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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, SECRETARY OF DEFENSE, in his official capacity,

Defendants.

Case No. CV04-8425 VAP (Ex)

**JOINT RULE 26(f) REPORT**

SCHEDULING CONFERENCE:
Date: July 6, 2009
Time: 1:30 p.m.
Place: Courtroom of Hon. Virginia A. Phillips

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

Pursuant to Federal Rule of Civil Procedure 26, Local Rule 26, and the Court's June 18, 2009, Order Setting Matter for July 6, 2009 Scheduling Conference, Plaintiff Log Cabin Republicans and Defendants United States of American and Robert M. Gates, Secretary of Defense, by and through their respective counsel, submit the following Joint Rule 26(f) Scheduling Conference Report.

## I. FRCP 26 REQUIREMENTS

### A. Rule 26(a) Disclosures

#### 1. Plaintiff's Position

Plaintiff proposes that the parties make the initial disclosures required under Rule 26(a)(1) within 60 days of the Rule 26(f) Scheduling Conference on July 6, 2009. Plaintiff does not believe any other changes should be made in the timing, form, or requirement for disclosures under Rule 26(a).

#### 2. Defendants' Position

Defendants do not believe that either discovery or initial disclosures are appropriate in this case. As the Court noted, Plaintiff has opted to pursue a "litigation strategy" to proceed solely with a facial, not an as-applied challenge. Order at 16. Because such a challenge raises legal, not factual issues, discovery is inappropriate. It is well understood that "[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).

To thus prevail upon its challenge to the Don't Ask, Don't Tell statute, Plaintiff would have to show that there is no legitimate constitutional application of the statute. Because the courts must be "careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases," *Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184,

1190, 170 L. Ed. 2d 151 (2008), Plaintiff's requested discovery is inappropriate.

This is particularly so here, given that the Court has already ruled that Plaintiff may not "rely upon [the] heightened scrutiny standard [adopted in *Witt v. Department of Air Force*, 527 F.3d 806 (9th Cir. 2008)] as the Ninth Circuit limited this standard to as-applied challenges." Order at 17. It is well understood that a legislative choice subject to the rational basis test "is not subject to courtroom fact-finding." *Federal Communications Comm'n v. Beach Communications*, 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L. Ed. 2d 211 (1993). The Government has "no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller v. Doe*, 509 U.S. 312, 113 S.Ct. 2637, 125 L. Ed. 2d 257 (1993). The only question presented is whether the legislature "rationally *could have believed*" that the conditions of the statute would promote its objective. *Western and Southern Life Insurance Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 671-72, 101 S.Ct. 2070, 68 L. Ed. 2d 514 (1981) (emphasis in original).

Rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Beach Communications*, 508 U.S. at 313. Rather, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111, 99 S.Ct. 939, 59 L. Ed. 171 (1979). "Only by faithful adherence to this guiding principle of judicial review," the Supreme Court has cautioned, "is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 366, 93 S.Ct 1001, 35 L. Ed. 2d 351 (1973).

Plaintiff's suggestion below (*see* Plaintiff's Position on Discovery) that this Court should permit it to revisit the constitutionality of the statute based on post-enactment developments cannot be squared with these principles. Classifications

subject to rational-basis review are not subject to challenge on the ground of changed circumstances. *See, e.g., United States v. Jackson*, 84 F.3d 1154, 1161 (9th Cir. 1996) (Congress's initial decision to enact the 100:1 ratio "was rational, even though it differs from the Sentencing Commission's current recommendation regarding the magnitude of the disparity."); *Montalvo-Huertas v. Rivera-Cruz*, 885 F.2d 971, 977 (1st Cir. 1989) ("[E]valuating the continued need for, and suitability of, legislation of this genre is exactly the kind of policy judgment that the rational basis test was designed to preclude."); *United States v. Teague*, 93 F.3d 81, 84 (2d Cir. 1996) ("Nor does Congress's failure to adopt the [Sentencing] Commission's proposal render the current 100:1 [crack to powder cocaine] ratio unconstitutional. The 100:1 ration had a rational basis when enacted, and the Commission's continuing consideration of the appropriate sentencing scheme for crack and powder cocaine counsels against judicial intervention.").

Indeed, courts have found that even where Congress has determined that a previous enactment is no longer necessary, that finding does render the statute unconstitutional. *See Smart v. Ashcroft*, 401 F.3d 119, 123 (2d Cir. 2005) ("A congressional decision that a statute is unfair, outdated, and in need of improvement does not mean that the statute when enacted was wholly irrational or, for purposes of rational basis review," unconstitutional); *Howard v. U.S. Dept. of Defense*, 354 F.3d 1358, 1361-62 (Fed. Cir. 2004) ("Congress acts based on judgments as to preferable policy; the fact that Congress repeals or modifies particular legislation does not reflect a judgment that the legislation, in its pre-amendment form lacked rational support"). Were it otherwise, all legislation subject to rational basis review could potentially be subject to periodic judicial review on the basis changed circumstances, a prospect incompatible with these principles and the Supreme Court's admonition that "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Heller*, 509 U.S. at 320.

Plaintiff's facial challenge to the statute should thus now proceed to summary judgment. The Ninth Circuit has recognized that the statute is rational and "necessary to further military effectiveness by maintaining unit cohesion, accommodating personal privacy and reducing sexual tension." *Philips v. Perry*, 106 F.3d 1420, 1429 (9th Cir. 1997). While this determination was made in the context of equal protection, Order at 17 n. 5, Defendants believe that ruling applies with equal force in the substantive due process context. The Ninth Circuit recognized that "avoiding sexual tension" has a "'footing in the realities'" of military life. *Id.*, citing *Heller*, 509 U.S. at 321. And that recognition applies generally to both equal protection and substantive due process.

With respect to Plaintiff's First Amendment claim, the Court granted the Government's motion to dismiss to the extent Plaintiff sought to challenge the military's use of a member's statement of homosexual orientation as an admission of a likelihood to engage in homosexual acts. Order at 21-22. The Court denied the motion insofar as Plaintiff is seeking to allege some impermissible use of a member's statement of homosexual orientation, a claim not clear on the fact of the First Amended Complaint. Order at 23. Given that Plaintiff has failed to identify any individual among its membership who has been subject to such treatment, *id.*, summary judgment/dismissal is also appropriate on this claim because Plaintiff lacks organizational standing to bring that challenge. Any such challenge, moreover, is not ripe. In fact, any such challenge could not be the subject of a constitutional challenge to the statute because it is premised upon a misapplication of the statute; as the Court observed, under the statute, a statement creates only the "presumption" that a member "engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." Order at 5 (quoting 10 U.S.C. § 654(b)). This presumption can, and has been rebutted. *See* e.g., *Thorne v. United States Department of Defense*, 945 F. Supp. 924, 927-28 (E.D. Va. 1996). To the extent Plaintiff refuses to voluntarily dismiss its First Amendment claim, the

Government intends to promptly move for dismissal under Fed. R. Civ. P. 12(c) or for summary judgment on this claim.

In any case, neither discovery nor initial disclosures are appropriate. To the extent the Court permits discovery, however, the Government reserves the right to seek certification under 28 U.S.C. § 1292(b) to obtain appellate review or to conduct discovery as provided by the Federal Rules of Civil Procedure.

**B. Discovery Plan**

**1. Plaintiff's Position**

Contrary to defendants' claim that discovery is inappropriate here, plaintiff is entitled to initial disclosures and to conduct discovery in the normal course. None of the cases defendants cite state that discovery is improper in the context of a facial challenge. In fact, as will be shown below, even the most deferential rational basis scrutiny is conducted in light of evidence gathered through the discovery process.

As an initial matter, plaintiff respectfully submits that this Report is not the proper forum in which to litigate the parties' discovery dispute. The question of whether Log Cabin Republicans is entitled to discovery is of too much significance to be handled in such a cursory manner, outside of normal motion practice. If the government intends to oppose all attempts at discovery, its opposition should take the form of a motion for protective order. Alternatively, the government can object to discovery requests plaintiff propounds in due course and can oppose plaintiff's eventual motion to compel.

In any event, Log Cabin Republicans is entitled to discovery even absent the *Witt* heightened scrutiny standard because this court did not preclude the application of some other heightened standard of scrutiny, *see* Order at 16-17, and because the rational basis test does not demand an analysis frozen in time. The Supreme Court has long held that plaintiffs may challenge "the constitutionality of a statute predicated upon the existence of a particular state of facts . . . by showing to the court that those facts have ceased to exist." *United States v. Carolene Prods.*

*Co.*, 304 U.S. 144, 153 (1938) (applying rational basis); *see also Leary v. United States*, 395 U.S. 6, 38 n. 68 (1969) ("a statute based upon a legislative declaration of facts is subject to constitutional attack on the ground that the facts no longer exist.").

Indeed, several recent decisions considered evidence that facts relied upon by a legislature in enacting a constitutionally-challenged statute no longer exist and held that a once-rational statute can subsequently become irrational. The Supreme Court in *Lawrence v. Texas*, 559 U.S. 558 (2003), provided a prime example of this. The Court overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), in part because the years following that decision highlighted its deficiencies and because criticism of *Bowers* in the U.S. and elsewhere had been "substantial and continuing." *Lawrence*, 559 U.S. at 576-77 (emphasis added). The *Lawrence* court also examined the degree to which anti-sodomy statutes were enforced "in the years following" *Bowers*. *Id.* at 573.

Just one month ago, the Tenth Circuit Court of Appeals confirmed that a rational basis analysis does not excuse the Court from examining evidence following enactment of the challenged legislation. In *Dias v. City & County of Denver*, __ F.3d __, No. 08-1132, 2009 WL 1490359 (10th Cir. May 27, 2009), the court considered a rational basis constitutional challenge to an ordinance banning pit bull dogs in Denver, Colorado. *Id.* at *9. The plaintiffs argued that no evidence existed that pit bulls as a breed pose a threat to public safety and that it is irrational for Denver to enact a breed-specific prohibition. *Id.* at *10. Specifically, the plaintiffs argued that "although pit bull bans sustained twenty years ago may have been justified by the then-existing body of knowledge, the state of science in 2009 is such that the bans are no longer rational." *Id.*

The court conceded that Denver's interest in public safety was legitimate, but acknowledged that evidence following the enactment of the ordinance may be relevant to whether the ordinance is still rational. *Id.* The court refused to preclude

the plaintiffs from presenting such evidence. *Id.* The court emphasized that a rational basis analysis must involve "a developed evidentiary record" and that plaintiffs must be permitted to "marshal" their evidence to that end. *Id.* at *11, n.12.

The recent Supreme Court decision in *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. ___ (2009) similarly demonstrates a judicial willingness to consider changes in circumstances following the enactment of a statute. Without resolving the constitutionality issue, the majority envisioned that circumstances may have changed enough to render Section 5 of the Voting Rights Act of 1965 unjustifiable and unconstitutional. *Id.* at 16. The Court noted that "the act imposes current burdens and must be justified by current needs." *Id.* at 8. In his concurring and dissenting opinion, Justice Thomas went further by arguing that "the lack of current evidence of intentional discrimination . . . renders § 5 unconstitutional. The provision can no longer be justified . . . ." *Id.* (opinion of Justice Thomas) at 1. Indeed, Justice Thomas emphasized that the evidence underlying the enactment of Section 5 no longer exists and that the lack of such evidence "undermines any basis for retaining" it.

The above authority – as well as others Log Cabin Republicans would submit in connection with formal motion practice regarding the proper scope of discovery – requires that plaintiff be permitted to marshal evidence from before and after enactment of the "Don't Ask, Don't Tell" statute.

In light of the above, plaintiff anticipates conducting discovery in the ordinary manner, initially propounding written discovery, incuding requests for production of documents, interrogatories, and requests for admission, followed by deposition discovery, including depositions noticed under Federal Rule of Civil Procedure 30(b)(6) and depositions of individuals no longer employed by the United States of America who would thus be third party witnesses.

Given the important constitutional issues at stake in this action, discovery

should not be limited or focused in terms of subject matter. By way of example only, among the topics into which plaintiff intends to conduct discovery are those enumerated at paragraph 36 of its First Amended Complaint:

- Discharge of service members under the Don't Ask, Don't Tell, Don't Pursue Policy and corresponding Department of Defense regulations (the "Policy");
- The frequency with which the Policy was been applied or enforced during peace time as compared to periods of war;
- Instances in which members of the U.S. military have served and fought side by side with forces from other nations that allow lesbian and gay military members to serve openly;
- The disproportionate impact of the Policy upon women in the U.S. military;
- Instances in which members of the U.S. military have worked closely with personnel from the U.S. Central Intelligence Agency, National Security Agency, Federal Bureau of Investigation, and other entities which prohibit discrimination on the basis of sexual orientation;

Plaintiff also anticipates seeking discovery from those individuals who were involved in the formulation of, advocacy for, or enactment of the Policy who now take a different position with regard to the propriety of the Policy.

Plaintiff also intends to engage in expert witness discovery following the conclusion of document discovery and lay witness depositions.

Other than by ordering discovery as described herein, plaintiff does not believe discovery should be conducted in phases.

Plaintiff proposes that the Court set the Discovery Cut-Off date approximately six (6) months following the parties' service of its initial disclosures under Rule 26(a).

**2. Defendants' Position**

Defendants do not believe discovery is appropriate and their position is set forth in Part A.

**B. Electronically Stored Information**

**1. Plaintiff's Position**

Plaintiff is not aware of any issues regarding the disclosure or discovery of electronically stored information. To the extent any party opts to or must produce information in electronic form, plaintiff will cooperate to determine the best format for production.

**2. Defendants' Position**

Defendants do not believe discovery is appropriate and their position is set forth in Part A.

**C. Protection of Materials**

**1. Plaintiff's Position**

Plaintiff is unaware of any issues regarding claims of privilege and does not anticipate requesting the entry of a protective order in this action. However, plaintiff recognizes that defendants may request the entry of a protective order to preserve third party privacy rights and the confidentiality of documents and other materials. Plaintiff does not anticipate that it will object to the entry of any such protective order.

**2. Defendants' Position**

Defendants do not believe discovery is appropriate and their position is set forth in Part A.

**D. Discovery Limitations**

**1. Plaintiff's Position**

Plaintiff hopes to require no more than ten (10) depositions as provided in

Federal Rule of Civil Procedure 30(a)(2)(A)(i). However, plaintiff may require additional depositions depending on the number of individuals defendants identify in their initial disclosures and in their responses to written discovery and depending on review of documents produced during discovery.

In light of the important constitutional issues at stake in this action, no additional limitations should be placed upon the parties' ability to conduct discovery beyond those enumerated in the Federal Rules of Civil Procedure and the Local Rules.

**2. Defendant's Position**

Defendants do not believe discovery is appropriate and their position is set forth in Part A.

## II. LOCAL RULE 26-1 REQUIREMENTS

### A. Complex Case

**1. Plaintiff's Position**

Plaintiff believes this is not a complex case.

**2. Defendant's Position**

Defendants agree that this is not a complex case; the matter should be resolved now on the legal issues presented.

### B. Motion Practice

**1. Plaintiff's Position**

Depending on the results of discovery, plaintiff may move for preliminary injunction.

**2. Defendant's Position**

Defendants intend to move for summary judgment and/or under Fed. R. Civ. P. 12(c) on the issues that remain.

### C. Settlement

**1. Plaintiff's Position**

In light of the constitutional questions at issue in this action, settlement is not

likely and efforts to that end would be unproductive.

**2. Defendant's Position**

Defendants believe that settlement is not possible and that further settlement discussions or procedures would not be fruitful.

**D. Trial Estimate**

**1. Plaintiff's Position**

At this time, plaintiff estimates that trial of this action will require approximately 7-8 days.

**2. Defendant's Position**

Defendants do not believe a trial is necessary or appropriate to resolve the remaining legal issues.

**E. Additional Parties**

**1. Plaintiff's Position**

Plaintiff does not plan to name additional parties, but reserves the right to do so if developments so warrant.

**2. Defendant's Position**

Defendants do not intend to name additional parties.

**F. Expert Witnesses**

**1. Plaintiff's Position**

As mentioned above, plaintiff anticipates conducting expert witness discovery following receipt of defendants' written discovery and the depositions of lay witnesses.

**2. Defendant's Position**

Defendants do not believe discovery is appropriate and their position is set forth in Part A.

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Respectfully submitted,

Dated: June 29, 2008

WHITE & CASE LLP

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

Dated: June 29, 2008

U.S. DEPARTMENT OF JUSTICE

By: /s/ Paul G. Freeborne
Paul G. Freeborne
Attorneys for Defendants United States of America and Secretary of Defense

## 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 June 29, 2009, I served the foregoing document(s) described as **JOINT RULE 26(f) REPORT** on the person(s) below, as follows:

| | |
|---|---|
| Roger West, AUSA First Assistant Chief<br>U.S. Department of Justice<br>United States Attorney<br>Central Division of California<br>Federal Building, Suite 7516<br>300 North Los Angeles Street<br>Los Angeles, CA 90012<br><br>Telephone: (213) 894-2461<br>Facsimile: (213) 894-7819/7385 | Tony West<br>Vincent M. Garvey<br>Paul G. Freeborne<br>U.S. Department of Justice, Civil Div.<br>Federal Programs Branch<br>P.O. Box 883<br>Washington, DC 20044<br><br>Telephone: (202) 353-0543<br>Fax: (202) 616-8460 / (or)<br>(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 June 29, 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