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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. CV 04-8425-VAP (Ex) Date: July 24, 2009

Title: LOG CABIN REPUBLICANS -*v*- UNITED STATES OF AMERICA, et al.

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PRESENT: HONORABLE VIRGINIA A. PHILLIPS, U.S. DISTRICT JUDGE

Marva Dillard Courtroom Deputy	None Present Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
None	None

PROCEEDINGS: MINUTE ORDER DENYING DEFENDANTS' REQUEST REGARDING DISCOVERY (IN CHAMBERS)

The Court has received and reviewed the parties' Joint 26(f) Report ("Report"), submitted in anticipation of the Scheduling Conference conducted on July 6, 2009. In it, Defendants United States of America and Secretary of Defense Robert M. Gates ("Defendants") contend they should be exempt from certain provisions of Rule 26 of the Federal Rules of Civil Procedure as Plaintiff Log Cabin Republican ("Plaintiff") brings facial, rather than as-applied, substantive due process and First Amendment challenges to 10 U.S.C. section 654, the "Don't Ask Don't Tell" ("DADT") policy. Having considered the Report and the arguments advanced at the Scheduling Conference, the Court DENIES Defendants' request and issues the attached Civil Trial Scheduling Order.

Neither party has been able to cite authority directly addressing the propriety of exempting a defendant from discovery where a facial substantive due process or First Amendment challenge has been brought. According to Defendants, who urge a departure from the right to discovery set forth in the Federal Rules, rational basis review under the Equal Protection Clause is a deferential

standard of review, under which the Court is not to second-guess Congressional choices. The cases Defendants cite, however, neither address discovery nor the constitutional claims now before the Court; the Court has dismissed Plaintiff's Equal Protection Claim on Defendants' motion. (See Report 2-3 citing FCC v. Beach Communications, 508 U.S. at 313, 315 (equal protection challenge to cable regulations); Heller v. Doe, 509 U.S. 312, 320 (1993) (equal protection challenge to law regarding commitment of mentally retarded persons); Western and Southern Life Ins. Co. v. State Bd. of Equalization of California, 451 U.S. 648, 671-72 (1981) (equal protection challenge to taxation of insurance companies); Vance v. Bradley, 440 U.S. 93, 111 (1979) (equal protection challenge to Foreign Service mandatory retirement age); Lenhahausen v. Lake Shore Auto Parts Co., 401 U.S. 356, 366 (1973) (equal protection challenge to taxation of corporations versus natural persons); U.S. v. Jackson, 84 F.3d 1154, 1161 (9th Cir. 1996) (equal protection challenge to disparity in sentencing guidelines relevant to "cocaine" and "cocaine base"); Montalvo-Huertas v. Rivera-Cruz, 885 F.2d 971, 977 (1st Cir. 1989) (equal protection challenge to Sunday closing law).)

Defendants urge the Court to find "a determination made in the context of equal protection" "applies generally to both equal protection and substantive due process." (Report 4 (discussing Philips v. Perry, 106 F.3d 1420, 1429 (9th Cir. 1997) (upholding predecessor to DADT policy on equal protection grounds).) Lawrence v. Texas does not support this contention. In Lawrence, the Supreme Court granted certiorari as to both substantive due process and equal protection challenges to Texas's sodomy law but granted relief pursuant only to petitioners' substantive due process claim, acknowledging the equal protection claim as a "tenable" "alternative argument." 539 U.S. at 574. Had a finding in one sphere mandated relief in the other, Lawrence would have so stated. Accordingly, the Court does not find Perry's equal protection holding forecloses relief, or discovery, for Plaintiff's substantive due process claim.

Plaintiff cites the holding of U.S. v. Carolene Products, 304 U.S. 144 (1938) that "a statute predicated upon the existence of a particular state of facts may be challenged upon showing to the court that those facts have ceased to exist." Id. at 153 citing Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924) (concerning challenge to a rent control law enacted in response to a housing crisis when the crisis ceased to exist).) Plaintiff argues it needs to, and is entitled to, conduct discovery in order to mount the sort of challenge described in Carolene Products, i.e., that the conditions described at 10 U.S.C. section 654(a) have "ceased to exist." See Carolene, 304 U.S. at 153; (Order Denying Part and Granting in Part Motion to Dismiss 6-7 (quoting Congress' factual findings).)

Although the other, out of circuit, authorities Plaintiff relies on, including Dias v. City and County of Denver, 567 F.3d 1169 (10th Cir. 2009), are not particularly persuasive here, the Court

finds Plaintiff is entitled to conduct discovery in this case to develop the basis for its facial challenge.

IT IS SO ORDERED.