Log Cabin Republicans v. United States of America et al Doc. 225

TONY WEST
Assistant Attorney General
ANDRÉ BIROTTE, Jr.
United States Attorney
JOSEPH H. HUNT
VINCENT M. GARVEY
PAUL G. FREEBORNE
W. SCOTT SIMPSON
JOSHUA E. GARDNER
RYAN B. PARKER
U.S. Department of Justice
Civil Division
Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 353-0543
Facsimile: (202) 616-8460
E-mail: paul.freeborne@ usdoj.gov

Attorneys for Defendants United States of America and Secretary of Defense

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

LOG CABIN REPUBLICANS, Plaintiff, v. UNITED STATES OF AMERICA AND ROBERT M. GATES, Secretary of Defense, Defendants.	No. CV04-8425 VAP (Ex) DEFENDANTS' SUPPLEMENTAL BRIEF REGARDING THE ADMISSIBILITY OF THE JOHN DOE DECLARATION BEFORE: Judge Phillips

Dockets.Justia.com

Pursuant to the Court's order allowing the parties "to submit briefs on whether the declaration of John Doe shall be admitted into evidence or not," Dkt. No. 223, Defendants Secretary Robert M. Gates, Secretary of Defense, and the United States of America submit the following brief explaining why Plaintiff Log Cabin Republican's ("LCR") request to admit the declaration of John Doe into evidence should be denied.

ARGUMENT

I. THE RECEIPT OF EVIDENCE IN SUPPORT OF LCR'S FACIAL CONSTITUTIONAL CHALLENGE IS INAPPROPRIATE

As an initial matter, because Plaintiff's overbreadth challenge presents the court with a "purely legal question," consideration of evidence beyond the statute and legislative history is inappropriate.[1] *United Food & Commerical Workers*

---

[1] The Ninth Circuit's decision in *City of Las Vegas v. Foley*, 747 F.2d 1294 (9th Cir. 1984), is not the to contrary. In *Foley*, the Ninth Circuit explained that, in the context of a First Amendment challenge, courts could determine the relevant government interest by looking at "objective indicators as taken from the face of the statute, the effect of the statute, comparison to prior law, facts surrounding enactment of the statute, the stated purpose, and the record of proceedings." *Id.* at 1297. Similarly, in *O'Brien v. United States*, 391 U.S. 367, 383-84, 88 S. Ct. 1673 (1968), the Supreme Court looked at "the effect of the statute on its face" solely to determine the challenged statute's purpose. Here, as LCR conceded during trial, the Ninth Circuit already has identified the relevant important government interest advanced by the DADT policy. *Witt v. Dep't. of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008) ("it is clear that the government advances an important governmental interest. DADT concerns the management of the military, and 'judicial deference to ... congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.'") (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70, 101 S. Ct. 2646, 69 L. Ed. 2d 478 (1981)). Accordingly, the receipt of evidence to resolve such an inquiry is unnecessary in this case, and the receipt of evidence for any other purpose to resolve the facial constitutionality of

(continued...)

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
P.O. BOX 883, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044
(202) 353-0543

Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341, 361 n.9 (6th 1998) ("Because the parties raised below the overbreadth argument in substance and the issue involves purely legal questions, we shall consider the issue on appeal."); *see also U.S. v. Lujan*, 504 F.3d 1003, 1006 (9th Cir.2007) ("[T]he constitutionality of a federal statute [is] a question of law that we review de novo."). As there are no factual issues before the Court with respect to LCR's overbreadth claim, Doe's declaration fails to make any fact of consequence any more or less probable and is, therefore, irrelevant and inadmissible. *See* Fed. R. Evid. 401 & 402.[2]

---

[1](...continued)
the statute is inappropriate.

[2] The Supreme Court's recent decision in *Christian Legal Society Chapter of the University of California v. Martinez*, 130 S. Ct. 2971 (2010), does not change the First Amendment analysis in this case. The question presented in *Christian Legal Society* – whether a public law school could condition its official recognition of a student group, and the attendant use of school funds and facilities, on the organization's agreement to open eligibility for membership and leadership to all students – arose in the civilian context, and the Court made clear it was not announcing any form of across-the-board rule. To the contrary, in rejecting the petitioner's argument that its policy excludes individuals not because of sexual orientation but rather a conjunction of conduct and the belief that the conduct was wrong, the Court stated that, "[o]ur decisions have declined to distinguish between status and conduct *in this context*." 130 S. Ct. at 2990 (emphasis supplied). This case, by contrast, involves a duly-enacted Congressional enactment regarding military affairs, an altogether different context in which judicial deference "'is at its apogee' when Congress legislates under its authority to raise and support armies.'" *Rumsfeld v. Forum for Academic & Inst. Rights*, 547 U.S. 47, 58 (2006) (quoting *Rostker*, 453 U.S. at 70). The Supreme Court has long made clear that, "[i]t is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used," *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 399, 5 L. Ed. 257 (1821), and that, "we think it generally undesirable, where holdings of the Court are not at issue, to

(continued...)

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
P.O. BOX 883, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044
(202) 353-0543

II. THIS COURT CANNOT TAKE JUDICIAL NOTICE OF THE DOE DECLARATION

"A judicially noticed fact must be one not subject to reasonable dispute." Fed. R. Evid. 201(b). *See Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1151 (9th Cir. 2005) ("Because the effect of judicial notice is to deprive a party of an opportunity to use rebuttal evidence, cross-examination, and argument to attack contrary evidence, caution must be used in determining that a fact is beyond controversy under Rule 201(b)."). LCR would have this Court assume the truth of statements on contested factual matters made by an anonymous declarant whose credibility Defendants cannot test on cross-examination. Given the contested nature of the facts asserted and the untested credibility of the declarant, the declaration's assertions lack the "essential prerequisite" of a "high degree of indisputability" necessary for this Court to judicially notice them. Fed. R. Evid. 201 advisory committee's note. *See also Turnacliff v. Westly*, 546 F.3d 1113, 1120 n.5 (9th Cir. 2008) (declining to notice declaration since facts contained therein "are not generally known" and declarant "is not a source whose accuracy cannot be reasonably questioned") (internal quotation marks omitted).

The Ninth Circuit's analysis in *Lee v. City of Los Angeles* compels this conclusion. The district court in *Lee* had taken judicial notice of a § 1983 plaintiff's waiver of extradition form and extradition hearing transcript. 250 F.3d 668, 689 (9th Cir. 2001). Although the Ninth Circuit found that Rule 201 gave the district court authority "to take judicial notice of the *fact* of the extradition hearing[and] the *fact* that a Waiver of Extradition was signed by [the plaintiff]," the court held that the district court had erroneously noticed such "*disputed* facts" as the

---

[2](...continued)
dissect the sentences of the United States Reports as though they were the United States Code." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993).

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
P.O. BOX 883, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044
(202) 353-0543

waiver's validity. *Id.* at 689-90 (emphasis in original). *See also Brody v. Hankin*, 145 Fed. Appx. 768, 772 (3d Cir. 2005). *Lee* therefore establishes that Rule 201 does not permit employing judicial notice to assume the truth of genuinely disputed facts contained within a document, even if that document appears in the record.

III. THE DOE DECLARATION IS INADMISSIBLE HEARSAY

Because LCR seeks to admit the Doe Declaration for the truth of the matters asserted therein related to LCR's First Amendment overbreadth claim, the declaration constitutes hearsay. Furthermore, no exception to the hearsay rule applies here.

Rule 803(3) does not apply because the ample time Doe had to reflect before drafting and signing his declaration "weighs heavily against admission." *United States v. Faust*, 850 F.2d 575, 586 (9th Cir. 1988). DADT was enacted in 1993, and Doe had the opportunity "to think long and hard before" drafting and signing his declaration in October of 2004. *Id.* Moreover, as discussed above, Doe's declaration is not relevant. *See id.* at 585 (recognizing relevance as a requirement for admission under 803(3)).[3]

---

[3] In addition, Doe's desire to remain anonymous did not make him "unavailable as a witness" within the meaning of Rule 804(a). Absent a court order or physical or mental deficiency, only if LCR has "been unable to procure the declarant's attendance . . . by process or other reasonable means" can Doe be considered "unavailable." Fed. R. Evid. 804(a)(5). LCR has not attempted to procure his presence at trial. *Compare Simulnet E. Assocs. v. Ramada Hotel Operating Co.*, 121 F.3d 717, 1990 WL 1253411997 WL 429153, at *6 (9th Cir. 1997) (no attempt made) *and Banks v. Prudential Cal. Realty*, 15 F.3d 1082, 1994 WL 6572, at *3 (9th Cir. 1994) (insufficient attempt where service of process could have been attempted at declarant's workplace) *with Maciel v. Mariposa Cty. Jail*, 869 F.2d 1497, 1989 WL 18110, at *1 (9th Cir. 1989) (good faith effort to obtain presence included sending subpoena and demanding presence with

(continued...)

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
P.O. BOX 883, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044
(202) 353-0543

Nor can LCR establish the admissibility of the Doe Declaration through the "residual exception" under Rule 807. The residual exception "is to be used rarely and in exceptional circumstances." *Fong v. American Airlines, Inc.*, 626 F.2d 759, 763 (9th Cir. 1980). Such circumstances do not exist here.

First, "[h]earsay evidence sought to be admitted under Rule 807 must have circumstantial guarantees of trustworthiness equivalent to the listed exceptions to the hearsay rule." *U.S. v. Sanchez-Lima*, 161 F.3d 545, 547 (9th cir. 1998) (citing *U.S. v. Fowlie*, 24 F.3d 1059, 1069 (9th Cir.1994)). Because Defendants have had no opportunity to cross-examine Doe on the statements in his declaration, or test his credibility in any other way, the Doe Declaration lacks the guarantees of trustworthiness required for admission under Rule 807.

In addition, LCR has failed to meet Rule 807's requirement of "mak[ing] known to the adverse party sufficiently in advance of the trial . . . the particulars of [the statement], *including the name and address of the declarant*." (emphasis added). Plaintiff bears the "heavy burden" of establishing that Rule 807 applies to the Doe Declaration, and it cannot meet that burden here. *See U.S. v. Washington*, 106 F.3d 983, 1001-02 (D.C. Cir. 1999).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny LCR's request to admit the declaration of John Doe into evidence.

---

[3](...continued)
documents). Anonymity only triggers unavailability when the proponent cannot discover the declarant's identity through reasonable means. *See, e.g., Minneapolis Elec. Supply Castings Co. v. Ross*, No. , 1985 WL 2875, at * (N.D. Ill. 1985) (citing *United States v. Medico*, 557 F.2d 309 (2d Cir. 1977)). It can hardly be the case here, however, that LCR's counsel do not know Doe's true identity. Accordingly, the exceptions listed under Rule 804 do not apply.

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
P.O. BOX 883, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044
(202) 353-0543

Dated: July 30, 2010

Respectfully submitted,

TONY WEST
Assistant Attorney General

ANDRÉ BIROTTE, JR
United States Attorney

JOSEPH H. HUNT
Director

VINCENT M. GARVEY
Deputy Branch Director

/s/Ryan B. Parker
PAUL G. FREEBORNE
W. SCOTT SIMPSON
JOSHUA E. GARDNER
RYAN B. PARKER
Trial Attorneys
U.S. Department of Justice,
Civil Division
Federal Programs Branch
20 Massachusetts Ave., N.W.
Room 6108
Washington, D.C. 20044
Telephone: (202) 353-0543
Facsimile: (202) 616-8202
paul.freeborne@usdoj.gov

Attorneys for Defendants United States of America and Secretary of Defense