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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOG CABIN REPUBLICANS, a non-profit corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA and ROBERT M. GATES, SECRETARY OF DEFENSE, in his official capacity,

Defendants.

Case No. ED-CV04-8425 VAP (Ex)

PLAINTIFF LOG CABIN REPUBLICANS' MEMORANDUM OF CONTENTIONS OF FACT AND LAW

Trial Date: July 13, 2010
Time: 9:00 a.m.
Place: Courtroom of Judge Phillips

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I.

INTRODUCTION

This case involves constitutional law issues of national importance concerning the rights of homosexuals to serve in the United States Armed Forces. Plaintiff Log Cabin Republicans ("Log Cabin") asks the Court to declare unconstitutional the government's "Don't Ask, Don't Tell" policy ("DADT" or the "Policy"), including both the statute codified at 10 U.S.C. section 654 and its implementing regulations, and to enjoin further enforcement of DADT. Doing so will put a halt to the irrational law that prevents open homosexuals from serving in any capacity in our Armed Forces, allows the investigation and discharge of patriotic servicemembers, and requires brave men and women fighting and dying for our country in wars in Iraq and Afghanistan to conceal the core of their identity.

The government intends to present no evidence of any type to support its position that DADT is constitutional. The government intends to submit no testimony from any military or government official that DADT was or is necessary to achieve its ostensible purposes; no expert opinion testimony to that effect; and no reports or studies to that effect. All the evidence at this trial will be presented by Log Cabin, and that evidence will overwhelmingly demonstrate the unconstitutionality of DADT.

The government's disdain for evidence also ignores admissions by the highest civilian and military officials in the government. Those admissions include President Obama's recent statements that DADT "doesn't contribute to our national security" and "weakens our national security," and that reversing DADT "is essential for our national security"; and acknowledgements by Admiral Michael Mullen, Chairman of the Joint Chiefs of Staff, and Secretary of Defense Gates, that there is no evidence showing that DADT is necessary for unit cohesion and that assertions proffered to sustain DADT "have no basis in fact."

A mountain of evidence shows that no rational basis existed for DADT at the time Congress enacted the statute, and certainly does not exist today. Since DADT was enacted, time has failed to show that DADT achieves, or can achieve, its stated purpose, in a manner consistent with the requirements of our Constitution. This Court should declare DADT unconstitutional, enjoin its further enforcement, and restore the liberties and human dignity that DADT daily denies to patriotic American servicemembers who defend those liberties the world over.

II.

SUMMARY OF CLAIMS AND DEFENSES (L.R. 16-4.1)

Plaintiff's First Amended Complaint asserts, and plaintiff plans to pursue, two grounds on which DADT should be declared unconstitutional: (1) Due Process; and (2) First Amendment. Each of those two claims is discussed below, with the additional matters required by L.R. 16-4. As a threshold matter, this section also discusses the issue and evidence relating to plaintiff's standing to bring this lawsuit.

A. *Plaintiff's Standing to Sue*

Plaintiff Log Cabin Republicans is a nonprofit corporation organized under the laws of the District of Columbia. It is the oldest and largest organization associated with the Republican Party advocating equal rights for all Americans, including homosexuals. Log Cabin has over sixty chapters across the United States, a full-time Washington, D.C. office, chapters in California, a federal political action committee, and membership in the thousands, including members who are residents of California.

Log Cabin's membership includes current, retired, and former homosexual members of the U.S. armed forces, including homosexual Americans who served in the United States Armed Forces but who were separated from the Armed Forces because of DADT and/or were otherwise injured by DADT due to, for example, the inability to reenlist, forced resignations, denial of promotions and/or separation

proceedings. Log Cabin has identified two members whose situations confer associational standing on it: Lt. Col. John Doe, and John Alexander Nicholson.

Lieutenant Colonel "John Doe," an officer in the United States Army Reserves who recently completed a tour of duty in Iraq, is a member of Log Cabin Republicans. Lt. Col. Doe joined Log Cabin prior to the filing of the original Complaint on October 12, 2004. The Court has granted Lt. Col. Doe permission to participate in this litigation using a pseudonym; he is unable to appear personally under his own identity at the trial due only to the Government's refusal to agree that he will not be subject to consequences under DADT if he does so. Lt. Col. Doe is identified here by this pseudonym because he is homosexual and wishes to continue his service in the United States Army without fear of investigation, discharge, stigma, forfeiture of constitutional civil liberties, harassment, and other negative repercussions resulting from enforcement of DADT.

As a result of the mandatory language of DADT (see 10 U.S.C. § 654(b)(2) ["A member of the armed forces shall be separated from the armed forces…if…the member has stated that he or she is a homosexual…."]), Lt. Col. Doe may not communicate the core of his emotions and identity to others in the same manner as his heterosexual comrades, nor can he exercise his constitutionally protected right to engage in private, consensual homosexual conduct without intervention of the United States government. He is unable to identify himself publicly as a member of Log Cabin, because if he were to identify himself and his role in this case, he would be subject to investigation and discharge under DADT. He is also, therefore, unable to fully participate in this litigation and testify at trial for fear he will be discharged.

John Alexander Nicholson is also a member of Log Cabin Republicans. Mr. Nicholson joined the membership rolls of the Log Cabin Republicans in April 2006 (prior to the filing of the First Amended Complaint). In 2006, Log Cabin's Georgia

chapter awarded Mr. Nicholson honorary membership. He has been a member of Log Cabin Republicans since April 2006 .

Mr. Nicholson enlisted in the United States Army just days after the September 11, 2001 attacks. In February 2002, Mr. Nicholson's sexual orientation became known to members of the Army when a fellow servicemember intercepted and read a personal letter from him to another man in Portuguese and revealed the contents of the letter to other servicemembers. After Mr. Nicholson's commanding officer confronted him and notified him of the allegations regarding his sexual orientation, to avoid a less-than-honorable discharge from the Army and an investigation of his personal life, Mr. Nicholson decided to admit his sexual orientation. He was separated on March 22, 2002 as a result of his statement. If DADT were repealed or invalidated, Mr. Nicholson would reenlist in the United States Armed Services.

An association has standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). Plaintiff's standing is to be evaluated as of April 28, 2006, the date of filing of the First Amended Complaint. County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991); Forum for Academic and Institutional Rights, Inc. v. Rumsfeld, 291 F. Supp. 2d 269, 289 (D.N.J. 2003), rev'd on other grounds, 390 F. 3d 219 (3rd Cir. 2004), rev'd, 547 U.S. 47, 126 S. Ct. 1297, 164 L.Ed.2d 156 (2006); May 27, 2010 Order Denying Summary Judgment (Dkt. 170), at pp. 13-15. Defendants cannot contest that plaintiff meets the requirements of the second and third prong of the Hunt test. Consequently, plaintiff need only demonstrate that its members would otherwise have standing to sue in their own right.

To show standing, a plaintiff must demonstrate: "(1) he suffered or will suffer an 'injury in fact' that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to defendant's challenged action; and (3) the injury is likely, not merely speculative, and will be redressed by a favorable decision." Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1171 (9th Cir. 2002); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). These elements will be established at trial through the testimony of Mr. Nicholson as to his personal situation, and through the Declaration of John Doe and the testimony of other individuals personally familiar with his situation.

B. *Claim 1: DADT Is Unconstitutional Because It Violates the Fifth Amendment Guarantee of Substantive Due Process*

(a) Summary of Plaintiff's claims

1. Factual contentions

The enactment of DADT in 1993 came against a backdrop of longstanding prejudice and animus against homosexuals; in enacting DADT, Congress ignored numerous reports and studies, prepared by or for the government itself, that concluded that there was no basis for excluding homosexuals from service in the military.

Before the 20th century, homosexual conduct was viewed as something all people were prone to engage in during moments of moral weakness; the concept that certain people have an enduring or innate homosexual identity, as in a characteristic behavior of one type of person called a homosexual, did not exist. During this period, military regulations did not speak of homosexual persons. Military policies expressly aimed at excluding homosexuals from service arose for the first time in the World War II era. By the end of World War II, homosexuals were deemed "unsuitable for military service" and were officially banned from all branches. Because it was difficult to pin down what it meant to have a proclivity to

engage in homosexual conduct, authorities came to rely heavily on stereotypes, especially the association of effeminacy with homosexuality.

In 1957 the Secretary of the Navy commissioned a report to investigate the Navy's homosexual exclusion policy. The report, referred to as the "Crittenden Report" (Ex. 4), concluded that no factual data exists to support the contention that homosexuals are a greater security risk than heterosexuals.

In 1981, a military-wide ban on homosexuals in uniform was implemented. The new policy modified the language that had called homosexual people unsuitable for military service, opting instead for language stating that "homosexuality is incompatible with military service," and removed any discretion previously enjoyed by different branches or individual commanders.

Two studies commissioned in 1988 by the military's Personnel Security Research and Education Center ("PERSEREC"), however, found that the ban on homosexual service was unnecessary and damaging and found that sexual orientation had no relationship to job performance or unit cohesion. The first PERSEREC report, Nonconforming Sexual Orientation in the Military and Society (Ex. 5), found that "having a same-gender or an opposite gender orientation is unrelated to job performance in the same way as being left- or right-handed"; it pointed to growing tolerance of homosexuality and concluded that "the military cannot indefinitely isolate itself from the changes occurring in the wider society, or which it is an integral part." The second PERSEREC report, Preservice Adjustment of Homosexual and Heterosexual Military Accessions: Implications for Security Clearance Suitability (Ex. 100), found that "the preponderance of the evidence presented indicates that homosexuals show pre-service suitability-related adjustment that is as good [as] or better than the average heterosexual," a result that appeared to "conflict with conceptions of homosexuals as unstable, maladjusted persons."

In 1992, the GAO conducted a study of the homosexual exclusion policy,

Defense Force Management: DOD's Policy on Homosexuality (Ex. 6). Its researchers looked at seventeen different countries and eight police and fire departments in four U.S. cities, reviewed military and nonmilitary polls, studies, legal decisions, and scholarly research on homosexual service, and recommended in an early draft that Congress "may wish to direct the Secretary of Defense to reconsider the basis" for homosexual exclusion. The GAO deleted this suggestion from its final report only because Congress had introduced legislation "to prohibit discrimination by the armed forces on the basis of sexual orientation."

On January 29, 1993, President Clinton signed a memorandum directing the Secretary of Defense to develop a policy "ending discrimination on the basis of sexual orientation in determining who may serve in the Armed Forces of the United States" and requesting submission of a draft Executive Order that embodied a new, non-discriminatory policy. The Secretary then commissioned a study from the National Defense Research Institute of the RAND Corporation, asking it to provide "information and analysis that would be useful in helping formulate the required draft Executive Order." The RAND study, Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment (Ex. 8) was a large interdisciplinary effort prepared by over 70 social scientists including, among others, a sociologist, psychologist, anthropologist, two physicians, a statistician, and a lawyer, as well as invited representatives from each of the branches of the U.S. Military. The RAND researchers' mission was to determine whether it was possible to end discrimination "in a manner that is practical, realistic, and consistent with the high standards of combat effectiveness and unit cohesion our armed forces must maintain." Teams of researchers studied foreign militaries, unit cohesion literature, police and fire departments, public health related issues, and organizational issues. They based their conclusions on evidence from six countries and data analyses from hundreds of studies of cohesion.

The study ultimately concluded that sexual orientation alone was "not

germane" to determining whether an individual was fit for military service, that permitting openly homosexual servicemembers to serve would not impair how the U.S. military functioned, and that sexual orientation was irrelevant to determining whether an individual was fit for military service. It also reported that permitting openly homosexual servicemembers to serve did not impair or reduce the functioning or effectiveness of numerous foreign militaries; that most U.S. police and fire departments had integrated homosexuals, and doing so actually enhanced cohesion and improved the department's community standing and organizational effectiveness; and that circumstances could exist under which the ban on homosexuals in the military could be lifted with little or no adverse consequences for recruitment or retention.

Also in 1993, the GAO reported in a separate study, Homosexuals in the Military: Policies and Practices of Foreign Countries (Ex. 7), that permitting openly homosexual servicemembers to serve did not impair the functioning of numerous foreign militaries. The GAO studied twenty-five foreign militaries, with special focus on Israel, Canada, Germany, and Sweden. In that same year another agency, the Army Research Institute ("ARI"), was assigned to conduct extensive research regarding President Clinton's proposal to lift the ban on homosexuals from serving openly in the Armed Forces. However, ARI was never given the 'green light' to fully pursue its assignment, and its research was hobbled by stringent restrictions on seeking attitudes and opinions from servicemembers.

Finally, in 1993, the Secretary of Defense also directed the formation of a working group ("the Military Working Group") to address the same issue that he asked RAND to address and submit recommendations to Congress on the U.S. Armed Forces' homosexuality policy. The Military Working Group's report (Ex. 205) ultimately found that DADT would be best for the U.S. military, but in doing so the Group did not review the final RAND report; never weighed research or empirical data about service of homosexual servicemembers in the military; and

ignored evidence regarding the relevance of sexual orientation to military service. In fact, members of the 1993 Military Working Group decided to retain the ban on openly homosexual servicemembers before ever convening.

While RAND and the Military Working Group prepared their reports, Congress held hearings regarding the ban. But those hearings ignored research, studies, and other evidence demonstrating that permitting openly homosexual individuals to serve in the U.S. Armed Forces would have no adverse effect on unit cohesion, morale, order, discipline, or military readiness. For example, the military suppressed the 1957 Crittenden report, and also suppressed the PERSEREC reports. The Pentagon attempted to disavow the PERSEREC reports on the basis that they were drafts. Congress also ignored evidence that comparable foreign militaries had already changed their policies to allow open service by homosexuals without any negative impact on unit cohesion. In enacting DADT, Congress relied primarily on three influential individuals, General Colin Powell, Senator Sam Nunn, and Professor Charles Moskos, each of whom argued against lifting the ban for what were actually personal, not military, reasons.

Congress's blindfolded, irrational determination to enact the DADT statute was also heavily influenced by a well-organized campaign by religious conservatives and others to stigmatize homosexuals and cast them as a threat to the military's effectiveness and core values. In testimony to Congress and public statements, this campaign made unfounded and unsupported assertions such as, for example, that homosexuality is a moral virus; that the homosexual lifestyle is unhealthy; that homosexuals are perverted and promiscuous; that homosexual servicemembers are rife with disease; that homosexuals would increase transmission of sexually transmitted diseases, including AIDS; that homosexuals are abnormal and mentally unstable; that homosexuals are more prone to criminal activity; that homosexuals are sexual predators and pedophiles; that servicemembers could not respect and take orders from individuals who enjoy anal

sex; and that homosexuals are cowards and thieves. These assertions were echoed in the Military Working Group's report as well. Behind the scenes, members of the Pentagon acknowledged that the ban on homosexuality in the military was motivated primarily by moral concerns, not concerns for unit cohesion. In sum, the decision to exclude openly homosexual servicemembers under DADT was based on animus, prejudice, hostility, ignorance, and fear of homosexuals. The unit cohesion and other rationales stated in the DADT statute were mere pretext.

Although all sides were given the opportunity to be heard at the Congressional hearings on homosexuals serving in the armed forces, each side was not heard in equivalent proportions. There was essentially no consultation of empirical research, and the ban itself prevented active-duty homosexual service members from participating in the debate. Congress and the President also ignored the nation's experience integrating African-Americans in the U.S. Military. No research has ever shown that the presence of openly homosexual servicemembers would cause or has caused the deterioration of morale, good order and discipline, or unit cohesion in the military, any more than the presence of women or black men in previous decades caused such ill effects. The arguments and fears of those who have historically opposed openly homosexual service has precisely echoed the arguments and fears of those who opposed racial integration in the military following World War II.

Finally, during the Congressional deliberations regarding DADT, there was no discussion regarding the impact the law would have upon women servicemembers.

Since the enactment of DADT, hundreds of servicemembers a year – in some years more than 1,000 – have been separated from the United States Armed Forces pursuant to DADT. In all, over 13,000 individuals have been discharged under DADT. These separations have deprived the military of personnel with critical occupations and skills, with no congruence to the ostensible goals of the policy. All

available empirical evidence shows that DADT does not advance – in fact, bears no relation to – the stated purposes of the policy (military readiness, morale, good order and discipline, and unit cohesion). The military's own actions demonstrate that as well: the evidence shows that DADT has been applied more frequently in peacetime than in times of war, when unit cohesion, as defendants posit the concept, is in theory most vital. Indeed, a military regulation, promulgated in 1999 and still in force today, FORSCOM Regulation 500-3-3 (Ex. 92), allows active duty deployment of homosexual servicemembers awaiting resolution of the allegation of homosexual conduct or statements, and indeed instructs officers not to discharge reservists and National Guard troops based on homosexuality from units on or about to be placed on active duty status, but to postpone their discharge until their return to the United States. The year 2001, during most of which the United States was not in a state of war, yielded the highest number of discharges under DADT.

Since the commencement of hostilities in Afghanistan in October 2001 and in Iraq in March 2003, discharges of homosexual members of the United States Armed Forces have decreased dramatically. The Department of Defense separated 49% fewer servicemembers under the Policy in fiscal year 2008 than it separated in fiscal year 2001.

Numerous studies and research since enactment of DADT have demonstrated that DADT does not advance its stated goals, and hence has no rational basis. For example, ARI studied the situation in Canada and concluded in a report for the Defense Department released in 1994 (Ex. 70) that anticipated damage to readiness never materialized after the ban was lifted there, and that the Canadian Forces ("CF") experienced "virtually no consequences of lifting the ban on known homosexuals in the CF for all important dimensions." Similarly, a 2001 Palm Center study of the San Diego Police Department (Ex. 278) echoed the finding of the RAND study that integration of open homosexuals into U.S. police and fire departments and the adoption of nondiscrimination policies did not impair

effectiveness, even though many departments were characterized as highly homophobic. A statistical analysis of United States military units in the Iraq and Afghanistan conflicts showed no correlation between the presence of openly homosexual servicemembers in the unit and the unit's cohesion, quality, or combat readiness. And an independent report in July 2008 by a bipartisan panel of retired flag officers (Ex. 264) found that lifting the ban is "unlikely to pose any significant risk to morale, good order, discipline, or cohesion."

The evidence also shows that in each year from 1994 through the present, Don't Ask, Don't Tell has disproportionately impacted women in the Armed Forces. Between 1994 and 2003, women constituted less than 20% of the United States Armed Forces yet accounted for over 40% of the servicemembers discharged under the Policy. And in 2008, women accounted for 14% of the Armed Forces but accounted for 36% of those discharged under the Policy.

Expert testimony will show that DADT uniquely impairs unit cohesion and military effectiveness among female servicemembers, since many female servicemembers, whether or not they are lesbian, must choose whether to perform their duties with full competence and risk being labeled a lesbian or to purposely act in a more stereotypically "feminine" but less competent manner. In addition, DADT discourages female servicemembers from reporting sexual harassment, impairing the unit cohesion and morale of all female servicemembers.

DADT applies to all members of the United States Armed Forces regardless of whether they serve in combat or non-combat positions. Military personnel in non-combat positions, for example instructors at the service academies, are also subject to DADT and some voluntarily leave military service because of the effects of the Policy.

Numerous servicemembers in occupations deemed "critical" by the Defense Department have been and continue to be separated from service under DADT. These include voice interceptors, interrogators, translators, explosive ordinance

disposal specialists, signal intelligence analysts, and missile and cryptologic technicians. Among the thousands of others discharged under DADT are servicemembers with skills in intelligence, combat engineering, medicine, JAG Corps members, military police and security, nuclear, biological, and chemical warfare, missile guidance and operation, medical personnel, dental care technicians, and ophthalmologists. DADT even applies equally to military judges. Discharges of servicemembers such as these continue to occur despite shortages in such personnel and despite force-wide recruitment and retention challenges, and, among other serious consequences, lead to inadequate medical attention for hundreds of injured National Guard and Army reserve soldiers, excessive delays in the delivery of care, and a negative impact on morale.

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

Numerous separated servicemembers have skills in important foreign languages such as Arabic, Chinese, Farsi, Korean, and Russian. Discharging individuals with these language skills has demonstrable negative effects on intelligence gathering, analysis, communications, force support, and hence national security.

Far from enhancing the quality, readiness, and cohesion of the military, DADT in fact impairs all those measures. Despite ongoing recruitment and retention shortfalls, DADT has deterred both heterosexual and homosexual Americans who are able, committed, and patriotic from enlisting to fight for their country during a time of two wars. In addition, because of those shortfalls, the U.S. military now recruits less qualified servicemembers – including thousands of servicemembers with low scores on military aptitude tests, felony and serious misdemeanor convictions, and substance abuse that would normally prohibit

service – rather than admitting openly homosexual individuals. These recruitments, which on their face (and confirmed by both independent research and government studies) harm rather than advance the objectives of a high-quality, capable military force, are completely unnecessary, and irrational, since the executive branch has the authority to suspend application of Don't Ask, Don't Tell if separation would not be in the best interest of the armed forces, to ensure the nation's combat effectiveness.

The irrationality of DADT is starkly illustrated by the military's use of "moral waivers" – invitations to enlist despite a prior record of criminal activity or substance abuse that would normally prohibit entry, authorized under 10 U.S.C. § 504. The United States Army includes kidnapping, child abuse, making terrorist threats, hate crimes, rape, and murder among the offenses permissible under the "moral waiver" program for new recruits. The military has in fact issued moral waivers for servicemembers convicted of murder, kidnapping, assault, illegal drug use, and making terrorist threats, and currently counts 4,000 or more felons among its ranks. Tens of thousands of convicted felons, individuals convicted of serious misdemeanors, including assault, and illegal drug abusers have been allowed to enlist.

Members of the United States Armed Forces work closely with personnel from other agencies, such as the CIA, NSA, FBI, and the Department of Defense, all of which prohibit discrimination on the basis of sexual orientation. Even the Commander in Chief can be openly homosexual without repercussion. No analogous civilian agency, such as police or fire departments, that allows homosexuals to serve openly has reported any negative impact on cohesion, readiness, morale, or discipline.

While Log Cabin does not contend that the Court should base its determination of DADT's constitutionality on public opinion, it is noteworthy that part of the basis for Congress's stated justification of DADT in 1993 were opinion

polls that purportedly demonstrated anti-homosexual sentiment among the American public and the military. Polling since enactment of DADT, however, demonstrates that both public and military opinion has become more tolerant towards homosexuals than it was in 1993; polls show an erosion of support for DADT and little and diminishing concern that the presence of openly homosexual servicemembers will negatively impact issues of privacy, sexual tension, and the like.

The government has recently emphasized, as justification for the Policy, the privacy concerns of heterosexuals who would supposedly be made uncomfortable serving alongside homosexuals. This consideration is, again, pretextual, motivated by animus and prejudice. It is supported by no evidence or research. It invokes false stereotypes, such as that homosexuals lack modesty themselves, or will stare at their fellow servicemembers in the shower, or will otherwise misbehave in ways that heterosexuals would not. It ignores the fact that the military can, and does, punish sexual misbehavior regardless of the sexual orientation of the perpetrator or the victim, and it therefore irrationally singles out homosexuals for an additional, superfluous, layer of restrictions. The supposed "privacy rationale" deserves the same lack of regard as the concern expressed in 1942, in connection with the racial integration of the military, that "the minute the negro is introduced in to general service… the high type of man that we have been getting for the last twenty years will go elsewhere and we will get the type of man who will lie in bed with a negro."

At least 23 countries allow homosexual individuals to serve openly in their respective armed forces; these countries include Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Estonia, Finland, France, Ireland, Israel, Italy, Lithuania, Luxembourg, the Netherlands, New Zealand, Norway, Slovenia, South Africa, Spain, Sweden, Switzerland, and the United Kingdom. American forces are stationed in many of those countries, often alongside members of those nations' armed forces, and they study and train together with those nations' forces,

frequently as seamlessly integrated units. None of these nations – including several which have specifically studied the issue – has reported any detriment to any metric of military effectiveness, including unit cohesion, readiness, morale, retention, good order, or discipline. Indeed, in our most closely allied nations such as Britain, Canada, and Israel, homosexuals serve openly in the highest positions. In both Afghanistan and Iraq, members of the United States Armed Forces have fought and continue to fight side by side with coalition forces from nations whose forces include openly homosexual servicemembers and commanding officers, with no adverse effects.

Independent studies and research confirm this. In 2000, for example, after Britain lifted its ban, the Palm Center at UCSB conducted exhaustive studies to assess the effects of openly homosexual service in Britain, Israel, Canada, and Australia, and found in detailed reports (Ex. 77-80) that not one person had observed any impact or any effect at all that "undermined military performance, readiness, or cohesion, led to increased difficulties in recruiting or retention, or increased the rate of HIV infection among the troops." A follow-up study by the same institution in 2010 (Ex. 22), for those countries plus South Africa, found the same. And top military commanders, including the Chairman of the Joint Chiefs of Staff and the Chairman of the NATO Military Committee, have confirmed publicly that open service by homosexuals has no impact on military effectiveness and does not undermine unit cohesion or combat readiness.

Notwithstanding its stated objectives of unit cohesion, morale, good order and discipline, and military readiness, DADT in fact undermines these objectives. Log Cabin's experts will testify in detail as to the effects and consequences of DADT on these objectives, including rape and violence, mental health implications ranging from depression to suicide, and incursions into heterosexual servicemembers' privacy during military investigations. Log Cabin will also present the testimony of several individuals who have been discharged under

DADT, or whose comrades have been, as well as expert witnesses' summaries of many other cases, to illustrate the irrational effects of the policy and how DADT does not advance, and indeed hinders, its objectives.

The President has admitted that DADT weakens America's national security by preventing patriotic Americans from serving their country, and both he and the Chairman of the Joint Chiefs of Staff have admitted that DADT forces members of the armed services to lie about who they are in order to defend their fellow citizens, and thereby encumbers and compromises their careers as they live a lie.

In addition to its costs in human dignity and military morale, DADT imposes significant financial burdens on the nation; the cost to U.S. taxpayers of separating thousands of capable, needed servicemembers and recruiting and training replacements is estimated in the hundreds of millions of dollars. (Exs. 9-10.)

Since DADT was enacted, numerous senior military commanders and civilian elected officials, among them some who supported the Policy at the time of its enactment, have criticized the Policy and/or called for its abandonment or repeal. Among many others, these individuals include former NATO Supreme Allied Commander Gen. Wesley Clark; two former Chairmen of the Joint Chiefs of Staff, Gen. John Shalikashvili and Gen. Colin Powell; former Republican Congressman Bob Barr; former Republican Senator Alan Simpson; and former Secretary of Defense William Cohen, on whose watch DADT was enacted. And as the Court is of course aware, the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff have stated that they believe the policy should be reviewed and repealed.

However, though Congress and the Defense Department are considering a repeal of DADT, that is neither certain to be enacted, nor would it be immediate and unconditional in effect. Meanwhile, there has been no stay in the application or enforcement of the Policy, and no stay of investigations pursuant to the Policy. Without a change in DADT, the Department of Defense will continue to authorize

the separation of servicemembers for homosexual acts, for statements that demonstrate a propensity or intent to engage in homosexual acts, or for homosexual marriage or attempted homosexual marriage.

Against this overwhelming evidence that DADT was irrational in its enactment and has proven to be irrational in its implementation and enforcement, lacking congruence to its stated objectives, and therefore violative of the constitutional rights of servicemembers and plaintiff's members, defendants intend to produce no witnesses at trial to testify that, since its enactment, DADT has actually furthered its stated purposes or that DADT was not the result of animus and prejudice against homosexuals. They will produce no study, report, analysis, or other document which shows that, since its enactment, DADT has furthered its stated purposes or that the enactment and maintenance of DADT was not the result of animus and prejudice against homosexuals. Indeed, they have affirmed repeatedly that they intend to produce no evidence whatsoever beyond the legislative history of the DADT statute – which contains no evidence supporting the congruence of the statute to its stated objectives.

In sum, the assertion contained in 10 U.S.C. § 654 that DADT advances morale, good order and discipline, and unit cohesion in the Armed Forces was at the time of its enactment, and is today, without factual support. No research has ever shown that open homosexuality impairs military readiness; that homosexual servicemembers are more likely than heterosexual servicemembers to reveal classified or otherwise confidential information; that homosexual servicemembers are more likely to violate military codes of conduct, the UCMJ, or Department of Defense regulations; that homosexual servicemembers possess a physical or psychological defect that renders them unfit for service; or that the presence in the Armed Forces of persons who demonstrate a propensity or intent to engage in homosexual acts creates an unacceptable risk to the standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

2. Legal Contentions

While the power of Congress to pass legislation is of course broad, no legislation, even in the military context, is exempt from constitutional scrutiny. Under any form of rational basis review, the means adopted in a statute must reasonably relate to the purposes of the statute, and they must meet constitutional requirements. Accordingly, this Court may not abdicate its responsibilities and simply rubber-stamp Congress's conclusions, as the government would have it do; it must review whether a rational basis exists for the conclusions.

a. The Standard of Review Announced in Witt v. Air Force Applies

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

Witt recognized that the Supreme Court in Lawrence investigated the extent of the liberty interest at stake, grounded its decision in cases which applied heightened scrutiny, and sought more than merely a hypothetical state interest to justify the challenged law. Id. at 816-17.[1] In sum, Witt held, the Supreme Court

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

applied a heightened level of scrutiny – "something more than traditional rational basis review." Id. at 817.

Faced with Major Witt's as-applied challenge to DADT, the Ninth Circuit defined the level of heightened scrutiny Lawrence demands in such cases. Id. at 818-19. But nothing in Witt bars applying the same standard to a facial challenge; Witt is simply silent on the issue.

It is also evident that Lawrence requires more than the most deferential form of constitutional review here because Lawrence itself was a facial challenge. Lawrence reviewed the Texas sodomy statute on its face, generally examining "the validity of … making it a crime for two persons of the same sex to engage in certain intimate sexual conduct." 539 U.S. at 562. The question was whether the statute was unconstitutional as to any two persons, not just the two specific men involved. See Lawrence v. State of Texas, 41 S.W.3d 349, 350 (Tex. App.-Houston [14th Dist.] 2001).

Because Lawrence mandates a heightened level of scrutiny here, the Court should apply the standard of review forth in Witt – that "when the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in Lawrence, the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest." 527 F.3d at 819. DADT intrudes upon the personal and private lives of homosexuals in a manner that implicates the rights identified in Lawrence.

It is appropriate to apply a heightened or intermediate scrutiny substantive due process test, such as that announced in Witt, even in the context of a facial challenge to a statute. See, e.g., Lawrence; Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed.2d 674 (1992) (applying undue burden test to facial substantive due process abortion challenge). Heightened scrutiny is additionally required given that sexual intimacy is recognized as

important in U.S. society, is a protected liberty interest under Lawrence, and given that servicemembers are not expected to remain forever celibate. See Witt, 527 F.3d at 818, n.6 (acknowledging that when a statute impairs a "significant" liberty interest like that recognized in Lawrence, some level of heightened scrutiny is applied).

Moreover, as with the active rational basis test described below, application of the Witt standard places the burden on the government to demonstrate that each element of the test is satisfied. The Witt Court recognized that the Supreme Court in Sell v. United States, 539 U.S. 166, 178, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003), and in Lawrence, 539 U.S. at 578, required the state to justify its intrusion into an individual's recognized liberty interest. Witt, 527 F.3d at 818.

b. Even if the Witt Standard Does Not Apply, the Court Must Apply Active Rational Basis

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

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

Romer v. Evans, 514 U.S. 620, 629, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996), also employed a heightened rational basis review in examining the

constitutionality of Colorado's Amendment 2, which precluded the state from enacting legislation designed to protect homosexuals from discrimination. The Supreme Court found Amendment 2 unconstitutional because "its sheer breadth [was] so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects." 514 U.S. at 632. Romer requires that legislation must be "grounded in a sufficient factual context" for the Court to ascertain some relationship between the legislation and its asserted purposes. Id. at 632-33.

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

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

The Supreme Court in Lawrence employed the more searching review it employed in Cleburne and Romer. Indeed, Lawrence identified Romer as among the principal authorities that eroded the foundations of Bowers v. Hardwick, 478

U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986). Lawrence, 539 U.S. at 574-76.

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

c. Judicial Deference to Military Affairs Does Not Rescue DADT

Nor do considerations of deference to military judgment immunize DADT from this heightened constitutional scrutiny. Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997), on which the government has relied for this proposition in earlier briefing, does not compel such a result, because the two core underpinnings of that case have been compromised.[2] Since that decision, the Supreme Court has upheld a constitutional challenge to the government's policy of denying procedural due process to an American citizen classified as an enemy combatant. Hamdi v. Rumsfeld, 542 U.S. 507, 533, 159 L. Ed. 2d 578, 124 S. Ct. 2633 (2004). It rejected the government's argument that federal courts should only review that policy under a "very deferential 'some evidence' standard" in light of the grave threat terrorism poses to the Nation and the "dire impact" due process would have on the central functions of war-making. Id. at 527, 534. In Hamdan v. Rumsfeld, 548 U.S. 557, 588, 165 L. Ed. 2d 723, 126 S. Ct. 2749 (2006), the Supreme Court likewise held that "the duty rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty."

[2] In addition, as the Court has noted more than once, Philips v. Perry is an equal protection case, not a substantive due process case, so it does not control here. See June 9, 2009 Order (Dkt. 83), at p. 17 n.5; July 24, 2009 Order (Dkt. 91), at p. 2.

Military commanders are not shamans or high priests tasked with interpreting mysteries unfathomable to lesser mortals – they are professionals in an occupation subject to civilian control, a fundamental principle since the first days of the Republic. The Ninth Circuit has accordingly not hesitated to subject military-related legislation to a heightened "active" rational basis review. Pruitt, 963 F.2d at 1165-66. Pruitt made clear that courts of this circuit must scrutinize military rationales in the same manner employed by the Supreme Court in Cleburne. Id. Indeed, "deference does not mean abdication" and Congress cannot subvert the guarantees of the Due Process Clause merely because it is legislating in the area of military affairs. Witt, 527 F.3d at 821. The Supreme Court has noted that "military interests do not always trump other considerations, and we have not held that they do," Winter v. Natural Resources Defense Council, Inc., ___ U.S. ___, 129 S.Ct. 365, 378, 172 L.Ed.2d 249 (2008). That caution is even more applicable where, as here, constitutional considerations are implicated.

Finally, the government's appeal to deference to military judgment is particularly ironic in view of the fact that the Commander in Chief, the Secretary of Defense, and the current Chairman of the Joint Chiefs of Staff (as well as at least two former Chairmen and scores of retired general and flag officers), all agree that DADT is not working, does not accomplish its stated objectives, and should be ended.

d. Post-Enactment Evidence is Relevant to the Constitutional Analysis

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

The government's position is that a statute "must be reviewed at the time of enactment and is not subject to challenge on the ground of changed circumstances." Once rational, always rational, the government contends. Even if such an extreme

position were necessary to avoid the supposed evil of "periodic judicial review [of legislation] on the basis of changed circumstances," as the government puts it, that supposed evil is a straw man which should not prevent this Court from scrutinizing DADT. Furthermore, the government's "once rational, always rational" contention is untrue: if legislation once considered to have been enacted with a rational basis were forever immunized from review, then no statute, once found constitutional under rational-basis review, would ever be subject to a second challenge, no matter how irrational or constitutionally odious it later is seen to be. If such an immunity were the law, the nation would still, for example, have laws in place for forced sterilization. "Three generations of imbeciles are enough." That infamous phrase from Justice Oliver Wendell Holmes' opinion in Buck v. Bell, 274 U.S. 200, 207, 71 L. Ed. 1000, 47 S. Ct. 584 (1927) stands today as perhaps the foremost expression of a public policy once deemed rational but since overtaken by history, a monument to discredited theories of social engineering. "Don't Ask, Don't Tell" should join it in the dustbin of irrational public policies.

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

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

Lawrence, 539 U.S. at 578-79.[3] That DADT lacks a rational basis can be shown by evidence of new or changed circumstances, such as polling data showing the lack of support for the policy both in the military and in the public at large.

But even if it were the case that the statute should be reviewed without consideration of changed circumstances, that does not preclude this Court from re-examining the rationality of the statute at the time based on evidence not previously presented or considered, such as the expert opinion testimony that Log Cabin proffers here. Log Cabin will show at trial the lack of a rational basis for DADT not simply by evidence of new or changed circumstances, such as polling data showing the lack of support for the policy both in the military and in the public at large, but also by extensive expert testimony explaining that there was no rational basis for Congress's original determination at the time of the enactment of DADT. That testimony shows that it is not simply the "wisdom" of DADT that is lacking, but the very rational basis for the policy.

Numerous courts adjudicating constitutional challenges to legislation, both facial and as-applied challenges, have recognized that it is appropriate to consider evidence outside the legislative history of the statutes, including evidence developed after enactment of the statute that sheds light on the existence of a rational basis for the statute, either at the time of enactment or as implemented following enactment. See, e.g., Western & Southern Life Ins. Co. v. State Board of Equalization, 451 U.S. 648, 652, 673-74, 101 S. Ct 2070, 68 L.Ed.2d 514 (1981) (apparently a facial challenge); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (as-applied challenge); Planned

[3] Lawrence itself recognized that "the deficiencies in Bowers became more apparent in the years following its announcement," and noted such factors as the diminishing number of states which outlawed sodomy, the relaxed pattern of enforcement of sodomy laws where they did exist, and substantial and continuing criticism of Bowers since its announcement. Lawrence, 539 U.S. at 573, 576. As Justice Kennedy wrote, "History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." Id. at 572.

Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L.Ed.2d 674 (1992) (facial challenge); Lawrence v. Texas, 539 U.S. 558, 572, 576-77, 156 L. Ed. 2d 508, 123 S. Ct. 2472 (2003) (facial challenge); Annex Books, Inc. v. City of Indianapolis, 581 F.3d 460 (7th Cir. 2009).

Log Cabin's experts' testimony will show that the statute, when enacted, lacked a rational basis, or was motivated by unconstitutional animus, so that, even independent of later events, the DADT policy did not have a rational basis when adopted and is therefore unconstitutional. The experts' opinions may be informed by post-enactment analysis, such as empirical studies of the actual effects of DADT and whether these effects are congruent with its stated purpose, but they do not arise only from new facts or changed circumstances since the enactment of DADT. Other events subsequent to the adoption of DADT – such as changed military and public opinion, and the changed views of those who formerly supported the policy like Gen. Powell – simply bolster the position that DADT is not rationally designed to accomplish its stated purposes, but do not vitiate Log Cabin's independent showing that DADT had no rational basis for its enactment.

e. Don't Ask Don't Tell Violates the Constitution's Guarantee of Substantive Due Process

Scrutiny of legislative enactments to ensure that their means are both congruent with their stated objectives, and constitutional in themselves, is not a new concept. It is a deeply-rooted principle of constitutional jurisprudence. As long ago as 1917 – when Plessy v. Ferguson was still the law of the land – the Supreme Court invalidated a municipal residential segregation ordinance because despite its supposedly laudable objectives, the means employed to reach those objectives were neither rationally related to them, nor constitutional. Though the factual setting of the Supreme Court's decision is distasteful, its analysis is instructive here.

In Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917), a Louisville, Kentucky ordinance prohibited the occupancy by a colored person of

property on a block where the majority of lots were occupied by white persons, and vice versa. The stated objectives of the ordinance were to "prevent[] racial conflicts; … maintain racial purity; … [and] prevent[] the deterioration of property owned and occupied by white people." 245 U.S. at 73-74. The Supreme Court first observed that local legislation under the police power "is not to be interfered with by the courts where it is within the scope of legislative authority and the means adopted reasonably tend to accomplish a lawful purpose," id. at 74 (emphasis added); and it acknowledged "[t]hat there exists a serious and difficult problem arising from a feeling of race hostility," but noted that "its solution cannot be promoted by depriving citizens of their constitutional rights and privileges." Id. at 80-81. The Court held that the means chosen by the statute – a prohibition on the sale of property to an individual who would be a minority race on the block – was not rationally related to its stated purposes of maintaining "the purity of the races" and property values. As to the first purpose, the ordinance did not prohibit the employment of servants of one race in the household of another, nor did it prohibit "nearby residences" of families of opposite race, so long as they were on a different block; and as to the second, "property may be acquired by undesirable white neighbors or put to disagreeable though lawful uses with like results [depreciation of property values]." Id. at 81-82. Because the prohibitions of the ordinance were not what today would be called rationally related to its objectives, and because the effect of the ordinance was to interfere with a constitutionally protected right – the right to acquire, enjoy, and dispose of property – the Supreme Court invalidated the ordinance.

Making allowances for changing times and changing mores, the issues presented in this case echo those that confronted the Supreme Court in Buchanan. Though a racial prohibition like the Louisville ordinance is unthinkable today, the type of animus and prejudice that gave rise to it has only found a new target. Congress's objectives in enacting DADT are laudable: enhancing military

capability, maintaining good order, discipline, and morale. But the means that it chose to achieve those objectives are not rationally related to them, and the resulting Policy is equally as odious to the Constitution as the Louisville ordinance was. This Court should have no hesitation in following well-established precedent and invalidating this irrational and constitutionally repugnant statute and regulations.

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

- No objective studies, reports, or data, either pre- or post-enactment, support the rationality of DADT and its congruence to Congress's stated objectives. In fact, at the time of the enactment of DADT, the only objective studies showed that DADT would not further unit cohesion and troop morale. Those studies were either ignored by or hidden from Congress;
- The enactment of DADT was motivated by animus, prejudice, hostility, ignorance, or fear of homosexuals;
- The enactment of DADT was based on the private biases of influential leaders about homosexuals rather than military judgment;
- The military itself recognizes that sexual orientation is not germane to military service, inasmuch as DADT is applied more frequently in time of peace than in time of war, and the military has knowingly deployed openly homosexual members to foreign theaters of combat;
- DADT has had a disproportionate impact on women, and purported rationales for the policy based on considerations of privacy and sexual

tension do not apply to female servicemembers;

- When DADT was enacted, some comparable foreign militaries, e.g., Canada, had already changed their policies to allow open service by homosexuals without any negative impact on unit cohesion, a factor ignored by Congress, and many comparable foreign countries' militaries have, both before and since the enactment of DADT, changed their policies to permit open service by homosexuals without any negative impact on unit cohesion. In addition, U.S. troops fight side-by-side with openly homosexual members of the armed forces of foreign militaries without any impact on unit cohesion and, in some instances, are commanded by openly homosexual officers from other countries;
- Service members in non-combat but critical occupations such as doctors, nurses, teachers, ophthalmologists, dentists, lawyers, linguists, translators, and others have been discharged under DADT;
- Open homosexuals are not allowed to serve in the armed forces but are allowed to work alongside our armed forces in the FBI, CIA, NSA, Department of Defense, private contracting firms performing military functions, and civilian paramilitary organizations such as police and fire departments. Indeed, the Commander-in-Chief of the Armed Forces could be openly homosexual;
- The available objective evidence establishes that DADT undermines military effectiveness, military readiness, and national security; undermines unit cohesion; undermines troop morale; and impairs recruitment and retention in the military;
- DADT particularly undermines task cohesion, a goal more germane to military effectiveness than unit cohesion;
- DADT violates First Amendment rights of speech and association.

Even if the constitutionality of DADT is not governed by the Witt standard, discussed above, it fails even the more deferential active rational basis and traditional rational basis tests for the same reasons. It additionally fails all constitutional scrutiny because Defendants offer no evidence whatsoever demonstrating DADT's rational relationship to its stated purposes, and because Log Cabin's unrebutted showing will be that DADT actually impairs those interests.

(b) Elements of Plaintiff's claims

1. Plaintiff's members who serve and served in the United States Armed Forces have constitutional liberties and a right to privacy under the Due Process Clause of the Constitution.

2. Homosexual servicemembers' constitutional liberties and right to privacy under the Due Process Clause of the Fifth Amendment encompass and protect intimate, consensual physical acts and relationships with persons of the same gender. Lawrence, 539 U.S. at 578-79.

3. DADT violates homosexual current and former servicemembers' constitutional liberties and right to privacy under the Due Process Clause of the Fifth Amendment by authorizing the government to investigate their private, consensual intimate relationships.

4. DADT further violates homosexual current and former servicemembers' constitutional liberties and right to privacy under the Due Process Clause of the Fifth Amendment by authorizing the government to discharge homosexuals from the Armed Forces if it is determined that they have engaged in, attempted to engage in, or demonstrated a propensity or intent to engage in private, consensual physical acts with persons of the same gender.

5. As a result of Defendants' implementation and enforcement of DADT Plaintiff's members have suffered injury and will suffer further irreparable harm to their constitutional rights under the Fifth Amendment if DADT is not declared unconstitutional and defendants are not enjoined from enforcing DADT.

6. Plaintiff's members have no adequate remedy at law.

(c) Key evidence supporting Plaintiff's claims

The key evidence on which Plaintiff will rely for its substantive due process claim is: the testimony and expert reports of its expert witnesses Aaron Belkin, Ph.D.; Nathaniel Frank, Ph.D.; Elizabeth Hillman, Ph.D., J.D.; Lawrence Korb, former Assistant Secretary of Defense; Robert MacCoun, Ph.D.; Alan Okros, Ph.D.; and Melissa Sheridan Embser-Herbert, Ph.D., J.D.; the publications and scholarly works relied on by those expert witnesses; the testimony of lay witnesses Major Michael Almy, Jenny Kopfstein, SSgt. Anthony Loverde, J. Alexander Nicholson III, Joseph Rocha, and Stephen J. Vossler, all of whom will testify regarding their own discharges and/or those of their comrades, and that individuals' sexual orientation had no negative effect on unit cohesion or morale; the admissions and testimony of the government, including the testimony of Col. Scott Brady, Dr. Paul Gade, and Dennis Drogo, the government's designated witnesses under Fed. R. Civ. P. 30(b)(6); and documents and reports on the Joint Exhibit List filed concurrently herewith including particularly the following: the Crittenden Report (Ex. 4); the 1993 RAND report (Ex. 8); reports of the GAO issued 1992 (Ex. 6), 1993 (Ex. 7), and 2005 (Ex. 9); the 1993 Military Working Group report (Ex. 205); the 1988 PERSEREC report (Ex. 5); the 1989 PERSEREC report (Ex. 100); the 1991 PERSEREC report (Ex. 101); ARI Research Note 93-17 (Ex. 69); ARI Research Report 1657 (Ex. 70); 2000-01 Palm Center reports (Exs. 77-80); 2010 Palm Center report (Ex. 22); FORSCOM regulation 500-3-3 (Ex. 92).

C. *Claim 2: DADT Is Unconstitutional Because It Violates First Amendment Guarantees of Freedom of Speech and Association and the Right to Petition*

(a) Summary of Plaintiff's claims

Plaintiff's second claim is that DADT violates its members' First Amendment rights, including their rights to freedom of speech and freedom of

association, and to petition the government for redress of grievances. DADT directly targets, and unconstitutionally impairs, these rights.

1. Factual Contentions

DADT provides that "Sexual orientation is considered a personal and private matter." Notwithstanding that, homosexual "conduct" is grounds for separation from the U.S. Military under DADT. Homosexual "conduct" includes a statement that one is a homosexual or bisexual, or words to that effect, or a statement by a person that demonstrates a propensity or intent to engage in homosexual acts unless the servicemember has "demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." 10 U.S.C. § 654(b). An estimated 80% to 85% of discharges under DADT since 1993 have been for "statements."

Importantly, being gay or lesbian is not wrongful conduct under DADT, and the policy does not prohibit gays or lesbians from serving in the military. Nevertheless, pursuant to DADT, the statement "I am a homosexual" is grounds for separation. Accordingly, while a servicemember's status is not a basis for discharge under DADT, a statement of that permissible status is grounds for separation. While a servicemember who is to be separated under DADT for homosexual conduct can in theory rebut the presumption that he or she has a propensity or intent to engage in such acts, the number of cases in which a servicemember has successfully done so has not been statistically significant.[4] Even a servicemember's promise to remain celibate in the future is insufficient to rebut the presumption and thereby avoid discharge (Ex. 337).

[4] Of the 3,227 servicemembers separated between 1994 and 1997, only 9 servicemembers threatened with separation under DADT were able to rebut the presumption.

Congress recognized that, among both heterosexuals and homosexuals, "[s]exual behavior is one of the most intimate and powerful forces in society" (Ex. 3). The Armed Forces do not presume that servicemembers will remain celibate.

Because homosexual "conduct" is defined so broadly, and the likelihood of rebutting the presumption is so low, DADT regulates, and in some cases punishes, people for their status and not for homosexual conduct. This is underscored by the nomenclature used to describe DADT discharges, which are categorized as "homosexual discharges," not "homosexual conduct discharges." This is the same nomenclature used before DADT, when the Defense Department's directives stated "**homosexuality** is incompatible with military service."

Not only does DADT broadly define conduct to include statements, but it prohibits such statements on a sweeping scale. DADT restricts all statements indentifying a servicemember as homosexual or bisexual "at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty." Indeed, private statements to civilian family and friends have served, as in the case of Log Cabin member Nicholson, as the basis for discharge proceedings under DADT.

Further, DADT prohibits homosexual servicemembers from acknowledging their homosexuality in court, to an elected representative, to the media, or in the course of a political debate. In fact, the government's training materials provide that a servicemember who advocates in a public, off-base forum for repeal of DADT is subject to investigation and potential discharge on that basis alone (Ex. 175).

Other servicemembers, including at least two Log Cabin members, have been discharged under DADT for "statements" without their ever having indicated a supposed "propensity to engage in 'homosexual acts'" to either their superior officers or other servicemembers, or indeed without ever admitting during separation proceedings they had committed such acts. In one of these cases, the

statement that launched the investigation was something akin to "I have a profile on Myspace."

2. Legal Contentions

Pursuant to the First Amendment to the U.S. Constitution, "Congress shall make no law … abridging the freedom of speech … or the right … to petition the Government for a redress of grievances." U.S. Const., Amdt. I. Thus, laws that restrict, punish, or chill constitutionally protected speech are presumptively invalid and must withstand the strictest constitutional scrutiny. See Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 116, 118, 123, 116 L.Ed.2d 476, 112 S.Ct. 501 (1991).

a. DADT Is an Unconstitutional Content-Based Restriction on Speech

"Laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed" constitute content-based restrictions on speech. Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 643, 129 L.Ed.2d 497, 114 S.Ct. 2445 (1994); Simon & Schuster, Inc., 502 U.S. 105, 116. Restrictions which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment and are "presumptively invalid." R.A.V. v. City of St. Paul, 505 U.S. 377, 382, 120 L.E.2d 305, 223 S.Ct. 2538 (1992); Simon & Schuster, 502 U.S. 105, 116.

In order to justify a content-based restriction on speech, the government "must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." Simon & Schuster, Inc., 502 U.S. 105, 118, 123. The government must choose the least restrictive means to achieve the compelling interest. Sable Comm. of Cal., Inc. v. FCC, 492 U.S. 115, 126, 106 L.Ed.2d 93, 109 S.Ct. 2829 (1989).

DADT constitutes a content-based restriction on speech. By its express terms, DADT prohibits servicemembers from stating "I am a homosexual or

bisexual" or "words to that effect." 10 U.S.C. § 654(b)(2). One of the bases for Log Cabin's associational standing is the ongoing harm to its military members that is caused by DADT's requiring those individuals to capitulate to the threat of discharge by concealing the expression of their identity. That implicates their First Amendment rights, because DADT's inhibition of speech targets only speech and expression that states that a servicemember is homosexual. DADT does not constrain servicemembers from stating, or expressing nonverbally, their heterosexuality: a servicemember may without fear of consequence express affection to an opposite-sex partner, display a family photograph of his or her opposite-sex partner and their children, and so forth.

"Notwithstanding the great deference owed to the military, regulations restricting speech on military installations may not discriminate against speech based on its viewpoint." Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 806 (1985); Shopco Dist. Co. v. Commanding Gen. of Camp Lejeune, 885 F.2d 167, 174 (4th Cir. 1989). Regulations that "selectively grant[] safe passage to speech of which [officials] approve while curbing speech of which they disapprove" are impermissible, Berner v. Delahanty, 129 F.3d 20, 28 (1st Cir. 1997), even in the military, Bryant v. Gates, 532 F.3d 888, 897 (D.C. Cir. 2008); Shopco, 885 F.2d at 172.

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

Amendment harm to members of the military by unconstitutionally restricting the content of their speech and expression, not simply their conduct.

There is no compelling governmental interest in prohibiting gay and lesbian servicemembers from truthfully identifying themselves. As discussed above, DADT was enacted out of animus and hostility towards gays and lesbians and not based on a legitimate concern about the effect of homosexuals on unit cohesion. No evidence exists to suggest that gay and lesbian servicemembers pose a risk to unit cohesion or military efficiency.

That certain members of the government and military may find homosexuality immoral does not make DADT "necessary to achieve a compelling governmental interest." Indeed, the "curtailing of expression" which the government may "find abhorrent or offensive cannot provide the important governmental interest upon which impairment of First Amendment freedoms must be predicated." Gay Student Orgs. of Univ. of New Hampshire v. Thomson, 509 F. 2d 652, 662 (1st Cir. 1974).

Because punishing, restricting, or chilling speech which tends to identify a servicemember as homosexual has no rational connection to a compelling governmental interest, DADT is an unconstitutional content-based restriction on servicemembers' First Amendment rights. DADT, which provided grounds for Mr. Nicholson's and other servicemembers' discharge based solely on a statement that they were homosexual, violated their First Amendment right to freedom of speech. Likewise, DADT's imposed restraint on Lt. Col. Doe's and other current servicemembers' speech infringes their First Amendment right to freedom of speech.

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b. DADT Is Overbroad: It Punishes All Speech That Does No More Than Acknowledge a Permissible Status

Even if DADT is necessary to achieve a compelling governmental interest, and it is not, it is not "narrowly tailored to achieve that end." Indeed, DADT is grossly overbroad, punishing both public and private speech which does no more than identify a servicemember as homosexual – a permissible status in the military, even under DADT.

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

DADT is overbroad in violation of the First Amendment for two reasons: (1) it punishes protected speech by conflating "status" and "conduct"; and (2) it punishes both public and private speech.

First, being homosexual is not wrongful conduct under DADT – the policy does not prohibit homosexuals from serving in the military. Thus, under DADT, being a homosexual is allowed but saying one is a homosexual is not. A policy which does no more than punish a servicemember for acknowledging a permissible status is an unlawful restriction on speech.

The provision of DADT (10 U.S.C. § 654(b)(2)) that a servicemember who has stated he or she is homosexual may avoid separation if the member can

demonstrate that "he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts" does not avoid the constitutional violations. This is because DADT makes the statement "I am a homosexual" *prima facie* evidence that a servicemember engages in "homosexual acts"; as noted above, in the 17 years of the policy's existence, less than one-third of one percent of servicemembers facing DADT separation proceedings have been able to rebut the presumption that a statement of identity indicates a propensity to engage in "homosexual acts." The provision for rebuttal is, in practice, illusory.

Protected speech cannot be restricted on the grounds it implies wrongful conduct. "Mere 'undifferentiated fear or apprehension' of illegal conduct . . . is not enough to overcome First Amendment rights, and speculation that individuals might at some time engage in an illegal activity is insufficient to justify regulation." Thomson, 509 F. 2d at 662, citing Tinker v. Des Moines Indep. Comm. Sch., 393 U.S. 503, 509, 21 L.Ed.2d 731, 89 S.Ct. 733 (1969). "Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. . . . But our Constitution says we must take this risk, and our history says that it this sort of hazardous freedom – this kind of openness – that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." Tinker, 393 U.S. at 508-08.

In Thomson, a university prohibited a gay and lesbian student organization from holding social events on campus, arguing, among other things, that the school had an interest in preventing "illegal activity," including "deviate sex acts, "lascivious carriage," and breach of the peace. 509 F. 2d at 662. The First Circuit held because there were no allegations of any such illegal activity, "fear or apprehension" of such conduct was not enough to overcome the students' First Amendment rights. Id. Likewise, in Gay and Lesbian Students Assoc. v. Gohn,

850 F.2d 361, 368 (8th Cir. 1988), the Eighth Circuit held that a university's refusal to provide funding to a student gay and lesbian association was unconstitutional. While sodomy was illegal in Arkansas, the court found that the student group did "not advocate sodomy, and even if it did, its speech about an illegal activity would still be protected by the First Amendment. People may extol the virtues of arson or even cannibalism. They simply may not commit the acts." Id.

DADT does more than that. DADT not only punishes statements regarding "illegal" homosexual activity, it punishes statements regarding an individual's self-identity – an identity that is permissible and not wrongful in the military. Moreover, as noted above, DADT even prohibits servicemembers – heterosexual or homosexual – from advocating for repeal of DADT: a servicemember who advocates in a public, off-base forum for repeal of DADT is subject to investigation and potential discharge on that basis alone. Because DADT punishes even pure protected speech, it is overbroad and violates the First Amendment.

Finally, DADT is overbroad because it restricts not only public but also private speech of gay and lesbian servicemembers, imposing categorical, content-based restrictions against a limited class of speakers that are applicable 24 hours a day, "at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty," whether speaking to family members and friends, as well as military personnel. 10 U.S.C. § 654(a)(10). Restricting the mere statement of gay or lesbian identity in civilian life has no rational connection to a compelling governmental interest.

c. DADT is Vague and Not Narrowly Tailored

The government may regulate areas of freedom of speech "only with narrow specificity." Hynes v. Mayor and Counsel of the Borough of Oradell, 425 U.S. 610, 620, 48 L.Ed.2d 243, 96 S.Ct. 1755 (1976). The general test of vagueness applies with particular force in review of laws dealing with speech. Id.; NAACP v. Button, 371 U.S. 415, 432, 9 L.Ed.2d 40, 83 S.Ct. 3285 (1963). A statute is

objectionably vague if it susceptible to "sweeping and improper application," and if "men of common intelligence must necessarily guess at its meaning." Hynes, 425 U.S. at 620; Button, 371 U.S. at 433.

DADT is unconstitutionally vague because it is unclear what language is prohibited by the policy. The term "words to that effect" is vague and does not explain what statements made by a servicemember might subject him or her to separation under DADT. 10 U.S.C. § 654(b)(2).

Further, DADT is unconstitutionally vague because it does not sufficiently specify the type or amount of proof sufficient to demonstrate that a servicemember "is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." 10 U.S.C. § 654(b). By failing to identify the type or amount of proof sufficient to rebut the "presumption" that a self-identified homosexual servicemember "engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts," DADT effectively eliminates the distinction between speech and conduct. By permitting enforcers of the policy to regulate speech as if it were conduct, DADT improperly attempts to circumvent the First Amendment and allows the military to chill protected speech.

d. DADT Violates Servicemembers' Right to Express Themselves Through Public Debate and to Petition the Government

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

Further, a "major purpose" of the First Amendment is "to protect the free discussion of governmental affairs." Ariz. Right to Life Political Action Comm. v. Bayless, 320 F. 3d 1002, 1008 (9th Cir. 2003) (citing Mills v. Alabama, 384 U.S. 214, 218, 16 L.Ed.2d. 484, 86 S.Ct. 1434 (1966)). This includes "discussion of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to the political process." Mills, 384 U.S. at 218-19. "Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" Police Dep't of the City of Chicago v. Mosley, 408 U.S. 92, 96, 33 L.Ed.2d 212, 92 S.Ct. 2286 (1972) (internal citations omitted); Ariz. Right to Life Political Action Comm., 320 F. 3d at 1008. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone. Mosley, 408 U.S. at 97.

By prohibiting homosexual servicemembers from stating they are homosexual or words to that effect, DADT prevents them from describing their distinctive needs and interests to elected officials in order to advocate for changes in those legislative policies that affect them personally. Further, by forbidding them to publicly acknowledge their identity, DADT denies servicemembers, including Lt. Col. Doe, the opportunity to engage freely in discussions of the governmental affairs that most affect them, including debates concerning the very policy that restricts their speech as well as other same-sex related issues. Indeed, as discussed above, according to stated military guidelines, advocating for repeal of DADT is, alone, grounds for separation from the military. A law that chills protected speech in such a manner violates the First Amendment.

In addition, DADT denies servicemembers the opportunity to participate in litigation, such as this very action, to seek redress from injuries caused by the government. "[U]nder the conditions of modern government, litigation may well be

the sole practicable avenue open to a minority to petition for redress of grievances." NAACP v. Button, 371 U.S. at 430. Indeed, here, Lt. Col. Doe is unable to fully participate in this litigation and testify at trial for fear he will be discharged. DADT's imposed restraint on Lt. Col. Doe's and other servicemembers' ability to participate in this, or any other litigation, violates their First Amendment right to petition the government for redress of grievances.

e. DADT Violates Servicemembers' Right to Express Themselves Through Association

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

Courts have long recognized the right of homosexuals to form associations. "[E]fforts to organize the homosexual minority, 'educate' the public as to its plight, and obtain for it better treatment from individuals and from the government thus represent but another example of the associational activity unequivocally singles out for protection in the very 'core' of association cases decided by the Supreme Court." Thomson, 509 F. 2d at 660 (citing Button, 371 U.S. 415, 428-31); see also Gohn, 850 F. 2d at 367.

DADT, however, prohibits servicemembers from identifying themselves as members of a gay and lesbian interest group, and thereby making a statement that tends to identify them as homosexuals. By doing so, DADT impermissibly prohibits homosexual servicemembers from contributing to "effective public

advocacy . . . enhanced by group association." Alabama, 357 U.S. 419, 460 (1958). For example, as a result of DADT, Lt. Col. Doe is unable to identify himself publicly as a member of Log Cabin. This restriction on Lt. Col. Doe and other gay and lesbian servicemembers constitutes an unconstitutional violation of First Amendment rights.

(b) Elements of Plaintiff's claims

1. Plaintiff's homosexual members who serve, and served, in the United States Armed Forces, including Mr. Nicholson and John Doe, have the constitutional right to free speech and expression and right to petition under the First Amendment of the United States Constitution.

2. DADT violates Plaintiff's members' rights to free speech and expression and right to petition under the First Amendment by impermissibly restricting, punishing and chilling all public and private speech that would tend to identify Plaintiff's members and other members of the United States Armed Forces as homosexuals. DADT impermissibly burdens such speech on the basis of the content and viewpoint of such speech.

3. As a result of Defendants' implementation and enforcement of DADT, Plaintiff's members have suffered injury and will suffer further irreparable harm to their constitutional rights under the First Amendment if the DADT is not declared unconstitutional and defendants are not enjoined from enforcing DADT.

4. Plaintiff's members have no adequate remedy at law.

(c) Key evidence supporting Plaintiff's claims

The key evidence on which Plaintiff will rely for its First Amendment claim is that relied on for its substantive due process claim, identified above, and also: the testimony (by declaration) of Lt. Col. John Doe; and a Defense Manpower Data Center report (Ex. 61).

D. *Anticipated Evidentiary Issues*

Defendants assert that no evidence may be considered in the determination of this case other than the record that was before Congress when it enacted DADT in 1993. Accordingly, the government seeks to exclude from the trial of this case – as it had repeatedly, and unsuccessfully, sought to exclude from discovery – all evidence other than that which was presented to Congress at the time of enactment of DADT, and has filed motions *in limine* seeking to exclude all plaintiff's expert witness testimony, all plaintiffs' lay witness testimony, and the vast majority of plaintiff's exhibits. Those motions will be ripe for decision at the Pretrial Conference.

In addition, one of Log Cabin's designated experts, Prof. Robert MacCoun, is now working with the RAND Corporation on the report that it has been tasked with preparing in connection with the current deliberations on potential repeal or modification of DADT. Because of that, he has informed us that, although he fully stands by his work in this case and his expert report, he cannot appear at trial to testify as an expert because RAND considers his engagement with it exclusive, precluding outside consulting work. Defendants took the deposition of Prof. MacCoun. Log Cabin has subpoenaed Prof. MacCoun to appear at trial; if he does not appear in response to the subpoena, Log Cabin intends to request that he be deemed "unavailable" within the meaning of Fed. R. Evid. 804(a) and that Log Cabin may present his testimony via his deposition and his expert report, pursuant to Fed. R. Evid. 804(b)(1).

E. *Issues of Law Germane to the Case*

In ruling on plaintiff's claim that DADT violates substantive due process guaranteed by the Fifth Amendment to the United States Constitution, the Court must determine the appropriate standard of review to be applied, including how much deference is due to military judgment; and must determine whether evidence other than that presented to Congress when it enacted the DADT statute may be

considered.

In its ruling on Defendants' Motion for Summary Judgment, the Court declared that it was "inclined [to] apply the standard of review set forth in Witt v. Dep't of the Air Force, 527 F.3d 806, 819 (9th Cir. 2008)." Order on Motion for Summary Judgment (Dkt. 170), p. 26. Plaintiff agrees with the Court's inclination and submits that the Witt standard applies to its due process challenge. In accordance with the Court's order, both sides are submitting supplemental briefing on this issue; however, that supplemental briefing will not be complete until June 23, 2010. A summary of plaintiff's contentions regarding the applicable standard is set forth in Section II(B)(a)(2)(a) of this Memorandum, at pp. 19-21.

III.

BIFURCATION (L.R. 16-4.3)

Plaintiff does not seek bifurcation of any issues for trial.

IV.

JURY TRIAL (L.R. 16-4.4)

This matter seeks only declaratory and injunctive relief and therefore is to be tried to the Court. The Court has the authority to declare an act of Congress unconstitutional and enjoin its enforcement, or enforcement of any government policy, nationwide. See, e.g., Rothe Development Corp. v. Department of Defense, 545 F.3d 1023 (Fed. Cir. 2008), on remand 606 F.Supp.2d 648 (W.D. Tex. 2009); cf. Ali v. Ashcroft, 213 F.R.D. 390 (W.D. Wash.), aff'd, 346 F.3d 873 (9th Cir. 2003).

V.

ATTORNEYS' FEES (L.R. 16-4.5)

Plaintiff intends to seek an award of attorneys' fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. Previous challenges to DADT have resulted in awards of attorneys' fees and expenses to prevailing plaintiffs under EAJA. See, e.g., Meinhold v. Department of Defense, 123 F.3d 1275 (9th Cir.

1997). The prevailing party must be awarded fees and expenses "unless the court finds that the position of the United States was substantially justified." The government's position is substantially justified only when it "has a reasonable basis both in law and in fact," and the burden of showing that reasonable basis is on the United States. United States v. Rubin, 97 F.3d 373, 375 (9th Cir. 1996). The "position" of the government includes the action on which the civil litigation is based, as well as the positions the government takes during the litigation. Oregon Natural Resources Council v. Madigan, 980 F.2d 1330, 1331 (9th Cir. 1992).

VI.

ABANDONED ISSUES (L.R. 16-4.6)

No issues presented in the pleadings have been abandoned.

VII.

CONCLUSION

DADT unconstitutionally denies to homosexual members of the Armed Forces rights and liberties guaranteed to them under the First and Fifth Amendments. Though times may have blinded the Congress that enacted DADT to this truth, all available evidence, both at the time of enactment and since, shows that DADT is a law that serves only to oppress. DADT lacked rational basis when enacted, it lacks rational basis today, and the time has come for it to be definitively repudiated as repugnant to our Constitution and our national values. The Court should find DADT unconstitutional and enjoin its continued enforcement.

Dated: June 21, 2010

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