
14 Rocha declined.

15 235. Rocha forfeited his dream of graduating from the Naval Academy
16 when he declared that he was homosexual. This disclosure ended his military
17 career. He was honorably discharged under DADT on October 15, 2007.

18 236. After his discharge, the U.S. Department of Veteran Affairs diagnosed
19 him with post-traumatic stress syndrome based entirely on the abuse he suffered
20 while serving in the Middle East.

21 237. If DADT were to be overturned, Rocha would rejoin the U.S. Armed
22 Forces.

23 **b. *Jenny L. Kopfstein***

24 238. Jenny L. Kopfstein joined the U.S. Navy in 1995 when she entered the
25 U.S. Naval Academy.

26 239. The Naval Academy places special emphasis on the values of honor
27 and integrity. The Academy's Honor Concept states, "Midshipmen are persons of
28 integrity: they do not lie, cheat, or steal."

1 240. While attending the Naval Academy, Kopfstein served as an
2 investigator for the Honor Committee investigating midshipmen who were accused
3 of violating the Honor Concept.

4 241. She graduated from the Academy and was commissioned in 1999 as a
5 Surface Warfare Officer. She then attended the Surface Warfare Officer School in
6 Newport, Rhode Island.

7 242. In March 2000, Kopfstein began serving on the U.S.S. Shiloh, in San
8 Diego. While on board, Kopfstein found it difficult to answer casual questions
9 from shipmates about her personal life without lying or concealing the whole truth.
10 Kopfstein found that, because of DADT, she had to be very reserved when she
11 interacted with her shipmates which undermined their ability to work as an
12 effective team.

13 243. In July 2000, after a few months on board, Kopfstein wrote a letter to
14 her commanding officer in which she disclosed her homosexuality. Kopfstein's
15 commanding officer did not believe her and viewed her letter as an attempt to be
16 released from her obligation to the Navy. The commanding officer ultimately
17 advised the Department of Defense that it should initiate an investigation of
18 Kopfstein under DADT.

19 244. Despite having made this admission, the Navy did not immediately
20 seek to discharge Kopfstein during her first deployment. Approximately one month
21 after she wrote the letter, the U.S.S. Shiloh embarked on a six month deployment to
22 the Western Pacific and Arabian Gulf.

23 245. During this deployment, Kopfstein qualified as Officer of the Deck,
24 and was chosen to be the Officer of the Deck during general quarters, which was a
25 great honor.

26 246. After writing her letter, Kopfstein began to disclose over time to her
27 shipmates that she was homosexual. She expected negative responses, but received
28 none. All of her shipmates reacted positively, and the universal attitude of her

1 colleagues was that DADT was foolish.

2 247. Thereafter, Kopfstein went on a second, six-month deployment in the
3 Western Pacific in support of Operation Enduring Freedom. She completed that
4 deployment, and still no discharge proceedings began. Although Kopfstein had
5 originally been scheduled for an 18-month tour of duty on the Shiloh, she was
6 retained on the ship for 22 months.

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

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

18 250. Nineteen months after she had disclosed her sexual orientation, a
19 Board of Inquiry finally convened to investigate whether grounds existed for
20 discharging Kopfstein under DADT. During the Board of Inquiry hearing, both of
21 Kopfstein's Captains (command of the U.S.S. Shiloh changed during her tour of
22 duty) volunteered to testify on her behalf. Both Captains testified that they
23 understood that Kopfstein was a homosexual, but that Kopfstein was an excellent
24 officer and that she should remain in the Navy.

25 251. The Board of Inquiry disregarded the recommendations of Kopfstein's
26 Captains. Concluding that Kopfstein's statement that she was a homosexual
27 constituted grounds for discharge under DADT, the board voted in February 2002
28 to discharge Kopfstein from the Navy.

1 252. After a delay, Kopfstein was honorably discharged from the Navy on
2 October 31, 2002. At the time of her discharge, Kopfstein had served in the Navy
3 for nearly three years, not counting her four years as a midshipman at the Academy.
4 Moreover, she served openly in the U.S. Navy for two years and four months.

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

10 **c. Major Michael D. Almy**

11 254. Michael D. Almy ("Almy") joined the United States Air Force Reserve
12 Officers' Training Corps ("AFROTC") in 1988 at Wright State University and was
13 awarded a full scholarship.

14 255. In 1991, Almy earned a United States Parachutist Badge, commonly
15 referred to as "Jump Wings."

16 256. In 1992, Almy graduated from the AFROTC in the top 10% of all
17 graduates nationwide. He was promoted to Second Lieutenant in December 1992.

18 257. Almy served as an active duty member of the United States Air Force
19 from June 1993 to July 2006.

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

26 259. In March 1995, Almy was promoted to First Lieutenant.

27 260. In approximately June 1995, Almy left navigator school and was
28 assigned to Scott Air Force Base in Illinois. There, Almy worked on systems

1 support for the J2 Directorate of the U.S. Transportation Command and worked at
2 the help desk for all Air Mobility Command and control systems.

3 261. In March 1997, Almy was promoted to Captain.

4 262. In 1998, Almy was stationed at the Third Combat Communications
5 Group at Tinker Air Force Base in Oklahoma. While there, Almy was named
6 officer of the year for a unit consisting of nearly 1,000 servicemembers.

7 263. In September 1998, Almy deployed to Eskan Village, Saudi Arabia as
8 the senior communicator from his unit with approximately 60 personnel from his
9 squadron. There, he and his squadron supported all the base-level communications
10 requirements during Operation Desert Fox.

11 264. In September 1999, Almy again deployed to Saudi Arabia to Prince
12 Sultan Air Base where he served as the executive officer for the 363rd
13 Expeditionary Operations Group.

14 265. In July 2001, Almy was stationed at Quantico Marine Corps Base in
15 Virginia as one of six Air Force officers attending the United States Marine Corps
16 C2 Systems School. This course has since become the United States Marine Corps
17 Expeditionary Warfare Course, an in-residence professional military education that
18 all Marine captains strive to attend.

19 266. In June 2002, Almy was transferred to Ramstein Air Base in Germany
20 in the Communications Directorate of the Headquarters of the United States Air
21 Forces in Europe. There, Almy worked on tactical communications and airborne
22 communications projects.

23 267. In December 2002, Almy again deployed to Prince Sultan Air Base to
24 work in the J6 directorate of the Combined Air and Space Operations Center during
25 the invasion of Iraq. As part of this assignment, Almy was directly responsible for
26 the communications activation of newly deployed sites. Almy also helped ensure a
27 smooth transition of all communications functions to the new Combined Air and
28 Space Operations Center at Al Udeid Air Base in Qatar.

1 268. Before Almy left Prince Sultan Air Base, he was contacted by his
2 superiors at Ramstein Air Base in Germany and asked if he wanted the Chief of
3 Maintenance position at the 606th Air Control Squadron at Spangdahlem Air Base,
4 Germany. He accepted.

5 269. In August 2003, Almy obtained the rank of U.S. Air Force Major.

6 270. In September 2003, Almy reported to his new assignment at the 52nd
7 Fighter Wing at Spangdahlem Air Base in Germany. As part of his new
8 assignment, Almy was in charge of a 180 person directorate.

9 271. While stationed at Spangdahlem Air Base, Almy regularly attended
10 Christian chapel services and served as a mentor to younger airmen, their spouses,
11 and family members of deployed members that needed emotional support.

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

19 273. While in Iraq, Almy occasionally volunteered at the hospital in Balad.
20 As a volunteer, he would comfort patients and move them to the flight line so
21 MEDEVAC helicopters could transport them to Landstuhl Regional Medical
22 Center in Germany – the nearest treatment center for soldiers wounded in Iraq and
23 Afghanistan.

24 274. As a result of his leadership, Almy was nominated for and received the
25 2004 Lieutenant General Leo Marquez Award in the field grade officer category for
26 electronic maintenance. The Award is presented to maintainers who have
27 demonstrated the highest degree of sustained job performance, job knowledge, job
28 efficiency, and results in the categories of aircraft, munitions and missile, and

1 communications-electronics maintenance. As a result of the Award, Almy was
2 regarded as the top Air Force Communications Officer in Europe.

3 275. While in Iraq, Almy used, with U.S. Air Force permission, Air Force
4 computers to send and receive electronic mail correspondence for personal
5 purposes from his government-issued electronic mail account. The Air Force
6 restricted access to all private electronic mail systems, so Almy's government-
7 issued account was the only way he could send and receive email.

8 276. Almy's unit remained in Iraq until the beginning of 2005. Thereafter,
9 Almy's unit returned to Spangdahlem Air Base, Germany.

10 277. In approximately February 2005, a search was conducted on the
11 computer Almy used while he was stationed in Iraq. The search resulted in the
12 discovery of emails Almy had sent to two men between December 2004 and
13 January 2005. In the emails, Almy discussed homosexual conduct. The emails
14 were forwarded to Almy's Commander, and Almy was ordered to report to his
15 Commander's office. While in his Commander's office, Almy was read the DADT
16 policy and was handed the emails and asked how he could explain their content. At
17 no point did Almy indicate to his Commander that he was homosexual.

18 278. Because of the content of the emails and his Commander's perception
19 that Almy had violated DADT, Almy was relieved of his duties on March 14, 2005.
20 Almy's security clearance was suspended and a portion of his compensation was
21 terminated.

22 279. The members of Almy's unit were not told why he was relieved of his
23 duties.

24 280. The removal of Almy from his leadership position resulted in
25 tremendous disruption to his unit and a loss of unit cohesion.

26 281. Almy was replaced with a junior officer with neither the training nor
27 expertise Almy possessed.

28 282. After he was relieved of his duties, Almy remained at Spangdahlem

1 Air Base in Germany for approximately sixteen months. During this time, Almy
2 was assigned to an administrative desk job.

3 283. The Air Force initiated discharge proceedings against Almy by
4 presenting him with a Notification of Show-Cause Action, dated July 7, 2005.

5 284. Almy initially contested his discharge. He invoked his right to an
6 administrative hearing, instead of resigning his commission. In preparation for the
7 hearing, Almy had several of his former troops write character reference letters for
8 him, including one of his squadron Commanders. A chaplain at Spangdahlem Air
9 Base also wrote a letter.

10 285. Approximately one year after being relieved of his duties, Almy's
11 Wing Commander recommended that he be promoted to Lieutenant Colonel, even
12 though the U.S. Air Force was pursuing his discharge.

13 286. Approximately one week before the administrative hearing, Almy's
14 attorney told him he could not prevail at the hearing and that the government's
15 lawyers would seek a general discharge instead of an honorable discharge. Almy
16 advised his attorney that he wanted to receive an honorable discharge. His attorney
17 advised Almy that if he waived the administrative hearing, he could receive an
18 honorable discharge. It had been approximately one year since he had been
19 relieved of his duties, and Almy was emotionally exhausted from the ordeal. He
20 decided to waive the hearing.

21 287. Almy was honorably discharged under DADT on July 21, 2006,
22 although he never stated he was homosexual.

23 288. If DADT were overturned, Almy would rejoin the U.S. Air Force.

24 **d. SSgt. Anthony Loverde**

25 289. Anthony Loverde served as an active duty member of the United
26 States Air Force from February 13, 2001 to July 13, 2008. Loverde was 21-years-
27 old when he first enlisted.

28 290. In December 2001, after Loverde had completed basic and other

1 training at two U.S. bases, Loverde was assigned to Ramstein Air Base in
2 Germany. While there, Loverde served as a member of the 86th Maintenance
3 Squadron where he worked as a Precision Measurement Equipment Laboratory
4 technician and was responsible for calibrating weapons systems in the United States
5 Air Forces in Europe, Southwest Asia, and the Continental United States.

6 291. While serving in Germany, Loverde did not tell any members of his
7 command that he was homosexual. He also did not go out of his way to conceal his
8 sexuality through his actions. For example, in December 2001, Loverde attended
9 an off base military holiday party in Germany wearing a blue velvet shirt, leather
10 pants, and sporting spiked hair. At the party were approximately forty enlisted
11 members that he worked with, including superiors from the ranks of Major
12 Sergeant (E-7) to Chief Master Sergeant (E-9). Additionally, when members of his
13 command asked him what kind of girls he liked, he would say “rugged ones with
14 broad shoulders.”

15 292. In recognition of his exceptional service at Ramstein Air Base,
16 Loverde was awarded early promotion to Senior Airman (E-4), deemed a
17 distinguish graduate from the United States Air Force Airman Leadership School,
18 and obtained a 7-level craftsman proficiency badge within his first four years of
19 service.

20 293. In August 2004, while at Ramstein Air Base, Loverde was also
21 promoted to Staff Sergeant (E-5).

22 294. From January 2005 to July 2007, Loverde was assigned to Edwards
23 Air Force Base in California as a Precision Measurement Equipment Laboratory
24 technician.

25 295. From September 2005 to January 2006, Loverde deployed to Al Udeid
26 Air Base in Qatar in support of Operation Enduring Freedom and Operation Iraqi
27 Freedom. While in Qatar, Loverde held the position of Precision Measurement
28 Equipment Laboratory Scheduler, Non-Commissioned Officer, in charge of

1 Production Control. He maintained coordination between 201 military units and
2 the Air Force requirements for electronic calibration and measurements with
3 logistics ranging through Africa, Iraq, Afghanistan, Kuwait, and eight other nations.

4 296. In January 2006, Loverde returned to Edwards Air Force Base.
5 Loverde's enlistment was to expire in February 2007, so he began weighing
6 whether to leave the U.S. Air Force at that time. Though he desired to remain in
7 the Air Force, Loverde found it extremely difficult to be precluded from disclosing
8 his homosexuality to his fellow servicemembers. He decided that pursuing a new
9 career field in the Air Force may allow him to better serve his country while still
10 concealing his sexuality.

11 297. Loverde re-enlisted and, in July 2006, applied for training as an
12 aircrew member (commonly known as a "loadmaster") on a Lockheed C-130
13 Hercules aircraft and was accepted. In June 2007, Loverde completed loadmaster
14 training.

15 298. In July 2007, Loverde was transferred to the 37th Airlift Squadron at
16 Ramstein Air Base in Germany. In December 2007, Loverde deployed to Ali Al
17 Salem Air Base in Kuwait to serve with the 386th Expeditionary Operations Group
18 in support of Operation Iraqi Freedom. Loverde remained in Kuwait until April
19 2008.

20 299. During his deployment in Kuwait, Loverde flew sixty-one (61) combat
21 missions into Iraq. During many of those missions, Loverde faced small arms fire,
22 surface to air missiles, and inclement weather. Loverde was awarded two Air
23 Medals as a result of the missions.

24 300. While serving in Kuwait and Iraq, Loverde endured constant
25 harassment by his supervisor, who repeatedly made homophobic remarks to him
26 and his unit. Although Loverde strongly desired to vocally defend his concealed
27 sexuality, he repeatedly resisted the urge to do so to protect his career.

28 301. In April 2008, Loverde returned to Ramstein Air Base in Germany.

1 After years of concealing his sexuality and enduring his supervisor's frequent
2 homosexual remarks while he was in Kuwait and Iraq, Loverde decided he could no
3 longer conceal his sexual orientation from his command. Loverde sent an email to
4 his First Sergeant and later his Commander advising them he was homosexual and
5 could no longer abide by DADT, but still wanted to serve. Although Loverde had
6 told a handful of members of the Air Force he was homosexual, he had never
7 disclosed this fact to his superiors.

8 302. Once news of Loverde's homosexuality spread to the members of his
9 command, they told him they were not surprised. They said it was an unspoken
10 truth that he was homosexual.

11 303. After Loverde's disclosure, three servicemembers called him to
12 apologize for making homophobic comments prior to his revealing his sexual
13 orientation. One servicemember told Loverde that Loverde had changed the way he
14 viewed homosexuals. He told Loverde he would be honored to be deployed and
15 serve with Loverde any day at any time.

16 304. Loverde was relieved of his flying duties in April 2008. Although
17 Loverde remained on active duty, he was assigned to an administrative desk job.

18 305. All of Loverde's supervisors from the ranks of Major Sergeant (E-7) to
19 Chief Master Sergeant (E-9) wrote character reference letters that requested his
20 retention.

21 306. Loverde served as an openly homosexual man for a couple of months.
22 During that time, Loverde made sure everybody knew he was homosexual and was
23 being forced to leave the Air Force because of that status. During this time, no
24 servicemembers approached Loverde to tell him they had a problem with his sexual
25 orientation.

26 307. Loverde signed a waiver of his right to contest his discharge to ensure
27 he received an honorable discharge. He was honorably discharged from the U.S.
28 Air Force on July 13, 2008.

1 308. Within three weeks of separation, Loverde accepted employment in
2 Iraq to support the U.S. Army as a defense contractor. He held several posts in Iraq
3 and Afghanistan and was greatly respected by his military unit as an openly
4 homosexual contractor.

5 309. Loverde's contracting job consisted of the same duties he performed
6 capably when he was in the Air Force – he worked in the calibration lab. The only
7 difference was that DADT did not apply to his civilian work. As a contractor,
8 Loverde worked alongside the same Airmen with whom he worked on active duty,
9 but this time, as an openly homosexual man. Everyone Loverde worked with was
10 very accepting of his openly homosexual status and it did not impact the mission.
11 Loverde's sexual orientation was a non-issue.

12 310. Loverde left his contracting job and returned to California in May
13 2009.

14 311. If DADT were overturned, Loverde would rejoin the U.S. Air Force.

15
16 **viii. DADT's Effect Upon Retention & Recruitment**

17 312. In the years preceding and following the attacks of September 11,
18 2001, all four major service branches were plagued with recruitment and retention
19 shortfalls. This problem was exacerbated by the fact that recruiters' access to
20 schools and universities was hampered because of the military's discriminatory
21 policy and by the fact that thousands of troops had been expelled or never enlisted
22 because of the homosexual ban.

23 313. The difficulty of recruiting qualified officers and seamen has led the
24 Navy to expand the pool of prospects for that mission, even as it culls its ranks
25 elsewhere under DADT.

26 314. DADT is unpopular among the public and media and negatively
27 affects civilian perception of the U.S. Armed Forces.

28 315. Many heterosexuals who would otherwise enlist view the U.S. Armed

1 Forces as out of touch as a result of DADT.

2 316. An additional 41,000 homosexual Americans might join the military if
3 the ban were lifted, and an additional 4,000 personnel might remain in uniform each
4 year if they were not required to conceal their identities.

5 317. DADT has deterred heterosexual and homosexual Americans who are
6 able, committed, and patriotic from enlisting to fight for their country during a time
7 of two wars.

8 318. Because of recruitment shortfalls, the U.S. military now recruits less
9 qualified servicemembers rather than admitting openly homosexual individuals.

10 319. The executive branch has the authority to suspend application of
11 DADT if separation would not be in the best interest of the U.S. Armed Forces, to
12 ensure the nation's combat effectiveness.

13 320. The military has recruited thousands of servicemembers despite low
14 scores on military aptitude tests, despite felony and serious misdemeanor
15 convictions, and despite substance abuse that would normally prohibit service.

16 321. Many veterans of the wars in Iraq and Afghanistan believe that DADT
17 impairs their ability to bond with their fellow service members.

18
19 **ix. Recruitment of Less Qualified Servicemembers**

20 322. In response to shortages of military personnel during the last few
21 years, rather than hiring or retaining competent homosexual troops, the U.S.
22 Military began to hire less competent recruits.

23 323. The U.S. Military began enlisting older recruits.

24 324. The U.S. Military began enlisting recruits with lower scores on the
25 military aptitude test. For instance, in 2005, the U.S. Army hired 667 soldiers who
26 scored in the lowest third of the military aptitude test – 14 more than the military
27 discharged the previous year under DADT.

28 325. The U.S. Military lowered physical standards that new enlistees must

1 meet and began advancing recruits that failed basic training.

2 326. The U.S. Military began recruiting higher numbers of high school
3 dropouts. Evidence shows that high school dropouts also have higher dropout rates
4 from the military, are more difficult to train, are more prone to disciplinary
5 problems, and are less likely to serve out their contracts.

6 327. The U.S. Military began enlisting recruits who were granted “moral
7 waivers” – invitations to enlist despite a history of criminal activity or substance
8 abuse that would normally prohibit entry.

9 328. In 2005, the U.S Army increased by nearly 50% the number of new
10 recruits granted moral waivers.

11 329. The enlistment in the U.S. Armed Forces of persons convicted of a
12 felony is authorized by the moral waiver provision of 10 U.S.C. § 504.

13 330. The U.S. Military allows enlistment of new recruits convicted of
14 multiple misdemeanors under the moral waiver program.

15 331. The U.S. Military allows enlistment of new recruits convicted of
16 felonies under the moral waiver program.

17 332. The U.S. Military includes kidnapping, child abuse, making terrorist
18 threats, hate crimes, rape, burglary, arson, armed robbery, and murder among the
19 offenses that qualify under the moral waiver provisions for new recruits.

20 333. A recruit enlisted under the moral waiver program may become an
21 officer.

22 334. The U.S. Military did not conduct or commission any studies to
23 determine the effect on unit cohesion or troop morale of enlisting servicemembers
24 convicted of criminal offenses.

25 335. In determining whether to grant a moral waiver, the U.S. Military
26 conducts a “whole person” review which requires examining and assessing all
27 information regarding each recruit individual. However, because of DADT, the
28 U.S. Military may not consider the fact that an individual is homosexual as part of

1 the whole person review. There is no rational reason why a recruit's homosexuality
2 could not be assessed as part of the whole person review.

3 336. The U.S. Military has issued moral waivers for servicemembers
4 convicted of multiple misdemeanors.

5 337. The U.S. Military has issued moral waivers for servicemembers
6 convicted of felonies.

7 338. The U.S. Military has issued moral waivers for servicemembers
8 convicted of murder, kidnapping, assault, illegal drug use, and making terrorist
9 threats, and currently counts 4,000 or more felons among its ranks.

10 339. Research shows that servicemembers enlisted as a result of moral
11 waivers pose greater risks to unit cohesion, morale, and good order than do
12 homosexual servicemembers serving openly.

13 340. In 2006, Private Steven Green shot and killed the parents and sister of
14 a young Iraqi girl in Mahmudiya, Iraq. He raped and murdered the girl, and then
15 set her body on fire. Nineteen-year-old Green was a high-school dropout with three
16 misdemeanor convictions and a history of drug and alcohol abuse. He had been
17 admitted into the U.S. Army pursuant to a moral waiver.

18 341. The Department of Defense cannot accurately determine the number of
19 persons convicted of serious and/or multiple misdemeanors who enlisted in the U.S.
20 Armed Forces using moral waivers between 2003 and 2007.

21 342. The Department of Defense cannot accurately determine the number of
22 felons who enlisted in the U.S. Armed Forces pursuant to moral waivers between
23 2003 and 2007.

24 343. The Department of Defense cannot accurately determine the number of
25 known illicit narcotic abusers who enlisted in the U.S. Armed Forces pursuant to
26 moral waivers between 2003 and 2007.

27 344. However, other evidence shows that between 2003 and 2006, 4,230
28 convicted felons, 43,977 individuals convicted of serious and/or multiple

1 misdemeanor, including assault, and 58,561 illegal drug abusers were allowed to
2 enlist.

3 345. According to one GAO study, servicemembers granted moral waivers
4 are more likely to be discharged for misconduct than those who are not.

5
6 **x. Homosexual Personnel in Other Government Agencies**

7 346. Members of the U.S. Armed Forces work closely with personnel from
8 other federal agencies, such as the United States Central Intelligence Agency,
9 National Security Agency, Department of Defense, and Federal Bureau of
10 Investigation, all of which prohibit discrimination on the basis of sexual orientation.

11 347. No analogous domestic agency, such as police or fire departments, that
12 allows homosexuals to serve openly has reported any negative impact on cohesion,
13 readiness, morale, or discipline.

14 348. The experiences of police and fire departments are diagnostic of what
15 would happen if the U.S. Armed Forces allowed homosexuals to serve openly and
16 demonstrate that, at least in the short run, very few homosexual servicemembers
17 would reveal their sexual orientation as a result of repeal of DADT.

18 349. Despite fears that homosexuals could cause disruption, the majority of
19 homosexuals serving in American police and fire departments conform to expected
20 norms of their organizations. Either they do not reveal their sexual orientation, or
21 they do so only to selected peers or supervisors and succeed at fitting in with their
22 units in dress, appearance, and comportment.

23 350. No law prohibits the President of the United States – the Commander
24 in Chief of U.S. Armed Forces – from being openly homosexual.

25
26 **xi. Opinion Polls**

27 351. Congress justified DADT in 1993 in part because opinion polls
28 purportedly demonstrated anti-homosexual sentiment among the American public

1 and the U.S. Armed Forces.

2 352. Polling since enactment of DADT, however, demonstrates that public
3 and military opinion has become more tolerant of homosexuals than it was in 1993.
4 Those polls show an erosion of support for DADT along with little and diminishing
5 concern that the presence of openly homosexual servicemembers will negatively
6 impact issues of privacy, sexual tension, and the like.

7 353. In a 2003 Fox News poll, 64% of respondents in the U.S. supported
8 the enlistment of homosexual servicemembers in the U.S. Armed Forces.

9 354. In a 2003 Gallup poll, 79% of respondents in the U.S. supported
10 enlistment of homosexual servicemembers in the military and 91% of respondents
11 between ages eighteen and twenty-nine favored abolition of DADT.

12 355. In a May 2005 national poll conducted by the Boston Globe, 79% of
13 respondents said openly homosexual individuals should be allowed to serve in the
14 U.S. Armed Forces.

15 356. A 2006 Zogby International poll of current and/or former United
16 States servicemembers reported that:

- 17 a. Roughly two-thirds of servicemembers returning from Iraq and
18 Afghanistan knew or suspected a homosexual person had served
19 in their unit, suggesting that a significant number of
20 servicemembers were known to be homosexual to their peers.
- 21 b. 66% of respondents who had experience with homosexuals in
22 their units said that the presence of homosexual unit members
23 had no impact on their personal morale.
- 24 c. Servicemembers who had served with a homosexual were less
25 likely to think it was disruptive to the unit than servicemembers
26 who said they had not served with a homosexual.
- 27 d. The poll sought to provide data to test the unit cohesion
28 rationale by measuring and comparing the degree to which

1 servicemembers were know to be homosexual and quality of a
2 unit while controlling for other causes of unit quality.

3 357. In a 2008 Washington Post-ABC News poll, 75% of respondents said
4 that openly homosexual people should be allowed to serve in the military. Nearly
5 two-thirds of conservatives as wells as 82% of white Catholics supported
6 permitting homosexual servicemembers to serve openly.

7

8 **xii. Foreign Militaries Since 1993**

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

14 359. None of these nations has reported any detriment to any metric of
15 military effectiveness, including unit cohesion, readiness, morale, retention, good
16 order, or discipline.

17 360. In those countries where the ban was lifted since enactment of DADT,
18 various negative consequences that had been predicted, e.g. resignations of
19 heterosexual servicemembers and decreased enlistments, never materialized.

20 361. In the case of closely allied nations, such as Canada, Great Britain, and
21 Israel, homosexuals serve openly in the highest positions. Even in those situations
22 where homosexuals have received unequal treatment in practice, the differences
23 have been rare and inconsequential. There is no evidence that these infrequent and
24 minor cases of differential treatment undermined performance, cohesion, or morale.

25 362. The nations that allow open homosexuals to serve openly have a wide
26 range of different cultures and deployment obligations. Thus, some countries are
27 more socially liberal than the United States, but some, like Israel, are not.

28 363. In 2000, a comprehensive study of several foreign militaries'

1 experiences after removing the ban on homosexual servicemembers reported no
2 observed impact on military effectiveness, unit cohesion, recruitment, or retention.

3 364. Four independent academic studies conducted by the Palm Center
4 found that lifting bans on homosexuals serving openly in Great Britain, Israel,
5 Canada, and Australia had “no impact” on military readiness and that negative
6 attitudes almost never translated into servicemember departures, recruitment
7 problems or other disruptions.

8 365. In both Afghanistan and Iraq, members of the U.S. Armed Forces have
9 fought and continue to fight side by side with coalition forces from such nations,
10 including Great Britain and Australia. Such forces include openly homosexual
11 commanding officers.

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

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

24 368. Despite fears that homosexual servicemembers could cause
25 disruptions, the majority of homosexual servicemembers serving in foreign
26 militaries conform to expected norms of their organization. Either they do not
27 reveal their sexual orientation, or they do so only to selected peers or supervisors
28 and succeed at fitting in with their units in dress, appearance, and comportment.

1 369. The experiences of other nations demonstrate the importance of the
2 centrality of leadership. Michael Codner, the assistant director for military sciences
3 at the Royal United Services Institute in the United Kingdom, noted that one reason
4 for the British military’s success was that those at the very top lined up behind the
5 policy change. Research shows that controversial new rules are most effective
6 when high-ranking leaders make their genuine support absolutely clear so that
7 lower level leaders, those who actually must implement the new rules, come to
8 identify enforcement of the new policy with their own self-interest as leaders of the
9 institution.

10 370. In the British military, servicemembers were polled prior to the repeal
11 of the ban on homosexual military service, and roughly two-thirds stated they
12 would not work with homosexuals post-repeal.

13 371. However, a study conducted by the British military six months
14 following repeal revealed that very few servicemembers resigned from the military

15 372. A 2000 report from the United Kingdom Ministry of Defence said the
16 lifting of the ban on openly homosexual servicemembers was “hailed as a solid
17 achievement” that was “introduced smoothly with fewer problems than might have
18 been expected.”

19 373. The British military’s own analysis of the effects of the repeal process
20 indicated there was no detriment to cohesion, readiness, morale, retention, or
21 recruitment.

22 374. There was widespread acceptance of the new policy, and British
23 servicemembers generally demonstrated a mature and pragmatic approach to the
24 change.

25 375. There were no reported problems with homosexuals harassing
26 heterosexuals, and there were no reported difficulties of note concerning
27 homophobic behavior amongst servicemembers.

28 376. The report concluded that “there has been a marked lack of reaction”

1 to the change.

2 377. In 2000, after Great Britain lifted its ban, the Palm Center at the
3 University of California, Santa Barbara, conducted exhaustive studies to assess the
4 effects of openly homosexual service in Great Britain, Israel, Canada, and
5 Australia. Researchers there reviewed over six hundred documents and contacted
6 every identifiable professional with expertise on the policy change, including
7 military officers, government leaders, academic researchers, journalists who
8 covered the issue, veterans, and nongovernmental observers. The Palm Center
9 found that not one person had observed any impact or any effect at all that
10 “undermined military performance, readiness, or cohesion, led to increased
11 difficulties in recruiting or retention, or increased the rate of HIV infection among
12 the troops.”

13 378. Palm Center researchers found that in each case, although many
14 heterosexual soldiers continued to object to homosexuality, the military’s emphasis
15 on conduct and equal standards was sufficient to encourage servicemembers to
16 work together as a team without undermining cohesion.

17 379. A study of several hundred combat soldiers in Israel found that
18 approximately the same percentage of Israeli soldiers knew a homosexual
19 servicemember in their unit as did U.S. servicemembers. The study found no
20 evidence that knowledge of serving with a homosexual servicemember undermined
21 the performance, cohesion, readiness, or morale of Israel’s military units.

22 380. Despite dire warnings that the 1992 removal of restrictions on
23 homosexual individuals serving openly in the Canadian Forces (“CF”) would cause
24 disruptions, there were neither increased departures by heterosexual
25 servicemembers nor significant numbers of complaints filed by homosexual
26 servicemembers concerning harassment or other discriminatory acts.

27 381. In the years following the removal of the ban in Canada, CF continued
28 to update its policies and programs to ensure equal rights for homosexual

1 servicemembers.

2 382. From its mid-1990's missions in Bosnia and Kosovo through its
3 missions in Afghanistan today, CF has been combat tested on land, in the air, and at
4 sea. CF has suffered no detriment to the military's combat effectiveness despite the
5 service of openly homosexual servicemembers in combat.

6 383. The presence of openly homosexual servicemembers is a non-issue
7 because CF assesses its servicemembers based on the competence of the individual
8 and his or her respect for and commitment to the fighting unit. CF has determined
9 that sexual orientation is irrelevant to military effectiveness.

10 384. CF has determined that servicemembers who are "joiners," as opposed
11 to loners, create cohesive teams that are the most effective in combat. By valuing
12 joiners, CF creates more tightly knit teams, enhanced operational effectiveness,
13 higher morale, increased re-enlistment and retention, and greater career satisfaction
14 within the CF. CF determined that preventing disclosure of sexual orientation
15 makes it more difficult for homosexual servicemembers to be seen as joiners
16 because they are prohibited from sharing aspects of their personal lives.

17 385. CF determined that permitting homosexual servicemembers to disclose
18 their sexual orientation creates a greater sense of belonging within the unit and can
19 result in higher retention and greater productivity and cohesion. The inclusion of
20 openly homosexual servicemembers has improved the CF's ability to recruit
21 talented individuals into the military.

22 386. CF has also determined that positive family support leads to increased
23 retention of servicemembers, enhanced performance, and servicemembers' greater
24 willingness to deploy on missions multiple times. As a result, CF ensures that
25 partners of homosexual servicemembers are included in all family support
26 programs so that the family can, in turn, support the servicemember.

27 387. CF also recognizes the key role of social support networks in
28 mitigating the psychological stressors of current missions and the incidences of

1 post-traumatic stress disorder. Family members are provided with information,
2 counseling services, and other resources so they can understand the psychological
3 responses to combat and can better assist their partners should symptoms arise. As
4 a result, CF includes partners of homosexual servicemembers in counseling
5 sessions and other programs. This provides the homosexual servicemember a
6 greater likelihood of recovery.

7 388. Openly homosexual servicemembers have attained positions of
8 command in CF. CF has integrated openly homosexual servicemembers at all
9 levels.

10 389. Canadian and U.S. servicemembers have served together in connection
11 with a number of missions over the last 15 years, including in Bosnia, Kosovo, and
12 Afghanistan. Canadian and U.S. forces also engaged in joint naval interdiction and
13 counter-piracy operations off the Horn of Africa during this time.

14 390. CF has earned a high level of respect and trust from U.S.
15 servicemembers as a result of their joint missions, despite the U.S. servicemembers'
16 knowledge that they were serving alongside units that could include openly
17 homosexual servicemembers.

18 391. There is no evidence that U.S. servicemembers are reluctant to serve
19 alongside Canadians despite the inclusion of openly homosexual servicemembers in
20 the CF.

21 392. Since 2000, no Canadian servicemembers have been subject to a court
22 martial for sexual misconduct involving homosexual servicemembers or for
23 inappropriate behavior directed at homosexual servicemembers.

24 393. In February 2010, the Chairman of the Joint Chiefs of Staff, Admiral
25 Mullen, testified before the Senate Armed Services Committee that his counterparts
26 in countries that allow homosexuals to serve openly report "no impact on military
27 effectiveness."

28 394. Admiral Giampaolo Di Paola, Chairman of the North Atlantic Treaty

1 Organization (“NATO”) Military Committee, recently acknowledged that most
2 NATO allies allow homosexuals to serve openly in the military and that that is
3 “working out quite well.”

4 395. Admiral Di Paola further stated, “In the end, fundamentally, ... sexual
5 orientation is not an issue insofar as you being a soldier or whatever you would be
6 in the environment you are working for, that is not a problem. Sexual orientation is
7 a personal matter, not a matter for state policy.”

8 396. According to Admiral Di Paola, allowing homosexuals to serve openly
9 in the military has “absolutely not” undermined unit cohesion or combat readiness.
10 He commented, “If there is misconduct, applied to a gay or non-gay, that would be
11 treated as misconduct. So your sexual orientation does not have to influence the
12 environment in which you work.”

13 397. In February 2010, the Palm Center released a report titled, “Gays in
14 Foreign Militaries 2010: A Global Primer.” The Report concluded that “[r]esearch
15 has uniformly shown that transitions to policies of equal treatment without regard to
16 sexual orientation have been highly successful and have had no negative impact on
17 morale, recruitment, retention, readiness, or overall combat effectiveness. No
18 consulted expert anywhere in the world concluded that lifting the ban on openly gay
19 service caused an overall decline in the military.”

20 398. The Report also concluded: “Lifting bans on openly gay service in
21 foreign countries did not result in a mass ‘coming out.’ Yet gay and lesbian troops
22 serve in all levels of the armed forces of Britain, Canada, Australia, South Africa,
23 and Israel, in both combat and noncombat positions, at both the enlisted level and
24 as high commanders. There were no instances of increased harassment of or by gay
25 people as a result of lifting bans in any of the countries studied.”

26 399. Finally, the Report provided: “Evidence suggests that lifting bans on
27 openly gay service contributed to improving the command climate in foreign
28 militaries, including increased focus on behavior and mission rather than identity

1 and difference, greater respect for rules and policies that reflect the modern
2 military, a decrease in harassment, retention of critical personnel, and enhanced
3 respect for privacy.”

4 400. Since DADT was enacted, no nation has adopted a ban on homosexual
5 service.

6
7 **xiii. DADT’s Effect on Unit Cohesion, Troop Morale, and Military**
8 **Readiness**

9 401. DADT undermines unit cohesion, troop morale, and military readiness.

10 402. Rape and violence occur as a result of DADT.

11 403. Mental health implications arise as a result of DADT, ranging from
12 depression to suicide.

13 404. In allowing the military to investigate the sexual orientation of its
14 servicemembers, DADT permits interrogation of servicemembers’ unit, lovers,
15 partners, friends, parents, etc., many of whom are heterosexual. These incursions
16 into heterosexual servicemember’s privacy can involve privacy injuries.

17 405. DADT weakens the United States’ national security by preventing
18 patriotic Americans from serving their country.

19 406. DADT makes it more difficult for homosexual servicemembers to
20 perform their duties.

21 407. DADT forces members of the U.S. Armed Forces to lie about who
22 they are in order to defend their fellow citizens.

23 408. The U.S. Army Academy at West Point conducted an investigation
24 when an academy counselor read and the Army seized Cadet Nikki Galvan’s
25 journal, in which Galvan confided private emotions about her sexuality. Feeling
26 “violated and humiliated,” and facing a discharge, Galvan resigned. The
27 investigation expanded to over thirty other women at West Point.

28 409. After assaulting and threatening to rape a female soldier, a group of

1 male soldiers spread lies that she was a lesbian. Her commander threatened to
2 imprison her if she did not admit being homosexual and identify other service
3 members suspected of being homosexual. Even after a military judge dismissed the
4 case for lack of evidence, her commander continued to pursue her discharge until
5 the Servicemembers Legal Defense Network intervened and she obtained a transfer.

6 410. Accused of raping another man and other charges, Airman Bryan
7 Harris faced life in prison. Air Force prosecutors offered a reduced sentence in
8 exchange for the names of all the male servicemembers with whom he had sexual
9 relations. These men were promptly investigated, and the five who served in the
10 Air Force were fired or court-martialed.

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

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

20 413. After Airman Jennifer Dorsey reported an incident during which two
21 women punched her repeatedly in the stomach while yelling, "You sick fucking
22 dyke," her commander, Major Richard Roche, did not discipline the attackers but
23 instead threatened an investigation into Dorsey's sexual orientation. Dorsey made a
24 "voluntary" statement that she was homosexual and left the Armed Forces pursuant
25 to a DADT discharge.

26 414. Co-workers of a certain Coast Guard member routinely accused him of
27 being homosexual. One member of his unit threatened, "If I ever find out for sure
28 you're a fag, I'll kick your ass." Because of DADT, the victim had little recourse to

1 end the torment other than to resign from the Coast Guard.

2 415. Airman Sean Fucci “voluntarily” left the Air Force at the end of his
3 service after facing extreme harassment, including notes that said, “Die fag” and
4 “You can’t hide, fag.” Torn between protecting his safety and facing a possible
5 discharge investigation, Fucci reported the events. An investigation into the threats
6 was opened, but to no avail; Fucci was unable to provide sufficient evidence
7 because he had yet to disclose his homosexuality and had to be circumspect in his
8 statements as a result of DADT.

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

14 417. During Operation Iraqi Freedom and Operation Enduring Freedom,
15 Fred Fox, an infantry soldier, was unable to speak openly with army counselors due
16 to DADT and was later diagnosed with post-traumatic stress disorder.

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

22 419. Lieutenant Colonel Peggy Laneri took an early retirement to adopt a
23 daughter with her wife and look after the needs of her family without putting her
24 job and future retirement benefits at risk.

25 420. Brian Hughes, Army ranger, who was part of the team that rescued
26 Jessica Lynch, decided not to reenlist in the Army because his male partner was
27 unable to come to events or participate in support networks that others took for
28 granted.

1 421. After hearing other commanders say “All fags should get AIDS and
2 die” and trying to maintain a forbidden relationship, Brian Muller, army staff
3 sergeant, decided to reveal his sexual orientation. Muller, who had earned twenty-
4 one medals during the wars in Bosnia and Afghanistan, said he was driven to leave
5 by fear and uncertainty about DADT.

6 422. Stephen Benjamin, cryptologic interpreter, was open about his sexual
7 orientation with nearly all of his co-workers. He was called in for questioning
8 because he made a comment on the government computer system: “That was so
9 gay—the good gay, not the bad one.” Benjamin stated that, when he was
10 discharged, “the only harm to unit cohesion that was caused was because I was
11 leaving.”

12 423. During medical school, a male civilian began to stalk and harass Beth
13 Schissel, an Air Force officer and physician. The civilian threatened to reveal
14 Schissel’s sexual orientation to harm someone they both knew well. Terrified,
15 Schissel disclosed her homosexuality in hopes of blunting the stalker’s efforts, and
16 was discharged on September 10, 2001.

17
18 **xiv. Heterosexual Attitudes During DADT**

19 424. Heterosexual servicemembers’ expressed attitudes about
20 homosexuality frequently do not conform to how they actually behave when
21 confronted with homosexual servicemembers. This discrepancy is consistent with
22 social science data that show a poor correlation between stated intentions and actual
23 behavior in paramilitary organizations. Polls on attitudes toward homosexuals in
24 the military show that most respondents believe their peers are less tolerant of
25 homosexual service than they, themselves, are. An article in Armed Forces and
26 Society concludes from this data that there is a cultural-organizational pressure
27 within the armed forces to appear as though “one is either uncomfortable or
28 intolerant of homosexuality” and indeed to “pretend to be uncomfortable” with

1 homosexuals, which belies greater actual comfort than what is stated.

2 425. Stephen J. Vossler is a heterosexual male from southeastern rural
3 Nebraska. He enlisted in the United States Army in November 2000. Vossler
4 served as an active duty member of the United States Army from June 2001 to June
5 2006 and was highly decorated. He was awarded the Army Commendation Medal,
6 the Army Achievement Medal, the National Defense Service Medal, Global War on
7 Terrorism Service Medal, the Korea Defense Service Medal, the Army Service
8 Ribbon, and the Overseas Service Ribbon.

9 426. Vossler trained as a Korean language cryptologic linguist at the
10 Defense Language Institute of the Presidio in Monterey, California, from
11 September 7, 2001 to February 25, 2003. Cryptologic linguists are responsible for
12 performing and supervising the detection, acquisition, identification, and
13 exploitation of foreign communications using signals equipment.

14 427. At the Defense Language Institute, Vossler shared a room with a
15 homosexual servicemember who was in the process of being discharged under
16 DADT. Vossler observed that the process of being discharged was emotionally
17 draining on his roommate, and caused his roommate to be alienated from his unit
18 because it gave him the stigma of being a bad soldier. Before joining the Army,
19 Vossler had not extensively interacted with an individual he knew to be
20 homosexual.

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

1 429. Approximately five (5) months after meeting Specialist Chlapowski,
2 Vossler learned that Chlapowski was homosexual. Specialist Chlapowski did not
3 try to deny his sexual orientation. Rather, he admitted his sexual orientation with
4 full knowledge it could result in his discharge from the military under DADT.
5 Vossler quickly developed a great sense of respect for Specialist Chlapowski
6 because he was honest with Vossler about his sexual orientation.

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

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

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

23 433. When Specialist Chlapowski's enlistment term ended in approximately
24 November 2005, he chose not to reenlist because of the burden of DADT.

25
26 **xv. Financial Costs**

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

1 and train replacements.

2 435. The total cost of DADT cannot be estimated because the Department
3 does not collect relevant cost data on inquiries and investigations, counseling and
4 pastoral care, separation functions, and discharge reviews.

5 436. 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, DADT might have cost the Defense Department
8 approximately \$95 million in constant fiscal year 2004 dollars to recruit
9 replacements for servicemembers separated under DADT.

10 437. The Navy, Air Force, and Army estimated that the cost to train
11 replacements for servicemembers separated under DADT was approximately \$48.8
12 million, \$16.6 million, and \$29.7 million, respectively.

13 438. 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.

16 439. The 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.

19 440. 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 DADT. When these over- and under-estimations
26 were reconciled, the Commission found that DADT policy cost the Pentagon at
27 least \$363.8 million to implement during its first ten years, or 91 percent more than
28 originally reported by the GAO. Because the Commission used conservative

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

2
3 **xvi. Admissions By Military Commanders & Elected Officials**

4 441. Since DADT was enacted, numerous senior military commanders and
5 civilian elected officials, among them some who supported DADT at the time of its
6 enactment, have criticized the Policy and/or called for its abandonment or repeal.
7 The criticisms and statements by these individuals include:

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

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

19 444. In a 2003 article in the National Law Review, Navy Rear Admiral
20 John Hutson (ret.) described the Policy as “odious” and “virtually unworkable in
21 the military.”

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

27 446. Former Vice President Dick Cheney described the security risk
28 rationale underlying policies banning homosexuals from service in the United

1 States Armed Forces as “a bit of an old chestnut.”

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

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

12 449. In November 2008, 104 retired generals and admirals signed a
13 statement urging Congress to repeal DADT.

14 450. On July 5, 2009, General Colin Powell (ret’d.) said, “this is a policy
15 and a law that should be reviewed,” in reference to DADT. On February 3, 2010,
16 Gen. Powell formally reversed his previous position and announced his support for
17 the repeal of DADT.

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

27 452. Alan Simpson, Republican Senator from Wyoming from 1979 to 1997
28 who originally voted in favor of DADT, has since stated that “[t]his policy has

1 become a serious detriment to the readiness of America's forces as they attempt to
2 accomplish what is arguably the most challenging mission in our long and
3 cherished history.”

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

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

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

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

24 457. Admiral Mullen also informed the U.S. Senate on February 2, 2010:
25 “No matter how I look at this issue, I cannot escape being troubled by the fact that
26 we have in place a policy which forces young men and women to lie about who
27 they are in order to defend their fellow citizens.”

28 458. The Secretary of Defense, defendant Robert M. Gates, also testified to

1 the Senate Armed Services Committee, with regard to whether repealing DADT
2 would undermine unit cohesion, that the Defense Department needed “to address a
3 number of assertions that have been made for which we have no basis in fact.”

4 459. In February 2010, defendant Gates notified Congress that, reversing a
5 policy of over 100 years’ standing, the Navy intended to permit women to serve on
6 submarines.

7
8 **F. Recent Developments**

9 460. Though Congress and the Defense Department are considering a repeal
10 of DADT, there has been no stay in the application or enforcement of DADT and
11 there has been no stay of investigations pursuant to DADT.

12 461. If a homosexual servicemember discloses his or her sexual orientation
13 to the task force currently studying repeal of DADT, the Defense Department is
14 required to initiate a formal investigation that could lead to discharge.

15 462. Without a change in DADT, the Department of Defense will continue
16 to authorize the separation of servicemembers for homosexual acts, for statements
17 that demonstrate a propensity or intent to engage in homosexual acts, or for
18 homosexual marriage or attempted homosexual marriage.

19 463. The legislation pending in Congress that would purportedly repeal
20 DADT is not certain to pass, nor is it certain to be signed by the President.

21 464. The legislation pending in Congress, even if enacted into law, does not
22 repeal DADT. Repeal would only occur when the President transmits a written
23 certification, signed by the President, the Secretary of Defense, and the Chairman of
24 the Joint Chiefs of Staff, stating that implementation of the repeal is consistent with
25 the standards of military readiness, military effectiveness, unit cohesion, and
26 recruiting and retention of the Armed Forces.

27 465. Under the pending legislation, the President, the Secretary of Defense,
28 and the Chairman of the Joint Chiefs of Staff are under no obligation to sign the

1 written certification.

2 466. Current and former high-ranking members of the military remain
3 opposed to repeal of DADT on moral grounds. For instance, in March 2007,
4 General Peter Pace, then Chairman of the Joint Chiefs of Staff, said “I believe
5 homosexual acts between two individuals are immoral and that we should not
6 condone immoral acts.” As a result, there is no assurance that repeal of DADT will
7 be accomplished.

8
9 **G. Defendants’ Evidence**

10 467. Defendants did not produce any witnesses at trial.

11 468. Defendants did not produce any witnesses to testify that, since its
12 enactment, DADT has actually furthered its stated purposes.

13 469. Defendants did not produce any witnesses to testify that DADT was
14 not the result of animus and prejudice against homosexuals.

15 470. Defendants did not produce any study, report, analysis, or other
16 document which shows that, since its enactment, DADT has furthered its stated
17 purposes.

18 471. Defendants did not produce any study, report, analysis, or other
19 document which shows that maintenance of DADT was not the result of animus
20 and prejudice against homosexuals.

21 472. The assertion contained in 10 U.S.C. § 654 that DADT advances
22 morale, good order and discipline, and unit cohesion in the United States Armed
23 Forces was at the time of its enactment, and is today, without factual support. In
24 addition, no research has ever shown that open homosexuality impairs military
25 readiness.

26 473. Documentation, research, academic or sociological studies supporting
27 such assertions are lacking.

28 474. No evidence exists that homosexual servicemembers are more likely

1 than heterosexual servicemembers to reveal classified or otherwise confidential
2 information.

3 475. No evidence exists that homosexual servicemembers are more likely to
4 violate military codes of conduct, the Uniform Code of Military Justice, or
5 Department of Defense regulations.

6 476. No evidence exists that homosexual servicemembers possess a
7 physical or psychological defect that renders them unfit for service.

8 477. No evidence exists to support the proposition that the presence in the
9 U.S. Armed Forces of persons who demonstrate a propensity or intent to engage in
10 homosexual acts creates an unacceptable risk to the standards of morale, good order
11 and discipline, and unit cohesion that are the essence of military capability.

12 478. Despite years of experience having homosexuals in the military,
13 including during the Vietnam War, Korean War, and World War II when the U.S.
14 imposed a draft and when there were reported instances of units with open
15 homosexuals, there has been no systematic evidence presented that open
16 homosexuality has impaired performance during those conflicts.

17 18 **II.**

19 **CONCLUSIONS OF LAW**

20 21 **A. Log Cabin Has Standing**

22 479. An association has standing to sue on behalf of its members when “(a)
23 its members would otherwise have standing to sue in their own right; (b) the
24 interests it seeks to protect are germane to the organization's purpose; and (c)
25 neither the claim asserted nor the relief requested requires the participation of
26 individual members in the lawsuit.” Hunt v. Wash. State Apple Adver. Comm’n,
27 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977).

28 480. To satisfy Article III’s standing requirement, a plaintiff must

1 demonstrate: “(1) he suffered or will suffer an ‘injury in fact’ that is concrete,
2 particularized, and actual or imminent; (2) the injury is fairly traceable to
3 defendant's challenged action; and (3) the injury is likely, not merely speculative,
4 and will be redressed by a favorable decision.” Biodiversity Legal Found. v.
5 Badgley, 309 F.3d 1166, 1171 (9th Cir. 2002); see also Lujan v. Defenders of
6 Wildlife, 504 U. S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

7 481. Log Cabin has demonstrated it has representational standing because it
8 satisfies the standard articulated in Hunt.

9 482. First, Log Cabin’s stated mission is to advocate equal rights for all
10 Americans, including homosexuals. Thus, Log Cabin satisfies the second prong of
11 Hunt because its lawsuit challenging DADT is consistent with this mission.

12 483. Second, Log Cabin seeks injunctive relief, not damages for individual
13 servicemembers affected by DADT. Therefore, the third prong of Hunt is satisfied.

14 484. Third, Log Cabin members, including, specifically, Alex Nicholson
15 and Lt. Col. Doe, would otherwise have standing to challenge the DADT policy.

16 485. Mr. Nicholson and Lt. Col. Doe are both members of Log Cabin and
17 both have been injured by the application of DADT. Mr. Nicholson was discharged
18 from the United States Armed Services pursuant to DADT; Lt. Col. Doe is subject
19 to DADT so long as he continues to serve, and is injured by DADT on a daily basis
20 (e.g., he cannot communicate the core of emotions and identity to others in the
21 same manner as his heterosexual comrades, nor can he exercise his constitutionally
22 protected right to engage in private, consensual homosexual conduct without
23 intervention of the United States government).

24 486. As noted above, Lt. Col. Doe was a member of Log Cabin prior to
25 October 12, 2004, the day Log Cabin filed the initial Complaint in this action.
26 Thus, Lt. Col. Doe alone confers standing on Log Cabin.

27 487. While as a general matter, standing is determined at the time a lawsuit
28 is commenced, this rule is not absolute. The Court concludes that an alternative,

1 equally appropriate, date to use for purposes of determining standing is the date
2 Log Cabin filed its Amended Complaint. When a complaint is dismissed and
3 plaintiff is granted leave to file an amended complaint, the dismissal of the original
4 complaint and the filing of the amended complaint renders the original complaint of
5 no legal effect and obsolete. See County of Riverside v. McLaughlin, 500 U.S. 44,
6 51, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991). Thus, Plaintiff’s standing is to be
7 evaluated as of April 28, 2006, the date of filing of the First Amended Complaint.
8 Id.; Forum for Academic and Institutional Rights, Inc. v. Rumsfeld, 291 F. Supp. 2d
9 269, 289 (D.N.J. 2003), rev’d on other grounds, 390 F. 3d 219 (3rd Cir. 2004),
10 rev’d, 547 U.S. 47, 126 S. Ct. 1297, 164 L.Ed.2d 156 (2006); May 27, 2010 Order
11 Denying Summary Judgment (Dkt. 170), at pp. 13-15.

12 488. As noted above, Lt. Col. Doe and Mr. Nicholson were both members
13 of Log Cabin as of the date Log Cabin filed its Amended Complaint. Therefore,
14 under either date (the date the original Complaint was filed, or the date the
15 Amended Complaint was filed), Log Cabin has standing.

16
17 **B. Don’t Ask Don’t Tell Violates Substantive Due Process**

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

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

20 489. Lawrence v. Texas held that “[l]iberty presumes an autonomy of self
21 that includes freedom of thought, belief, expression, and certain intimate conduct.”
22 539 U.S. 558, 562, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003). The Ninth Circuit,
23 in Witt v. Dep’t of Air Force, 527 F.3d 806, 816 (9th Cir. 2008), made clear that
24 Lawrence controls the scrutiny applied to DADT and concluded it could not
25 “reconcile what the Supreme Court did in Lawrence with the minimal protections
26 afforded by traditional rational basis review.” Rather than picking through
27 Lawrence to find talismanic language of rational basis, intermediate or strict
28 scrutiny, however, Witt simply realized that it and other courts must follow what

1 the Lawrence court “actually did.” Id. (emphasis in original).

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

6 491. Witt noted Lawrence’s reliance on Griswold v. Connecticut, Roe v.
7 Wade, Carey v. Population Servs. Int’l, and Planned Parenthood of Southeastern
8 Pa. v. Casey. 527 F.3d at 817. Lawrence also reviewed Eisenstadt v. Baird, 405
9 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972), in which a statute prohibiting the
10 distribution of contraceptives was also subject to heightened scrutiny. 539 U.S. at
11 565.

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

14 493. Faced with Major Witt’s as-applied challenge to DADT, the Ninth
15 Circuit defined the level of heightened scrutiny Lawrence demands in such cases.
16 Id. at 818-19. But, nothing in Witt bars a facial challenge to DADT. It is simply
17 silent on the issue.

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

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

1 2001).

2
3 **b. The Witt Intermediate Scrutiny Standard Applies**

4 496. Because Lawrence mandates a heightened level of scrutiny here, the
5 Court will apply the standard of review set forth in Witt – that “when the
6 government attempts to intrude upon the personal and private lives of homosexuals,
7 in a manner that implicates the rights identified in Lawrence, the government must
8 advance an important governmental interest, the intrusion must significantly further
9 that interest, and the intrusion must be necessary to further that interest.” 527 F.3d
10 at 819.

11 497. DADT intrudes upon the personal and private lives of homosexuals in
12 a manner that implicates the rights identified in Lawrence. Heightened scrutiny is
13 required given that sexual intimacy is recognized as important in U.S. society and is
14 a protected liberty interest under Lawrence, and given that servicemembers are not
15 expected to remain forever celibate. See Witt, 527 F.3d at 818, n.6 (acknowledging
16 that when a statute impairs a “significant” liberty interest like that recognized in
17 Lawrence, some level of heightened scrutiny is applied).

18 498. It is appropriate to apply a heightened or intermediate scrutiny
19 substantive due process standard, such as that announced in Witt, even in the
20 context of a facial challenge to a statute. See, e.g., Planned Parenthood of
21 Southeastern Pa. v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)
22 (applying undue burden standard to facial substantive due process abortion
23 challenge).

24 499. Moreover, as with the active rational basis test described below,
25 application of the Witt standard places the burden on the government to
26 demonstrate that each element of the test is satisfied. The Witt Court recognized
27 that the Supreme Court in Sell v. United States, 539 U.S. 166, 178, 123 S. Ct. 2174,
28 156 L. Ed. 2d 197 (2003), and in Lawrence, 539 U.S. at 578, required the state to

1 justify its intrusion into an individual’s recognized liberty interest. Witt, 527 F.3d
2 at 818.

3
4 **c. *Even if the Witt Standard Does Not Apply, the Court Must Apply***
5 ***Active Rational Basis***

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

10 501. City of Cleburne v. Cleburne Living Center, 473 U.S 432, 105 S. Ct.
11 3249, 87 L. Ed. 2d 313 (1985), from which the Ninth Circuit derived this
12 heightened level of rational basis scrutiny, see Pruitt, 963 F.2d at 1165-66, requires
13 examination of the government’s actual – not hypothetical – bases for the
14 challenged legislation. 473 U.S. at 448-50. This includes examining the record and
15 delving behind the government’s stated justifications to determine whether the
16 legislation is based upon and furthers any such actual purpose or whether its
17 relationship to the “asserted goal is so attenuated as to render the distinction
18 arbitrary or irrational.” Id. at 446.

19 502. Romer v. Evans also employed a heightened rational basis review in
20 examining the constitutionality of Colorado’s Amendment 2, which precluded the
21 state from enacting legislation designed to protect homosexuals from
22 discrimination. 514 U.S 620, 629, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). The
23 Supreme Court found Amendment 2 unconstitutional because “its sheer breadth
24 [was] so discontinuous with the reasons offered for it that the amendment seems
25 inexplicable by anything but animus toward the class it affects.” Id. at 632. Romer
26 requires that legislation must be “grounded in a sufficient factual context” for the
27 Court to ascertain some relationship between the legislation and its asserted
28 purposes. Id. at 632-33.

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

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

20 505. At a minimum, the Supreme Court in Lawrence employed the more
21 searching review it used in Cleburne and Romer. Indeed, Lawrence identified
22 Romer as among the principal authorities that eroded the foundations of Bowers v.
23 Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986). 539 U.S. at
24 574-76.

25 506. The Court rejected Texas’ proffered legitimate governmental interest
26 and held that restrictions on homosexuals’ liberty interests cannot be justified
27 merely on the basis of society’s moral preferences. Id. at 571. Its investigation of
28 the stated rationale and its factual context was searching, even including

1 examination of foreign sources. Id. at 572, 576-77. Following Lawrence and Witt,
2 this heightened level of scrutiny is the standard of review the Court, at a minimum,
3 must apply in evaluating the constitutionality of DADT.

4
5 **d. *Judicial Deference to Military Affairs***

6 507. The Supreme Court has refined the judicial deference afforded to
7 military-effectiveness rationales – a foundational basis of Philips v. Perry, 106 F.3d
8 1420, 1425, 1429 (9th Cir. 1997). Since that decision, the Supreme Court has
9 upheld a constitutional challenge to the government’s policy of denying procedural
10 due process to an American citizen classified as an enemy combatant. Hamdi v.
11 Rumsfeld, 542 U.S. 507, 533, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004). It
12 rejected the government’s argument that federal courts should only review that
13 policy under a “very deferential ‘some evidence’ standard” in light of the grave
14 threat terrorism poses to the Nation and the “dire impact” due process would have
15 on the central functions of war-making. Id. at 527, 534. In Hamdan v. Rumsfeld,
16 548 U.S. 557, 588, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006), the Supreme Court
17 likewise held that “the duty rests on the courts, in time of war as well as in time of
18 peace, to preserve unimpaired the constitutional safeguards of civil liberty.”

19 508. Military commanders are professionals but their judgment is not
20 immune from oversight. Civilian control of the military has been a fundamental
21 principle since the first days of the Republic, and the Ninth Circuit has not hesitated
22 to subject military-related legislation to a heightened “active” rational basis review.
23 Pruitt, 963 F.2d at 1165-66. Pruitt made clear that courts of this circuit must
24 scrutinize military rationales in the same manner employed by the Supreme Court
25 in Cleburne. Id. Indeed, “deference does not mean abdication” and Congress
26 cannot subvert the guarantees of the Due Process Clause merely because it is
27 legislating in the area of military affairs. Witt, 527 F.3d at 821.

1 ***e. Post-Enactment Evidence is Relevant to the Constitutional***
2 ***Analysis of DADT***

3 509. Constitutional review of Congressional legislation is not limited to
4 examination of evidence available at the time of enactment. A court may scrutinize
5 post-enactment evidence and evidence of changed circumstances.

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

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

19 Those who drew and ratified the Due Process Clauses ...
20 knew times can blind us to certain truths and later
21 generations can see that laws once thought necessary and
22 proper in fact serve only to oppress. As the Constitution
23 endures, persons in every generation can invoke its
24 principles in their own search for greater freedom.

25 Lawrence, 539 U.S. at 578-79. That DADT lacks a rational basis is proved by
26 evidence of new or changed circumstances, such as polling data showing the lack of
27 support for the policy both in the military and in the public at large.

28 512. But even without consideration of changed circumstances, the Court

1 may re-examine the rationality of the statute based on evidence not previously
2 presented or considered, such as the expert opinion testimony proffered here
3 explaining that there was no rational basis for Congress’s original determination at
4 the time of the enactment of DADT. It is not simply the “wisdom” of DADT that is
5 lacking, but the very rational basis for the policy.

6
7 **ii. Don’t Ask Don’t Tell Violates the Constitution’s Guarantee of**
8 **Substantive Due Process**

9 513. The evidence presented by Plaintiff establishes that DADT fails the
10 standard of review set forth in Witt; while purportedly addressed to the important
11 governmental interests of military “morale, good order and discipline, and unit
12 cohesion that are the essence of military capability” (10 U.S.C. § 654(a)(15)),
13 DADT does not significantly further those interests, nor is it necessary to further
14 those interests. DADT, therefore, violates the substantive due process guarantee of
15 the Constitution (U.S. Const., Am. V). The enactment and implementation of
16 DADT violates substantive due process because:

- 17 a. No objective studies, reports, or data, either pre- or post-
18 enactment, support the rationality of DADT and its congruence
19 to Congress’s stated objectives. In fact, at the time of the
20 enactment of DADT, the only objective studies showed that
21 DADT would not further unit cohesion and troop morale. Those
22 studies were either ignored by or hidden from Congress;
- 23 b. The enactment of DADT was motivated by animus, prejudice,
24 hostility, ignorance, or fear of homosexuals;
- 25 c. The enactment of DADT was based on the private biases of
26 influential leaders about homosexuals rather than military
27 judgment;
- 28 d. The military itself recognizes that sexual orientation is not

1 germane to military service, inasmuch as DADT is applied more
2 frequently in time of peace than in time of war, and the military
3 has knowingly deployed openly homosexual members to foreign
4 theaters of combat;

5 e. DADT has had a disproportionate impact on women, and
6 rationales for the policy based on considerations of privacy and
7 sexual tension do not apply to female servicemembers;

8 f. When DADT was enacted, some comparable foreign militaries,
9 e.g., Canada, had already changed their policies to allow open
10 service by homosexuals without any negative impact on unit
11 cohesion, a factor ignored by Congress, and many comparable
12 foreign countries' militaries have, both before and since the
13 enactment of DADT, changed their policies to permit open
14 service by homosexuals without any negative impact on unit
15 cohesion. In addition, U.S. troops fight side-by-side with openly
16 homosexual members of the armed forces of foreign militaries
17 without any impact on unit cohesion and, in some instances, are
18 commanded by openly homosexual officers from other
19 countries;

20 g. Service members in non-combat but critical occupations such as
21 doctors, nurses, teachers, ophthalmologists, dentists, lawyers,
22 linguists, translators, and others have been discharged under
23 DADT;

24 h. Open homosexuals are not allowed to serve in the U.S. Armed
25 Forces but are allowed to work alongside the U.S. Armed Forces
26 in the FBI, CIA, NSA, Department of Defense, private
27 contracting firms performing military functions, and civilian
28 paramilitary organizations such as police and fire departments.

1 Indeed, the Commander-in-Chief of the U.S. Armed Forces is
2 not precluded from being openly homosexual;

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

12 514. For the same reasons, even if the constitutionality of DADT were not
13 governed by the Witt standard of review, the evidence also establishes that DADT
14 fails the active rational basis standard of review set forth and applied in, *inter alia*,
15 Pruitt, Romer, Cleburne, and Lawrence, and the traditional rational basis standard
16 of review. It additionally fails all constitutional scrutiny because Defendants have
17 submitted no evidence demonstrating DADT’s rational relationship to its stated
18 purposes and because Log Cabin has shown that DADT actually impairs those
19 interests.

20

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

22 515. The First Amendment to the U.S. Constitution provides that “Congress
23 shall make no law . . . abridging the freedom of speech . . . or right to petition the
24 government for a redress of grievances.” U.S. Const., Am. I.

25 516. Laws that chill constitutionally protected speech are presumptively
26 invalid and must withstand the strictest constitutional scrutiny. See Simon &
27 Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105,
28 116, 118, 123, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991).

1 517. A law that discriminates against speech on the basis of its content
2 constitutes a content-based violation of the First Amendment. Id. at 116.

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

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

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

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

21 522. “Notwithstanding the great deference owed to the military, regulations
22 restricting speech on military installations may not discriminate against speech
23 based on its viewpoint.” Cornelius v. NAACP Legal Defense & Educ. Fund, 473
24 U.S. 788, 806, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985); Shopco Dist. Co. v.
25 Commanding Gen. of Camp Lejeune, 885 F.2d 167, 174 (4th Cir. 1989).
26 Regulations that “selectively grant[] safe passage to speech of which [officials]
27 approve while curbing speech of which they disapprove” are impermissible, Berner
28 v. Delahanty, 129 F.3d 20, 28 (1st Cir. 1997), even in the military. Bryant v. Gates,

1 532 F.3d 888, 897 (D.C. Cir. 2008); Shopco, 885 F.2d at 172.

2 523. Thus, regardless of any considerations of deference owed to military
3 judgment, “regulations restricting speech on military installations may not
4 discriminate against speech based upon its viewpoint ... a regulation is viewpoint
5 based if it suppresses the expression of one side of a particular debate.” Nieto v.
6 Flatau, No. 7:08-CV-185, 2010 WL 2216199 (E.D.N.C. March 31, 2010) at *5
7 (citations omitted). The military may not restrict speech “in a manner that allows
8 one message while prohibiting the messages of those who can reasonably be
9 expected to respond.” Id. DADT does just that, and therefore causes First
10 Amendment harm to members of the military by unconstitutionally restricting their
11 speech and expression, not simply their conduct.

12 524. To justify a content-based restriction on speech, the government “must
13 show that its regulation is necessary to serve a compelling state interest and is
14 narrowly drawn to achieve that end.” Simon & Schuster, Inc., 502 U.S. at 118,
15 123.

16 525. The government must choose the least restrictive means to achieve the
17 compelling interest. Sable Commc’ns of Cal., Inc. v. F.C.C., 492 U.S. 115, 126,
18 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989).

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

23 527. DADT prohibits all public and private speech that would tend to
24 identify a servicemember as homosexual on the basis of the content and viewpoint
25 of such speech.

26 528. Punishing, restricting, or chilling speech which tends to identify a
27 servicemember as homosexual has no rational connection to a compelling,
28 governmental interest.

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

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

17 531. DADT is overbroad in violation of the First Amendment because it
18 punishes and restricts speech that does no more than acknowledge a permissible
19 status.

20 532. DADT is overbroad in violation of the First Amendment because it
21 restricts not only public but also private speech of homosexual servicemembers,
22 levying categorical, content-based restrictions against a limited class of speakers
23 that are applicable 24 hours a day, “at all times that the member has a military
24 status, whether the member is on base or off base, and whether the member is on
25 duty or off duty,” whether speaking to family members and friends, as well as
26 military personnel. 10 U.S.C. § 645(a).

27 533. Restricting a statement of a homosexual identity when a
28 servicemember is off duty has no rational connection to a compelling governmental

1 interest.

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

10 535. Furthermore, DADT is unconstitutionally vague because the type of
11 language prohibited by DADT is uncertain. The term “words to that effect” is
12 vague and does not explain which statements made by a servicemember might
13 subject him or her to separation under DADT.

14 536. DADT also is unconstitutionally vague because it does not sufficiently
15 specify the type or amount of proof sufficient to demonstrate that a servicemember
16 “is not a person who engages in, attempts to engage in, has a propensity to engage
17 in, or intends to engage in homosexual acts.”

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

23 538. DADT’s vagueness and overbreadth improperly permits its enforcers
24 to conflate homosexual status and homosexual conduct, and allows the U.S. Armed
25 Forces to circumvent the First Amendment by regulating speech as if it were
26 conduct.

27 539. A “major purpose” of the First Amendment is “to protect the free
28 discussion of governmental affairs.” Ariz. Right to Life Political Action Comm. V.

1 Bayless, 320 F. 3d 1002, 1008 (9th Cir. 2003) (citing Mills v. Alabama, 384 U.S.
2 214, 218, 86 S.Ct. 1434, 16 L. Ed. 2d. 484 (1966)). This includes “discussion of
3 candidates, structures and forms of government, the manner in which government is
4 operated or should be operated, and all such matters relating to the political
5 process.” Mills, 384 U.S. 214, 218-19 (1966).

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

12 541. “Selective exclusions from a public forum may not be based on
13 content alone, and may not be justified by reference to content alone.” Mosley, 408
14 U.S. at 97.

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

21 543. “[U]nder the conditions of modern government, litigation may well be
22 the sole practicable avenue open to a minority to petition for redress of grievances.”
23 Button, 371 U.S. at 430.

24 544. By prohibiting homosexual servicemembers from stating they are
25 homosexual or words to that effect, DADT impermissibly prohibits homosexuals
26 from participating meaningfully and freely in discussions of governmental affairs
27 and improperly inhibits their ability to debate public issues.

28 545. By prohibiting homosexual servicemembers from stating they are

1 homosexual or words to that effect, DADT prevents them from describing their
2 distinctive needs and interests to elected officials in order to advocate for changes
3 in those legislative policies that affect them personally.

4 546. By prohibiting homosexual servicemembers from stating they are
5 homosexual or words to that effect, DADT prevents them from participating in
6 litigation against the government, such as this action.

7 547. DADT impermissibly prohibits homosexual servicemembers from
8 participating meaningfully in their protected right to petition the government for a
9 redress of grievances.

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

19 549. “[E]fforts to organize the homosexual minority, ‘educate’ the public as
20 to its plight, and obtain for it better treatment from individuals and from the
21 government thus represent but another example of the associational activity
22 unequivocally singled out for protection in the very ‘core’ of association cases
23 decided by the Supreme Court.” Gay Student Orgs. of Univ. of New Hampshire,
24 509 F. 2d at 660 (citing Button, 371 U.S. at 428-31).

25 550. By prohibiting homosexual servicemembers from stating they are
26 members of homosexual interest groups, and thereby making a statement that tends
27 to identify them as homosexuals, DADT impermissibly prohibits homosexual
28 servicemembers from contributing to “effective public advocacy . . . enhanced by

1 group association.” Alabama, 357 U.S. at 460.

2 551. DADT, which provided grounds for Mr. Nicholson’s discharge based
3 solely on his statement that he was homosexual, violated Mr. Nicholson’s First
4 Amendment right to freedom of speech.

5 552. DADT’s imposed restraint on Lt. Col. Doe’s speech infringes his First
6 Amendment right to freedom of speech.

7 553. DADT’s imposed restraint on Lt. Col. Doe’s ability to meaningfully
8 participate in governmental affairs or a public political debate related to DADT,
9 violates his First Amendment right to petition the government for redress of
10 grievances.

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

14 555. DADT’s imposed restraint on Lt. Col. Doe’s ability to publicly state he
15 is a member of Log Cabin violates his First Amendment associational rights.

16
17 **D. Relief**

18 556. The Court has the authority to declare an act of Congress
19 unconstitutional and enjoin its enforcement, or enforcement of any government
20 policy, nationwide. See, e.g., Rothe Development Corp. v. Department of Defense,
21 545 F.3d 1023 (Fed. Cir. 2008), on remand 606 F. Supp. 2d 648 (W.D. Tex. 2009);
22 cf. Ali v. Ashcroft, 213 F.R.D. 390 (W.D. Wash.), aff’d, 346 F.3d 873 (9th Cir.
23 2003).

24 557. Based on the foregoing findings of fact and conclusions of law, the
25 Court grants Plaintiff’s request for a permanent injunction enjoining Defendants
26 from enforcing DADT (10 U.S.C. § 654).

27 558. Based on the foregoing findings of fact and conclusions of law, the
28 Court grants Plaintiff’s request for a declaration that DADT and the Department of

1 Defense regulations enacted thereunder are unconstitutional.

2 559. Plaintiff is entitled to attorney's fees pursuant to the Equal Access to
3 Justice Act, 28 U.S.C. § 2412.

4 560. Plaintiff is entitled to costs of suit.

5

6

7 IT IS SO ORDERED.

8

9

10 Dated: _____

11 Hon. Virginia A. Phillips
U.S. District Judge

12

13

14 Respectfully submitted June 21, 2010.

15

16 WHITE & CASE LLP

17

18 By: /s/ Dan Woods

19 Dan Woods
Attorneys for Plaintiff
20 Log Cabin Republicans

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