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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, in his official capacity, Defendants.	Case No. CV04-8425 (VAP) DEFENDANTS' SUPPLEMENTAL BRIEF ADDRESSING THE ISSUE OF SUBSTANTIVE DUE PROCESS Motion to Dismiss: Date: March 9, 2009 Time: 10 a.m. Complaint filed: October 12, 2004 Trial date: None scheduled

INTRODUCTION

Pursuant to the Court's January 29, 2009 Order, *see* Dkt. No. 76, defendants submit the following supplemental brief addressing the plaintiff Log Cabin Republicans' ("LCR's") substantive due process challenge to the Don't Ask, Don't Tell ("DADT") statute, 10 U.S.C. § 654, and, in particular, the effect of the Ninth Circuit's recent decision in *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008) on that claim. As discussed more fully below, *Witt* now makes clear that LCR's facial substantive due process challenge to the statute cannot proceed, and that its facial challenge to the statute would fail in any event.

First, in *Witt*, the Ninth Circuit subjected the statute to heightened scrutiny under substantive due process. But the *Witt* panel was careful to note that only "as-applied" substantive due process challenges to the statute can proceed. Because LCR's challenge to the statute is a facial challenge, its substantive due process challenge cannot proceed as a matter of law. *Second*, unlike the situation in *Witt*, which was brought by an individual, LCR seeks to establish associational standing to challenge the statute. Inasmuch as *Witt* now makes clear that substantive due process challenges require the involvement of an individual, LCR cannot satisfy its burden of establishing associational standing. To do so, LCR must demonstrate, among other things, that "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). In light of *Witt*, LCR cannot make that showing. And *finally*, even if LCR's facial substantive due process challenge could proceed after *Witt*, LCR would have the burden of establishing that there is no set of circumstances under which the statute would be valid. Because the *Witt* panel has reaffirmed that the statute serves an "important governmental interest"–"the management of the military," 527 F.3d at 821, LCR's facial challenge to the statute would fail. LCR's substantive due process challenge should be dismissed.

BACKGROUND

I. The *Witt* Decision

In *Witt*, plaintiff was suspended from the Reserves under the DADT statute. Plaintiff admitted to having engaged in homosexual conduct in violation of the DADT policy, but challenged the constitutionality of that policy on substantive due process, equal protection, First Amendment, and procedural due process grounds, seeking to return to service in the Air Force Reserves. Plaintiff also sought a preliminary injunction to enjoin her suspension from service.

The district court denied plaintiff's motion for a preliminary injunction and dismissed the case for failure to state a claim for relief. *See Witt v. U.S. Dep't of Air Force*, 444 F. Supp. 2d 1138, 1148 (W.D. Wash. 2006). In rejecting plaintiff's substantive due process challenge to the statute, the district court considered the Supreme Court's 2003 decision in *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L. Ed. 2d. 508 (2003). Although the Supreme Court in *Lawrence* concluded that Texas's criminal anti-sodomy law violated substantive due process protections, the district court in *Witt* concluded that *Lawrence* did not require application of heightened scrutiny. *See Witt*, 444 F. Supp. 2d at 1142-44.

Plaintiff appealed to the Ninth Circuit challenging the district court's dismissal of her substantive due process, procedural due process, and equal protection claims. (Plaintiff did not challenge the dismissal of her First Amendment claim on appeal). On May 21, 2008, the Ninth Circuit vacated and remanded the district court's judgment with respect to the substantive due process and procedural due process claims, and it affirmed the judgment as to the equal protection claim.

With respect to plaintiff's substantive due process claim, the Ninth Circuit determined that although its precedent had previously applied rational basis review, the Supreme Court's decision in *Lawrence* required something more than rational basis review. *Witt*, 527 F.3d at 817. The Ninth Circuit then looked to *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174, 156 L. Ed. 2d 197 (2003), for guidance. *See Sell*, 539 U.S. at 179; *Witt*, 527 F.3d at 818-19. In *Sell*, the Supreme Court examined whether the government could forcibly administer anti-psychotic drugs to a mentally-ill defendant so that the defendant would be competent to stand trial. *See Sell*, 539 U.S. at 178-80; *see also Witt*, 527 F.3d at 818. In conducting the analysis, *Sell* set forth four factors to consider in evaluating whether the governmental action (in that case the forcible administration of anti-psychotic drugs) ran afoul of substantive due process:

1. whether there is an *important* governmental interest;
2. whether the governmental action *significantly furthers* those interests;
3. whether the governmental action is *necessary* to further those interests, and whether less intrusive actions would be unlikely to achieve substantially the same result; and
4. whether the action is *medically appropriate*.

See Sell, 539 U.S. at 178-81 (emphasis in original); *see also Witt*, 527 F.3d at 818. The Ninth Circuit explained that the fourth factor would not apply in this context, but that the other three factors would guide the substantive due process analysis of the DADT policy after *Lawrence*. *See Witt*, 527 F.3d at 819.

Critical to the Ninth Circuit's analysis was its conclusion that, due to intervening Supreme Court decisions, the modified *Sell* analysis must be "as-applied rather than facial." *Id*. The Ninth Circuit then evaluated the three applicable *Sell* factors, to the extent it could on the record before developed below.

As to the first *Sell* factor, an important governmental interest, the Ninth Circuit concluded that the interests at issue in DADT (unit cohesion and morale) satisfy that requirement. *See Witt*, 527 F.3d at 821 ("[i]t is clear that the government advances an important governmental interest."). Due to the undeveloped record, however, the court could not sufficiently evaluate the second and third *Sell* factors. The Ninth Circuit vacated the district court's ruling and remanded the case to evaluate those factors. *Id*.[1]

[1] The government sought *en banc* rehearing, which was denied on December 4, 2008. *See Witt*, 2008 WL 5101565. The government's certiorari petition is currently due March 4, 2009. *See* 28 U.S.C. § 2101(c).

II. LCRs' Facial Challenge to the DADT Statute

LCR's challenge is a facial challenge. LCR has repeatedly represented to this Court and the court of appeals that its challenge is thus distinguishable from *Witt*. *See* Plaintiff's *Ex parte* Application, Dkt. No. 53, at 2 ("*Witt* involves an "as-applied" challenge while [LCR's] challenge involves a facial constitutional challenge to "Don't Ask, Don't Tell"); Plaintiff's Writ of Mandamus, dated July 21, 2008, at 4 (representing that "*Witt* involves an 'as-applied' challenge to the policy while [LCR's] complaint involves a facial challenge to the [DADT] policy"). LCR has argued that:

> *Witt* involves an "as-applied" constitutional challenge to the Don't Ask, Don't Tell" policy, and, therefore, the Ninth Circuit also held that its heightened scrutiny analysis is as-applied rather than facial. This case, on the other hand, involves a facial challenge to the "Don't Ask, Don't Tell" policy.

Plaintiff's *Ex parte* Application, Dkt. No. 53, at 10 (internal citations to *Witt* omitted). And, according to LCR, its facial challenge to the statute is based upon "several facts [which it alleges evidence] the animus of the policy toward gay and lesbian members of the nation's armed forces." *Id*., citing First Amended Compl., ¶ 36. The allegations set forth in paragraph 36 of the Complaint are not based upon the individualized harm of any specific, identified LCR member.

ARGUMENT

I. *Witt* Prohibits Facial Substantive Due Process Challenges to DADT

Inasmuch as the Ninth Circuit has clearly stated that the heightened scrutiny analysis it adopted is "as-applied rather than facial," *Witt*, 527 F.3d at 819, LCR's admitted facial challenge to the DADT statute cannot proceed.

The Ninth Circuit emphasized that allowing only as-applied challenges to proceed "is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments." *Id*., quoting *City of Cleburne v. Cleburne Living* Ctr., *Inc*., 473 U.S. 432, 447, 105 S.Ct. 3249, 87 L. Ed. 2d 313 (1985). This recognition is consistent with the well-established law

recognizing that facial challenges to validly enacted statutes such as the DADT statute are disfavored. *See Washington State Grange v. Washington State Republican Party*, __ U.S. __, 128 S.Ct. 1184, 1191, 170 L. Ed. 2d 151 (2008). Because "[c]laims of facial invalidity often rest on speculation . . . , they raise the risk of 'premature interpretation of statutes on the basis of factually barebones records.'" *Id*. at 1191, quoting *Sabri v. United States*, 541 U.S. 600, 609, 124 S.Ct. 1941, 158 L. Ed. 2d 891 (2004). "Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Id*., quoting *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring); *accord United States v. Raines*, 362 U.S. 17, 21, 80 S.Ct. 519, 4 L. Ed. 2d (1960). And, lastly, permitting facial challenges to proceed also "threaten[s] to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.*

The Ninth Circuit thus made clear that challenges to the DADT statute must be as-applied and conducted through an "individualized balancing analysis." *Witt*, 527 F.3d 821. As to the first *Sell* factor– an important governmental interest–the Ninth Circuit concluded that the governmental interests at issue in DADT (unit cohesion and morale) satisfy that requirement. *See Witt*, 527 F.3d at 821 ("[i]t is clear that the government advances an important governmental interest."). But the Ninth Circuit emphasized that the application of the second and third *Sell* factors requires an "as-applied" challenge that is tied "specifically" to the circumstances an individual. *Id*. It is "[o]nly then [that] DADT be measured against the . . . constitutional standard" adopted in *Witt*. *Id*.

An individualized inquiry, however, is impossible here given that LCR has attempted to challenge the statute facially. LCR's challenge is not based upon the record of a particular individual. It is instead based upon generalized claims that the statute is based upon animus "toward gay and lesbian members of the nation's armed forces." Plaintiff's *Ex parte* Application, Dkt. No. 53, at 10. And even those general claims are not supported with reference to the record of any particular individual officer(s). Paragraph 36 of LCR's amended complaint, which LCR states forms the basis of its substantive due process challenge, *see id*., is not tied to the facts of any individual officer. That paragraph contains generalized statistics purportedly showing that the statute has been disproportionately applied in certain sectors of the military and to women, and generalized assertions that other armed forces throughout the world and non-military agencies allow the open service of gay and lesbian members. *See* First Amended Compl., ¶ 36. Because those allegations are not tied to the facts of any particular individual member, they cannot be heard under the as-applied analysis now required by *Witt*. LCR's substantive due process challenge to the DADT statute can thus be dismissed on this basis alone.

II. The *Witt* Analysis Makes Associational Standing Unavailable

In addition to negating any possible claims LCR has, the *Witt* ruling affects this lawsuit at an even more fundamental level–it strips LCR of organizational standing. To establish associational standing, LCR must demonstrate that each of the following tests are satisfied: "its members would otherwise have standing to sue in their own right; the interests it seeks to protect are germane to the organization's purpose; and 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*, 431 U.S. 333, 343, 97 S.Ct. 2434, 53 L. Ed. 2d 383 (1977).

Because the application of the second and third *Sell* factors now require an "as-applied" challenge that applies "specifically" to an individual, *see Witt*, 527 F.3d at 821, LCR cannot satisfy the third factor of the *Hunt* test. In this respect, this case is like *Washington Legal Found. v. Legal Found. of Washington*, 271 F.3d 835 (9th Cir. 2001). There, plaintiffs attempted to establish associational standing to obtain injunctive relief for a taking under the Fifth Amendment. But because the adjudication of a takings claim will differ from person to person because the determination of just compensation will differ depending upon the plaintiff, the Ninth Circuit found associational standing to be unavailable as a matter of law under the third prong of the *Hunt* test. *Id*. at 849-50; *see also Committee for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency*, 365 F. Supp. 2d 1146, 1162-65 (D. Nev. 2005) (plaintiff lacks associational standing to bring as-applied challenge). Because the adjudication of substantive due process challenges will differ under the "individualized balancing analysis" of the second and third of the *Sell* factors now required in *Witt*, 527 F.3d at 821, associational standing is similarly unavailable here.

III. LCR's Facial Challenge Would Fail In Any Event After *Witt*

Finally, even if LCR's facial challenge could proceed after *Witt*, it would still fail. "[A] facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L. Ed. 2d 697 (1987) (addressing standard of proof for a facial substantive due process challenge, as presented here). And where, as here, a statute has a "plainly legitimate sweep," *Washington v. Glucksberg*, 521 U.S. 702, 739-40 n. 7, 117 S.Ct. 2258,138 L. Ed. 2d 772 (1997) (Stevens, J., concurring in judgment); *see also Washington State Grange*, __U.S. __, 128 S. Ct. at 1190 (recognizing standard), a facial challenge fails.

The Ninth Circuit has recognized that the DADT statute serves a legitimate governmental interest. *See Philips v. Perry*, 106 F.3d 1420, 1426 (9th Cir. 1997), quoting *Beller v. Middendorf*, 632 F.2d 788, 810 (9th Cir. 1980). *Witt* reaffirms this precedent. The Ninth Circuit in *Witt* noted that "applying heightened scrutiny to DADT in light of Supreme Court precedent, 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." *Witt*, 527 F.3d at 821, quoting *Rostker v. Goldberg*, 453 U.S. 57, 70, 101 S.Ct. 2646, 69 L. Ed. 2d 478 (1981). And while LCR posits that the statute is based upon animus, First Amended Compl. ¶ 36, the Ninth Circuit has recognized that the "military's justifications for separating members who engage in homosexual acts have roots in factors which distinguish military from civilian life[,]" including the need to ensure unit cohesion and preparedness, and avoid sexual tension. *Philips*, 106 F.3d at 1429. Those factors are not based upon animus. *See Witt*, 527 F.3d at 821 n. 10 (recognizing that such factors are not based upon animus).

The deliberations that led to the statute also reveal that Congress and the Executive Branch fully considered both sides of the debate over the issue of military service by homosexuals, including in particular the criticism that the military's policies were based on "prejudice." The Senate Committee emphasized that "its position on the service of gays and lesbians is not based upon stereotypes." *See* S. Rep. No. 103-112, at 282 (1993), *reprinted* at 1993 WL 286446 (statement of General Colin Powell, Chairman of the Joint Chiefs of Staff). Rather, the statute embodies Congress's judgment about "the impact in the military setting of the conduct that is an integral element of homosexuality," *id*., and the considered professional judgment of military authorities after a "careful,

thorough, and open-minded review" as to what is best for "military effectiveness." *Id*. at 279.

Based upon that judgment, Congress specifically concluded that the statute does not embody "an irrational prejudice against gays and lesbians"; it is "based upon prudence, not prejudice." *Id*. at 283. Congress' conclusion that the policy is not based on prejudice is confirmed by the fact that the DADT policy does not exclude homosexuals from working for DoD as civilian employees or contractors; rather, due to the "unique conditions of military service, and the critical role of unit cohesion" (10 U.S.C. § 654(a)(8)(A)), the policy excludes military service by persons who engage in, or are likely to engage in, homosexual acts.[2] The statute thus recognizes "the extraordinary responsibilities of the armed forces" (*id*.), and Congress and the Executive Branch tailored the statute to meet the unique demands of military service. In short, *Witt* held and the congressional record establishes that DADT has a plainly legitimate sweep, and therefore, LCR's facial substantive due process challenge to the statute fails as a matter of law.

CONCLUSION

LCR's substantive due process claim should thus be dismissed. And because LCR's other claims are subject to binding Ninth Circuit precedent upholding the statute that are not altered by *Witt*,[3] the action should be dismissed.

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[2] Congress acknowledged that service members "may be required to work with gays or lesbians who are DoD civilian. . . or contractor employees." S. Rep. 103-112 at 281. "This is not the same, however, as requiring military personnel to share their personal living spaces with individuals who, by their acts or statements, demonstrate a propensity or intent to engage in sexual conduct with persons of the same sex." *Id*.

[3] The *Witt* majority reaffirmed *Philips*, which "clearly held that DADT does not violate equal protection under rational basis review, 106 F.3d at 1424-25, and [found this holding to be] not disturbed by *Lawrence*, which declined to address equal protection argument[.]" 527 F.3d at 821. The court thus dismissed plaintiff's equal protection claim in *Witt, id*., and the same result should be reached here. And because the plaintiff in *Witt* did not appeal the dismissal of her First Amendment claim, the precedent in *Holmes v. California Army Nat. Guard*, 124 F.3d 1126, 1136 (9th Cir. 1997), upholding the statute under the First Amendment, remains binding upon this Court.

Respectfully submitted,

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