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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 (substituted for Donald H. Rumsfeld pursuant to FRCP 25(d)), SECRETARY OF DEFENSE, in his official capacity,

Defendants.

Case No. CV04-8425 VAP (Ex)

PLAINTIFF'S SUPPLEMENTAL BRIEF RE: SUBSTANTIVE DUE PROCESS PURSUANT TO JANUARY 29, 2009 MINUTE ORDER

Motion to Dismiss:
Date: March 9, 2009
Time: 10 a.m.

Complaint Filed: October 12, 2004
Trial Date: None scheduled

I. INTRODUCTION

Plaintiff Log Cabin Republicans respectfully submits, pursuant to this Court's January 29, 2009 Order, this supplemental brief regarding the effect of the Ninth Circuit's recent decision in *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008) in this case, particularly with respect to Log Cabin Republicans' substantive due process claim.[1] As discussed below, *Witt* requires this Court to deny the government's motion to dismiss. Under *Witt*, this Court must subject the government's "Don't Ask Don't Tell" policy [codified at 10 U.S.C. § 654l ("DADT")][2] to a new level of heightened scrutiny. In light of *Witt*, Log Cabin Republicans has clearly plead facts sufficient to state a claim for a violation of its members' substantive due process rights.

In addition, the three arguments advanced by the government, all based on a misreading of *Witt*, are unavailing. First, *Witt* did not foreclose facial challenges to DADT. Second, *Witt* has no effect on Log Cabin Republicans' ability to assert its claims based on representational standing. Finally, *Witt* did not "reaffirm[]" prior Ninth Circuit precedent regarding DADT. Rather, the decision represents a rejection – based on principles articulated in *Lawrence v. Texas*, 539 U.S. 558 (2003) – of those past decisions, which applied the wrong standard of review.

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[1] *Witt* has no direct impact on either Log Cabin Republicans' equal protection or first amendment claims. Log Cabin Republicans submits that those claims, like its substantive due process claim, were adequately plead and should not be dismissed.

[2] During the January 29, 2009 hearing, the Court inquired regarding the status of DADT in light of the change in presidential administrations. DADT is still in effect, however President Obama has stated he believes DADT must be repealed. *See* The White House Agenda - Civil Rights (available at htttp://www.whitehouse.gov/agenda/civil_rights) (last accessed 2/27/09).

II. *WITT* CONFIRMS DEFENDANTS' MOTION TO DISMISS MUST BE DENIED

The significance of *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008) is simple, straightforward, and controlling: in *Witt*, for the first time "the Ninth Circuit subjected DADT to heightened scrutiny under substantive due process." *See* Defs.' Supplemental Br. Addressing Substantive Due Process 2.

In *Witt*, the court announced a three-part test to determine whether DADT's "intrusion into the personal and private life of the individual" including, specifically, the individual rights recognized by the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), was justified. *Witt*, 527 F.3d at 818 (quoting *Lawrence*, 539 U.S. at 578). Namely, the court held that in order for DADT to withstand heightened scrutiny, a court must find (1) "that *important* governmental interests are at stake;" (2) that the application of DADT "will *significantly further* those interests;" and (3) that the application of DADT "is *necessary* to further those interests . . . [and] that any alternative, less intrusive [means] are unlikely to achieve substantially the same results." *Id.* at 818-19 (emphasis in original).

Witt requires denial of Defendants' motion to dismiss, particularly with respect to Log Cabin Republicans' substantive due process claim. The question before the Court is not whether Log Cabin Republicans will ultimately prevail on all three prongs of the test newly announced in *Witt*, but whether Log Cabin Republicans has adequately plead a claim for relief such that it should be allowed to conduct discovery and present substantive evidence regarding its claims. The facts plead in the First Amended Complaint clearly establish that Log Cabin Republicans has met its burden. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987) (in ruling on a motion to dismiss, a court must accept as true all material allegations of the complaint and draw all reasonable inferences in favor of plaintiff).

Specifically, Log Cabin Republicans pleads facts that establish DADT fails the second and third prongs of the *Witt* test when these facts are accepted as true (as they must be at the motion-to-dismiss stage). Log Cabin Republicans does not dispute that "the management of the military" is an "important government interest" under the first prong of the *Witt* test. *See* Defs.' Supplemental Br. 2. As to the second *Witt* prong, Log Cabin Republicans adequately pleads facts showing that DADT does not "significantly further" the "management of the military," for example, by pleading that "[e]limination of the policy would strengthen the United States Armed Forces." First Am. Compl. ¶ 37; *see also* The White House Agenda - Civil Rights, *supra* (repealing DADT will "help[] accomplish our national defense goals"); *id.* (DADT has cost millions of dollars, has removed over 300 much-needed military specialists).

With regard to the third *Witt* prong, Log Cabin Republicans plead facts establishing that the institution of DADT and the rationales proffered in support of it at the time of its adoption were mere pretexts. Log Cabin Republicans also plead that the military has successfully coordinated with U.S. and foreign military and government entities that do proudly accept the participation of gays and lesbians, thereby belying any claim that DADT is "necessary" to the successful "management of the military." *See, e.g.* First Am. Compl. ¶ 36; *see also* Brian Witte, *Admirals, Generals: Repeal 'Don't Ask, Don't Tell'*, Associated Press, Nov. 17, 2008 (available at http://abcnews.go.com/US/ wireStory?id=6274139) (last accessed Feb. 27, 2009) (more than 100 retired generals and admirals call for repeal of DADT stating, "our service members are professionals who are able to work together effectively despite differences in race, gender, religion, and sexuality").

III. DEFENDANTS' THREE NEW ARGUMENTS ARE UNAVAILING AND BASED ON A MISUNDERSTANDING OF *WITT*

Perhaps appreciating its tenuous position in light of *Witt*, the Government advances three new arguments, all based on a misreading of that opinion. First,

Defendants contend *Witt* forecloses Log Cabin Republicans from advancing a facial challenge to DADT. Defendants are wrong. In *Witt*, unlike here, the plaintiff did not present a facial challenge to DADT. Rather, "plaintiff urge[d] this Court to engage in an 'as-applied' analysis." *Witt v. Department of the Air Force*, 444 F. Supp. 2d 1138, 1143 (W.D. Wash. 2006); *id*. ("She argues that her exemplary military service coupled with the fact that the conduct in question applied off-base, in private, with a consenting adult, tip the balance in her favor and compels a decision that DADT is unconstitutional *as applied* to her.") (emphasis added). Thus, to any extent *Witt* did purport to find that the heightened scrutiny test it announced can be made solely on an "as-applied" basis, that finding is dicta.

Such a finding would also be inconsistent with the principal authorities cited in *Witt*: *City of Cleburne v. Cleburne Living Center. Inc.*, 473 U.S. 432 (1985), and *Sell v. United States*, 539 U.S. 166 (2003). *City of Cleburne* merely stands for the proposition that where a plaintiff asserts both an "as-applied" challenge and a facial challenge, the "preferred course of adjudication" is to consider the "as-applied" challenge first. *City of Cleburne*, 473 U.S. at 447. In *City of Cleburne*, the plaintiff advanced both facial and "as-applied" challenges to a zoning ordinance on the ground that it discriminated against the mentally retarded in violation of equal protection. *City of Cleburne*, 473 U.S. at 437 ("[Plaintiff] then filed suit … alleging… that the zoning ordinance was invalid on its face and as applied…."). The Supreme Court addressed the plaintiff's "as-applied" challenge first, reasoning that if it ruled for the plaintiff on that basis "there will be no occasion to decide whether the [challenged ordinance] is facially invalid." *Id*. at 447. Having found the ordinance unconstitutional "as-applied," the court did not decide the facial challenge.

In *Sell*, the plaintiff asserted only an "as-applied" challenge. *See Sell*, 539 U.S. at 177-78 ("We turn now to the basic question presented: Does forced administration of antipsychotic drugs to render [the *plaintiff*] competent to stand trial

unconstitutionally deprive *him* of his 'liberty' to reject medical treatment?") (emphasis added). The court's analysis, therefore, necessarily involved "the facts of the individual case." *Id.* at 180.

Defendants' reading of *Witt* would lead to absurd results, essentially requiring this Court to override a plaintiff's self-selected method of raising a constitutional challenge – i.e., "as-applied" or "facial" – based on the standard of review. There is no authority for that proposition. Moreover, such a practice would be entirely inconsistent with one of the most basic precepts of constitutional law: a constitutional challenge is evaluated on the basis advanced by the plaintiff. *See, e.g. Rust v. Sullivan*, 500 U.S. 173, 194 (1991) ("These cases…involve only a facial challenge to the regulations, and we do not have before us any application…to a specific fact situation."); *Martinez v. Bynum*, 461 U.S. 321 (1983) (Brennan, J., concurring) (noting that "this case involves only a facial challenge to the constitutionality" of a statute and that "[i]n upholding the statute, the Court does not pass on its validity as applied …in a range of specific factual contexts."); *IDK, Inc. v. Clark County*, 836 F.2d 1185, 1190 (9th Cir. 1988) ("The case was brought as facial challenge only, and it is in that context that we undertake our review.").

Defendants' second argument, predicated on their first, is that because Log Cabin Republicans has not advanced an "as-applied" claim, it cannot meet the requirements of representational standing. That argument fails, for the reasons described above. Moreover, the primary authority Defendants cite for this proposition, *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835 (9th Cir. 2001), does not support it. Contrary to Defendants' portrayal, the case did not find "associational standing to be unavailable as a matter of law" "because the adjudication of a takings claim will differ from person to person." Defs.' Supplemental Br. 8. Rather, the court denied associational standing for an entirely different reason that has no application here. In *Washington Legal*

Foundation, the court denied representational standing to an organization that was seeking "prospective injunctive relief" for an alleged taking because injunctive relief was "an inappropriate remedy here." *Wash. Legal Found.*, 271 F.3d at 849. Because the "appropriate relief" in takings cases is "just compensation" (i.e., damages), the court concluded that the participation of individual plaintiffs was required in order to determine what, if any, damages, were due to the owners of the taken properties. *Id.* Here, however, Log Cabin Republicans' prayer for relief seeks only injunctive remedies (aside from attorney's fees and costs), not damages, and therefore this case presents no individual evidentiary issues. *See Hunt v. Wash. State Apple Adver. Comm'n*, 431 US 333 (1977) (associational standing permitted when "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit").

Finally, Defendants claim that Log Cabin Republicans' facial challenge "fail[s] after *Witt*." Defs.' Supplemental Br. 8. Defendants argue *Witt* "held…DADT has a plainly legitimate sweep" and that *Witt* recognized DADT was "not based upon animus." Defs.' Supplemental Br. 9, 10. Defendants are incorrect. As to the former, the *Witt* court merely noted that "management of the military" is an "important governmental interest." In no way did the Ninth Circuit signal that DADT is somehow presumptively valid. Rather, the court was careful to note both that judicial deference to the military "does not mean abdication" and that Congress "remains subject to the Due Process Clause when legislating in the area of military affairs." *Witt*, 527 F.3d at 821 (quoting *Weiss v. United States*, 510 U.S. 163, 176 (1994)).

Defendants' principal citation for the claim DADT was "not based on animus" is footnote 10 of the *Witt* opinion. There is no such statement (either express or implied) in the footnote; rather, there the court stressed both that the rationales advanced in support of DADT "should not be given unexamined effect today as a matter of law" and that if DADT were based on inappropriate biases against

homosexuals – as Log Cabin Republicans contends it was – "the law cannot, directly or indirectly, give them effect." *Witt*, 527 F.3d at 821 n.10 (quoting *Pruitt v. Chaney*, 963 F.2d 1160, 1165 (9th Cir. 1992)).

In sum, Defendants would have this Court replace *Witt's* second and third factors with blind deference to congressional fact-finding. *Witt* requires just the opposite – that Log Cabin Republicans be permitted to independently develop facts which show that under no circumstances does DADT significantly further important government interests and that DADT is not necessary to further those interests. Plaintiff is confident that, with adequate discovery, it will meet its burden.

IV. CONCLUSION

For these reasons, and for the reasons previously briefed and argued, Plaintiff Log Cabin Republicans respectfully submits that Defendants' motion to dismiss be denied.

Respectfully submitted,

DATED: February 27, 2009

WHITE & CASE LLP

By: /s/
Patrick Hunnius
Attorneys for Plaintiff Log Cabin Republicans

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 633 W. Fifth Street, Suite 1900, Los Angeles, CA 90071-2007. I am employed by a member of the Bar of this Court at whose direction the service was made.

On February 27, 2009, I served the foregoing document(s) described as PLAINTIFF'S SUPPLEMENTAL BRIEF RE: SUBSTANTIVE DUE PROCESS PURSUANT TO JANUARY 29, 2009 MINUTE ORDER on the person(s) below, as follows:

Roger West, AUSA First Assistant Chief U.S. Department of Justice United States Attorney Central Division of California Federal Building, Suite 7516 300 North Los Angeles Street Los Angeles, CA 90012 Telephone: (213) 894-2461 Facsimile: (213) 894-7819/7385	Michael F. Hertz Vincent M. Garvey Paul G. Freeborne U.S. Department of Justice, Civil Div. Federal Programs Branch P.O. Box 883 Washington, DC 20044 Telephone: (202) 353-0543 Fax: (202) 616-8460 / (or) (202) 616-8202

☒ **(BY MAIL)** I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed above and placed the envelope for collection and mailing at White & Case, LLP, Los Angeles, California, following our ordinary business practices. I am readily familiar White & Case's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the correspondence would be deposited in the United States Postal Service on that same day in the ordinary course of business.

Executed on February 27, 2009 at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Cynthia Gomez