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9 UNITED STATES DISTRICT COURT  
 10 CENTRAL DISTRICT OF CALIFORNIA  
 11

12 LOG CABIN REPUBLICANS, a  
 13 nonprofit corporation,  
 14 Plaintiff,  
 15 v.  
 16 UNITED STATES OF AMERICA and  
 17 ROBERT M. GATES, SECRETARY  
 OF DEFENSE, in his official capacity,  
 18 Defendants.  
 19

Case No. CV 04-8425-VAP (Ex)

**LOG CABIN’S TRIAL  
 MEMORANDUM REGARDING  
 LEGISLATIVE PRIVILEGE AND  
 EXPERT TESTIMONY ON  
 LEGISLATIVE HISTORY**

20 Plaintiff Log Cabin Republicans (“Log Cabin”) presents the following trial  
 21 memorandum on legislative privilege and expert testimony on legislative history in  
 22 support of its evidence adduced at trial.  
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1 **I. INTRODUCTION**

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3 At the pretrial conference on June 28, during the discussion of the  
4 defendants’ motion *in limine* to exclude expert witnesses, the Court expressed a  
5 concern as to whether a portion of Professor Nathaniel Frank’s anticipated expert  
6 testimony might infringe the legislative privilege. This memorandum explores that  
7 privilege and explains that it protects legislators from liability or questioning about  
8 statements made during the legislative process but does not make their acts or  
9 statements inadmissible for independent purposes. It also shows that Professor  
10 Frank’s anticipated testimony about statements or viewpoints of members of  
11 Congress does not infringe on that privilege and, therefore, is admissible.

12 Because Professor Frank is expected to testify on the first or second day of  
13 trial, Log Cabin Republicans submits this memorandum today to enable the Court  
14 to consider the issue before Professor Frank testifies next week.

15 **II. THE LEGISLATIVE PRIVILEGE AND STATEMENTS BY**  
16 **LAWMAKERS**

17 **A. Origins**

18  
19 Legislative privilege, also known as parliamentary or legislative immunity, is  
20 set forth in Article 1, Section 6 of the United States Constitution, which provides:

21 The Senators and Representatives. . . shall in all Cases, except  
22 Treason, Felony, and Breach of the Peace, be privileged from  
23 Arrest during their Attendance at the Session of their respective  
24 Houses, and in going to and returning from the same; and for  
25 any Speech or Debate in either House, they shall not be  
26 questioned in any other Place.

27 U.S. Const. art. 1, § 6, cl. 1. The language of Section 6, clause 1 is known as the  
28 “Speech or Debate Clause.” Although identified in the U.S. Constitution, the

1 origins of the legislative privilege extend back to late sixteenth and early  
2 seventeenth century disputes between the British Parliament and the monarchy.  
3 Richard Silver, Note, A Common Law Privilege For State Legislators in Federal  
4 Criminal Prosecutions, 54 St. John's L. Rev. 79, 83 (1979). After a long history of  
5 arrests and intimidation of legislators who questioned the judgment of the monarch,  
6 Parliament successfully enacted legislation recognizing free speech in debate,  
7 immunizing legislators from all prosecutions arising from parliamentary  
8 proceedings and privileging the use of parliamentary statements against legislators.  
9 Id.; 26A Charles Alan Wright & Kenneth W. Graham, Federal Practice &  
10 Procedure, § 5675, pp. 69-70 (1992).

## 11 **B. American Development**

12  
13 Cognizant of the potential struggles among the branches of government, the  
14 architects of the American republic also inserted the legislative privilege into the  
15 Articles of Confederation and the federal Constitution, where it garnered no  
16 substantive attention for 90 years. Silver, supra at 84-85. In 1880, the Supreme  
17 Court addressed the legislative privilege in Kilbourn v. Thompson, 103 U.S. 168,  
18 26 L.Ed. 377 (1880), an action by Hallett Kilbourn for false imprisonment against  
19 John Thompson and members of a House of Representatives investigative  
20 committee that had ordered Kilbourn's arrest for his refusal to testify before the  
21 committee. Id. at 85. The Supreme Court held that although Thompson did falsely  
22 imprison Kilbourn, the legislative privilege immunized Thompson and the other  
23 Representatives from Kilbourn's suit. Kilbourn v. Thompson, 103 U.S. 168, 182-  
24 83, 200-04 (1880). In so doing, the Supreme Court interpreted the legislative  
25 privilege to protect "things generally done in a session of the House by one of its  
26 members in relation to the business before it." Id. at 204.

27 For another 80 years, few courts opined on the legislative privilege. Wright  
28 & Graham, supra, § 5675, pp. 70-71. In 1966, the Supreme Court held that a

1 speech on the floor of Congress could not be used as evidence of a conspiracy to  
2 commit bribery. United States v. Johnson, 383 U.S. 169, 184-85, 86 S.Ct. 749, 15  
3 L.Ed.2d 681 (1966). A recent increase in the federal prosecution of legislators has  
4 provided opportunities for further interpretation, extending, for instance, the  
5 privilege to aides, Gravel v. United States, 408 U.S. 606, 616-17, 92 S.Ct. 2614, 33  
6 L.Ed.2d 583 (1972), and beyond the physical space of the legislative floor to any  
7 legislative acts, United States v. Helstoski, 442 U.S. 477, 477-78, 99 S.Ct. 2432, 61  
8 L.Ed.2d 12 (1979). See also Powell v. McCormack, 395 U.S. 486, 501-06, 89 S.Ct.  
9 1944, 23 L.Ed.2d 491 (1969).

### 10 **C. Scope and Purpose of the Legislative Privilege**

11  
12 Today, the legislative privilege provides federal legislators both a substantive  
13 immunity from civil and criminal liability and an evidentiary immunity against the  
14 use of statements made in the legislative process, essentially as it did in its original  
15 iteration imported from England, despite minor expansions and retractions along its  
16 periphery. Wright & Graham, supra, § 5675, pp. 69-70.

17 The evidentiary aspect of the legislative privilege finds justification in the  
18 need to spare the legislator from having to devote his time and effort to defending  
19 himself in court. United Transp. Union v. Springfield Terminal Ry., 132 F.R.D. 4,  
20 5 (D. Me. 1990) (“In civil cases the clause prevents the litigation from distracting  
21 members of Congress and their aides, forcing them to divert their time and attention  
22 from their legislative tasks, and from delaying and disrupting the legislative  
23 function.”). Typically, cases triggering the legislative privilege involve allegations  
24 that the legislator accepted bribes in exchange for votes, or where the legislator is  
25 sued for defamation on the basis of statements made in connection with legislation.  
26 Wright & Graham, supra, § 5675, p. 71.

27 Where legislators are not subject to liability or questioning, assertion of the  
28 privilege on behalf of third parties is inappropriate. Benford v. Am. Broadcasting

1 Co., 98 F.R.D. 42, 46 (D. Md. 1983). In Benford, a committee of members of the  
2 U.S. House of Representatives – none of whom were parties to the action – filed a  
3 motion to intervene and for a protective order against the plaintiff’s subpoena *duces*  
4 *tecum*. Id. at 44. The subpoena, served on the Clerk of the House, sought  
5 communications between several congressional aides – who were co-defendants in  
6 this action – and ABC. Id. at 44-45. The court denied the motion and  
7 acknowledged that while the aides themselves may assert the privilege under  
8 Gravel, the non-party Representatives could not. Id. at 46, 47.

9  
10 **D. Use of Statements Beyond the Scope of the Legislative Privilege**

11 While the legislative privilege prohibits questioning legislators and their  
12 aides outside of Congress, it does not necessarily preclude the testimony of third  
13 party witnesses about legislative acts. Gravel, 408 U.S. at 628-29. In Gravel,  
14 Senator Gravel’s aide was subpoenaed in connection with the dissemination of the  
15 “Pentagon Papers.” Id. at 608. Although the Supreme Court held that the  
16 legislative privilege extended to congressional aides, it noted that third party  
17 witnesses could still testify about the senator’s legislative acts. Id. at 629, n.18.  
18 Additionally, the Supreme Court further noted that Senator Gravel’s recitation of  
19 the complete Pentagon Papers at a subcommittee hearing constituted adequate proof  
20 of his public disclosure of confidential information, implying that the legislative  
21 record lies entirely beyond the scope of the legislative privilege. Id.

22 Where the intent of the legislators enacting law is at issue, statements made  
23 by lawmakers in the context of legislation within and outside the official record  
24 provide relevant evidence of their motivations for enacting a law. For example, in  
25 Wallace v. Jaffree, 472 U.S. 38, 43, 105 S.Ct. 2479, 86 L.Ed.2d. 29 (1985), the  
26 legislative sponsor of a school “meditation” law testified in person about his intent  
27 to reintroduce prayer to public schools. In Edwards v. Aguillard, 482 U.S. 578,  
28 587, 107 S.Ct. 2573, 96 L.Ed. 510 (1987), legislators’ statements made during the

1 course of debate on a law requiring the teaching of creationism in schools provided  
2 “clear” evidence of an improper purpose. Similarly, in McCreary County v.  
3 American Civil Liberties Union of Kentucky, 545 U.S. 844, 851, 125 S.Ct. 2722,  
4 162 L.Ed.2d 729 (2005), the Supreme Court considered evidence of religious  
5 statements by a judge at a county courthouse to find a predominantly religious  
6 purpose behind the courthouse’s display of the Ten Commandments.

7 In Kitzmiller v. Dover Area School District, 400 F.Supp.2d 707, 746, n.20  
8 (M.D. Pa. 2005), the school board defendants argued that individual board  
9 members’ statements were irrelevant as a matter of law and sought to exclude them  
10 entirely. Citing McCreary and Edwards, the Court admitted evidence of those  
11 statements, noting that “the Supreme Court has consistently held not only that  
12 legislative history can and must be considered in ascertaining legislative purpose. . .  
13 but also that statements by a measure’s sponsors and chief proponents are strong  
14 indicia of such purpose.” Id. at 747.

15 **III. TESTIMONY OF DR. FRANK REGARDING THE STATEMENTS OF**  
16 **LEGISLATORS**

17  
18 Log Cabin proffers the testimony of Dr. Nathaniel Frank to prove, *inter alia*,  
19 that DADT was enacted because of prejudice and animus toward homosexuals.  
20 Dkt. 189 at 15-21. As one of the bases for a portion of his expert opinion, Dr.  
21 Frank relies on the statements of legislators before and during the DADT legislation  
22 process. See id. For instance, he will cite to the official legislative record to show  
23 that Representative Robert Dornan laid bare his own prejudice in saying, “You  
24 gentleman all know that the best of your troops can never respect and thereby  
25 follow orders totally from someone who likes taking it up the bum, no matter how  
26 secret he keeps it. Once it leaks out, they think this person is abnormal, perverted,  
27 and deviant from the norm.” Id. at 19, citing House Comm. on Armed Services,  
28 Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings

1 Before the House Comm. on Armed Services, 103rd Cong., 1st sess., 1993.

2 As another example, Dr. Frank will also rely on the statements of Senator  
3 Nunn, who said the government should not “endorse the sex behavior of people that  
4 are lesbian and gay.” Asked if he was “saying the heterosexual lifestyle is superior,  
5 is morally superior, to the homosexual lifestyle,” Nunn answered that he was “not  
6 only saying that,” but that “the American family deterioration is one of the biggest  
7 problems we face in our culture, and government programs cannot solve that.”

8 The statements to which Dr. Frank will testify are a matter of public record.  
9 Log Cabin will not subpoena any legislators for questioning. Log Cabin does not  
10 proffer Dr. Frank’s expert opinion to accuse any legislators of criminal misconduct.  
11 For Log Cabin’s purposes in this action, their statements are being used to evidence  
12 the animus and prejudice exhibited by legislators in enacting DADT, nothing more.

13 Therefore, the legislative privilege does not apply here. Nothing in the  
14 history of cases interpreting the legislative privilege indicates that statements made  
15 by legislators are beyond the scope of judicial review. Indeed, the Supreme Court  
16 has on numerous occasions reviewed testimony regarding the statements of  
17 legislators in determining the purpose of a particular law. Dr. Frank’s testimony is  
18 no different, and the legislative privilege should not apply to exclude it.

19 **IV. CONCLUSION**

20  
21 For the above reasons, the testimony of Dr. Frank regarding the statements of  
22 legislators should not be excluded under the legislative privilege.

23 Dated: July 6, 2010

WHITE & CASE LLP

24  
25 By: /s/ Dan Woods

Dan Woods  
26 Attorneys for Plaintiff