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14 **UNITED STATES DISTRICT COURT**  
15  
16 **CENTRAL DISTRICT OF CALIFORNIA**

17 LOG CABIN REPUBLICANS,  
18  
19 Plaintiff,

20 v.

21 UNITED STATES OF AMERICA and  
22 ROBERT M. GATES, SECRETARY  
23 OF DEFENSE, in his official capacity,  
24  
25 Defendants.

Case No. CV 04-8425 VAP (Ex)

**PLAINTIFF'S POST-TRIAL BRIEF  
ON THE ADMISSIBILITY OF  
EXHIBIT 38, LT. COL. JOHN  
DOE'S DECLARATION**

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28  
29 Plaintiff Log Cabin Republicans ("Log Cabin") submits this Post-Trial Brief  
30 on the admissibility of Exhibit 38, Lt. Col. John Doe's April 27, 2006 Declaration,  
31 in accordance with the Court's order of July 23, 2010 (Doc. 223).

1 Log Cabin offers the April 27, 2006 Declaration of Lt. Col. John Doe,  
2 marked as Exhibit 38 for identification, to evidence the effects of “Don’t Ask,  
3 Don’t Tell” (“DADT”) on Lt. Col. Doe’s constitutional rights to free speech and the  
4 right to petition. The declaration shows that he “desire[s] the same right to  
5 communicate the core of emotions and identity to others as granted to heterosexual  
6 members of the United States Armed Forces” and “fear[s] that challenging the  
7 constitutionality of the Policy, and/or making [his] own name or identity known in  
8 such an action, will subject [him] to investigation and discharge pursuant to the  
9 Policy, and may subject [him] to other possible harms.” Ex. 38, ¶ 7-8. Defendants  
10 only objected to its admission by arguing that it is hearsay, but Exhibit 38 is  
11 admissible under either Fed. R. Evid. 803(3), the “mental condition” exception to  
12 the hearsay rule, or Fed. R. Evid. 807, the residual exception.

13 **I. EXHIBIT 38 IS ADMISSIBLE UNDER FED. R. EVID. 803(3)**

14 Fed. R. Evid. 803(3) exempts from the hearsay rule statements showing “the  
15 declarant’s then existing state of mind, emotion, sensation, or physical condition  
16 (such as intent, plan, motive, design, mental feeling, pain, and bodily health) . . . .”  
17 To merit exemption from the hearsay rule, the statement must be contemporaneous  
18 with the mental state to be proven, it must not provide a chance for reflection or  
19 misrepresentation, and it must evidence a state of mind relevant to an issue in the  
20 case. United States v. Faust, 850 F.2d 575, 585 (9th Cir. 1988). The Court has  
21 already recognized the applicability of this exception with respect to statements of  
22 Lt. Col. Doe, when it permitted Mr. Philip Bradley to testify to such statements.  
23 See Trial Tr. (Jun. 13, 2010 a.m., daily rough), at 86:22-87:23.

24 **The declaration is contemporaneous.** The contemporaneity requirement is  
25 distinct from the separate hearsay exceptions for present sense impression and  
26 excited utterance; it merely means that little or no time should elapse between the  
27 mental state to be proven and the statement describing it. Faust, 850 F.2d at 585-  
28 86. Lt. Col. Doe’s declaration reflects his state of mind precisely at the time he

1 made the declaration. Lt. Col. Doe discussed in his declaration – in the present  
2 tense – his mental condition at the moment he signed the declaration, when he was  
3 then, as he is now, suffering the chilling effects of DADT. Lt. Col. Doe’s  
4 participation on April 27, 2006 in Log Cabin’s challenge to DADT further  
5 evidences that the declaration reflects his state of mind at the time he signed it, just  
6 as his continued participation still proves the reality of that state of mind today.

7 **The declaration is not subject to reflection or misrepresentation.** The  
8 declaration is not subject to reflection because it describes Lt. Col. Doe’s desires  
9 and fears at the moment he felt them. No chance of misrepresentation exists  
10 because the desires and fears he describes are not imagined or subjective; the right  
11 to speak desired by Lt. Col. Doe and his fears of punishment for doing so are  
12 entwined with and evidenced by DADT’s prohibition on the disclosure of  
13 homosexual identity.

14 **Lt. Col. Doe’s state of mind is relevant.** Here, the relevant issue is the  
15 chilling effect that DADT has on the speech of servicemembers and on their right to  
16 petition the government for redress of grievances. If Lt. Col. Doe may not  
17 communicate the core of his sexual identity, or appear in person to testify, without  
18 violating DADT, then his First Amendment rights are violated. Log Cabin  
19 challenges that chilling effect of DADT as a violation of the First Amendment,  
20 making Lt. Col. Doe’s inability to identify himself central to that challenge.

21 Because Lt. Col. Doe’s declaration is contemporaneous to the state of mind  
22 sought to be proven and relevant to Log Cabin’s First Amendment challenge, the  
23 Court should admit it into evidence as an exception to the hearsay rule under Fed.  
24 R. Evid. 803(3).

25 **II. EXHIBIT 38 IS ADMISSIBLE UNDER FED. R. EVID. 807**

26 Fed. R. Evid. 807, the residual exception to the hearsay rule, makes  
27 admissible statements not specifically covered elsewhere but having equivalent  
28 circumstantial guarantees of trustworthiness where (A) the statement is offered as

1 evidence of a material fact, (B) the statement is more probative on that fact than any  
2 other reasonably available evidence, and (C) the interests of justice are served by  
3 the statement's admission into evidence. The residual exception "exists to provide  
4 courts with flexibility in admitting statements traditionally regarded as hearsay but  
5 not falling within any of the conventional exceptions." United States v. Valdez-  
6 Soto, 31 F.3d 1467, 1471 (9th Cir. 1994). Exhibit 38 meets those requirements.

7 **Guarantees of trustworthiness.** "Equivalent circumstantial guarantees of  
8 trustworthiness" sufficient to justify the application of Fed. R. Evid. 807 include  
9 criminal consequences to the declarant for making the statement, possibility of  
10 penalties for perjury, opportunity to cross-examine, and lack of motive to lie. Santa  
11 Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812-813 (9th Cir.  
12 2008) (criminal consequences); United States v. Sanchez-Lima, 161 F.3d 545, 547-  
13 548 (9th Cir. 1998) (penalty of perjury, opportunity to cross-examine); United  
14 States v. George, 960 F.2d 97, 100 (9th Cir. 1992) (no motive to lie).

15 Each guarantee is present here. Lt. Col. Doe is subject to possible criminal  
16 penalties for violation of the Uniform Code of Military Justice and other  
17 detrimental consequences in the form of separation from the U.S. Armed Forces,  
18 where he is an officer. 10 U.S.C. § 925; 10 U.S.C. § 654. The declaration is signed  
19 under penalty of perjury, and Defendants should be estopped from objecting on the  
20 basis of lack of opportunity to cross-examine because they refused to stipulate that  
21 Lt. Col. Doe would not be investigated or discharged under DADT if he were to  
22 testify openly at deposition or trial. See Trial Tr. (Jun. 22, 2010 p.m., daily rough),  
23 at 1589:3-8. Finally, Lt. Col. Doe has nothing to gain from lying about his fears  
24 and desires – his declaration attests, rather, to his desire to speak truthfully to his  
25 comrades about his homosexuality.

26 Thus, Exhibit 38 shows sufficient circumstantial guarantees of  
27 trustworthiness to merit application of Fed. R. Evid. 807. It also meets the specific  
28 substantive and procedural requirements of that Rule.

1           **Evidence of a material fact.** As described above, the declaration is offered  
2 as evidence of a material fact central to Log Cabin’s First Amendment challenge:  
3 the chilling effect of DADT on servicemembers’ rights to free speech and petition.

4           **More probative than any other reasonably available evidence.** The  
5 declaration is highly probative on the chilling effect DADT has on servicemembers’  
6 First Amendment rights, demonstrated by Lt. Col. Doe’s fears of reprisal – criminal  
7 and otherwise – if he revealed his sexual identity. Since Defendants would not  
8 stipulate to the limited non-enforcement of DADT against Lt. Col. Doe for him to  
9 present live testimony at trial, the best available evidence as to Lt. Col. Doe’s state  
10 of mind, more probative than the testimony of Mr. Bradley or Mr. Meekins on this  
11 point, is his declaration.

12           **The interests of justice would be served.** Fed. R. Evid. 807 acknowledges  
13 the courts’ need for flexibility in admitting normally inadmissible hearsay where it  
14 may be reliable and probative, and where it facilitates the basic purposes of the  
15 Federal Rules of Evidence: the ascertainment of truth and the promotion of fairness.  
16 Valdez-Soto, 31 F.3d at 1471; United States v. Sposito, 106 F.3d 1042, 1048 (1st  
17 Cir. 1997).

18           Lt. Col. Doe would have preferred to testify personally: he would have  
19 preferred to take the stand and describe his experience under DADT and the  
20 chilling effect that it has had on his First Amendment rights. But had he done so,  
21 he would have been separated from his unit, deprived of his income, and  
22 discharged. Therefore, as a practical matter, Lt. Col. Doe can only testify by means  
23 of his anonymous declaration. It would be contrary to the interests of justice to  
24 deny Lt. Col. Doe the opportunity to present his own testimony in a challenge to the  
25 very policy that unconstitutionally mandates both his silence and his anonymity.

26           **The procedural requirements of Fed. R. Evid. 807 have been met.**  
27 Finally, Fed. R. Evid. 807 requires that the proponent of the out-of-court statement  
28 provide the particulars of the statement, and notice of its intent to rely on the

1 statement, sufficiently in advance of trial to provide a fair opportunity to meet it.

2 Log Cabin provided notice of its intent to introduce Lt. Col. Doe's  
3 declaration before trial when it discussed with the government, and ultimately filed,  
4 its proposed exhibit list, which identified the declaration as Exhibit 38. Doc. 192 at  
5 5. Defendants would have had ample time and opportunity to cross-examine him if  
6 they had either arranged for an anonymous cross-examination, such as via a  
7 telephone deposition, or stipulated to a limited suspension of DADT in Lt. Col.  
8 Doe's case to permit him to testify, but they did not do so.

9 Exhibit 38 is being offered under the residual exception in recognition of the  
10 extraordinarily difficult circumstances facing Lt. Col. Doe. Log Cabin has satisfied  
11 the substantive and procedural requirements of Fed. R. Evid. 807, withholding his  
12 name and address only out of necessity. In the interests of justice, and in the  
13 absence of other means, Fed. R. Evid. 807 should function to admit the declaration.

14 **III. CONCLUSION**

15 For these reasons, this Court should admit Lt. Col. Doe's declaration into  
16 evidence under the "mental condition" hearsay exception under Fed. R. Evid.  
17 803(3), or, alternatively, under Fed. R. Evid. 807's residual exception.

18  
19 Dated: July 30, 2010

WHITE & CASE LLP

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21 By:           /s/ Dan Woods          

22 Dan Woods  
23 Attorneys for Plaintiff  
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