Log Cabin Republicans v. United States of America et al Doc. 93

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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 GATES, Secretary of Defense, Defendants.	No. CV04-8425 VAP (Ex) DEFENDANTS' MOTION TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL AND STAY OF PROCEEDINGS PENDING RESOLUTION OF MOTION AND APPEAL DATE: November 16, 2009 TIME: 1:30 P.M. BEFORE: Judge Phillips

Filed herewith:

1. Notice of Motion and Motion to Certify Order for Interlocutory Appeal and Stay of Proceedings Pending Resolution of Motion and Appeal
2. Memorandum of Points And Authorities in Support of the Motion
3. Proposed Order
4. Attachment

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NOTICE OF MOTION AND MOTION TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL AND FOR STAY OF PROCEEDINGS PENDING RESOLUTION OF MOTION AND APPEAL

NOTICE IS HEREBY GIVEN that on November 16, 2009, at 1:30 PM, in the Courtroom of the Honorable Virginia A. Phillips, United States District Judge, Defendants United States and Secretary of Defense Robert Gates (hereafter "Defendants"), by and through counsel, will move to certify for interlocutory appeal its order denying the government's motion to dismiss this action with prejudice and for an order staying all proceedings pending resolution of the motion and appeal. The motion will be based upon these moving papers, the attached Memorandum of points and authorities in support of the Motion, and upon such other and further arguments, documents, and grounds as may be advanced in the future.

The Court's dismissal order should be certified for interlocutory appeal because it "involves a controlling question of law as to which there is substantial ground for difference of opinion" and because "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). In that order, this Court ruled that plaintiff Log Cabin Republicans has stated viable facial substantive due process and First Amendment challenges to the "Don't Ask, Don't Tell" statute, which generally prohibits those who engage in homosexual conduct from serving in the military. *See* 10 U.S.C. § 654. There is a substantial ground for disagreeing with that ruling under existing Ninth Circuit law. *See Holmes* v. *California Army National Guard*, 124 F.3d 1126, 1136 (9th Cir. 1997) (First Amendment); *Philips* v. *Perry*, 106 F.3d 1420 (9th Cir. 1997) (equal protection); *Beller* v. *Middendorf*, 632 F.2d 788, 810-11 (9th Cir. 1980) (Kennedy, J.) (substantive due process). An appeal will also materially advance the ultimate termination of this litigation because, if successful, it will end this litigation, and thus pretermit the burdensome, wide-ranging, and

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inappropriate discovery plaintiff seeks. Interlocutory appeal of the district court's order is therefore appropriate. The Court should thus grant the government's motion and stay all proceedings pending resolution of the instant motion and a final decision upon appeal.

On October 15, 2009, the government conferred with plaintiff's counsel , who advised that they oppose this motion.[1]

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[1] On June 29, 2009, the parties filed a Joint Rule 26(f) report in which the government specifically reserved the right to seek certification under 28 U.S.C. § 1292(b) and objected to plaintiff's contemplated discovery. *See* Dkt. No. 86, at 1-5. At the time that report was filed, and at the status conference on July 6, 2009, counsel for plaintiff fully understood and disagreed with the government's position regarding both the law and discovery. On October 15, 2009, the government conferred with opposing counsel, who advised that plaintiff opposes this motion. Despite the fact that plaintiff's counsel has both known and objected to the government's position for months, counsel complained of not being provided 20-days notice of the motion pursuant to LR 7-3. That position ignores the history of this case. Even if there were any prejudice, moreover, that can be addressed by permitting plaintiff additional time to respond to this motion. *See Fitzgerald v. City of Los Angeles*, 485 F. Supp. 2d 1137, 1140 (C.D. Cal. 2007).

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Dated: October 16, 2009

Respectfully submitted,

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I. INTRODUCTION

Plaintiff Log Cabin Republicans ("LCR") brings a facial challenge to the constitutionality of the statute (10 U.S.C. § 654) and the Department of Defense's ("DoD's") implementing regulations generally prohibiting homosexual conduct in the military, commonly known as the "Don't Ask, Don't Tell" ("DADT") policy. The government moved to dismiss plaintiff's challenge on the ground that Ninth Circuit precedent forecloses it. The Court denied the motion on June 9, 2009, Dkt. No. 83, and plaintiff has now propounded substantial and burdensome discovery requests that it believes are appropriate under this Court's view of the law.

The Government respectfully requests that the Court amend its order denying the motion to dismiss and certify the order for interlocutory appeal. Interlocutory appeal is warranted because the Court's order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and because "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). In that order, the Court ruled that plaintiff has stated viable facial substantive due process and First Amendment challenges to the DADT policy, and thus denied the government's motion to dismiss this action. There is a substantial ground for disagreeing with the Court's ruling on those controlling questions. The Ninth Circuit rejected a facial substantive due process challenge to the prior, more restrictive version of the DADT policy in *Beller* v. *Middendorf*, 632 F.2d 788, 810-11 (9th Cir. 1980) (Kennedy, J.) (substantive due process), and rejected a facial First Amendment challenge to DADT in *Holmes* v. *California Army National Guard*, 124 F.3d 1126, 1136 (9th Cir. 1997). The government accepts that the Court disagrees with its reading of those cases, but they do demonstrate, at the very least, that there is a substantial ground for the government to have reached a different conclusion from the Court.

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An interlocutory appeal of the Court's decision to deny the government's motion to dismiss also "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The breadth of plaintiff's discovery requests has made that clear. Plaintiff seeks wide-ranging, burdensome, and inappropriate discovery concerning Congress' subjective motivations in enacting the statute, the Executive Branch's motivations in promulgating regulations implementing the law, and other documents that seek to probe the continuing rationality of the DADT policy. If permitted, that discovery will impose substantial burdens on the military. Moreover, plaintiff has pursued this discovery even as Congress has indicated its intent to hold hearings on the continued wisdom of DADT, and even as the President has stated that he opposes the policy and has called for repeal of the statute. Plaintiff's discovery requests confirm that certification is appropriate here–an immediate appeal of the Court's resolution of the controlling legal questions, if resolved in the government's favor, would obviate the need for the parties to engage in that burdensome discovery and end this litigation.

II. BACKGROUND

Having ruled on the government's motion to dismiss, the Court is familiar with the legal background of this case, so the government provides only a brief summary of the background here.[2]

The military's DADT policy implements 10 U.S.C. § 654. That statute provides for separation from the military if a member of the armed forces has (1) "engaged in, attempted to engage in, or solicited another to engage in a homosexual act"; (2) "stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding . . . that the member has demonstrated that he or she is not a person who engages in, attempts to engage in,

[2] For a more detailed account of that legal background, see the government's motion to dismiss, Dkt. No. 29.

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has a propensity to engage in, or intends to engage in homosexual acts"; or (3) "married or attempted to marry a person known to be of the same biological sex." 10 U.S.C. § 654(b)(1)-(3). The DoD has implemented these prohibitions in regulations, which are set forth in Directives. *See* Department of Defense Instruction 1332.14, *Enlisted Administrative Separations* (Aug. 28, 2008); Department of Defense Instruction 1332.30, *Separation Procedures for Regular and Commissioned Officers* (Dec. 11, 2008).

On June 9, 2009, this Court denied the government's motion to dismiss plaintiff's facial constitutional challenges to the DADT policy. As a threshold matter, the Court ruled that plaintiff had demonstrated organizational standing to challenge the DADT statute. The Court noted that plaintiff had submitted two declarations by members of its organization–one formerly a member of the military, and an anonymous declaration by a current member of the military–both of which averred that the DADT statute injured them. Op. 12-14.

On the merits, the Court ruled that plaintiff stated a viable facial substantive due process claim following the Ninth Circuit's decision in *Witt* v. *Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008). *Witt* held that an as-applied substantive due process challenge to the DADT statute could proceed in light of the Supreme Court's decision in *Lawrence* v. *Texas*, 529 U.S. 558, 123 S.Ct. 2472, 156 L. Ed. 2d 508 (2003). This Court ruled that nothing in *Witt* forbade facial substantive due process challenges to the DADT statute, and rejected the government's argument that prior Ninth Circuit precedent did so. Op. 18-20.

The Court also held that plaintiff's First Amendment challenge could proceed. The Court did hold that the DADT statute was consistent with the First Amendment to the extent it permitted the military to use statements as admissions of a propensity to engage in homosexual conduct. Op. 21-22. The Court further held, however, that "[d]ischarge on the basis of statements not used as admissions

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of a propensity to engage in 'homosexual acts' would appear to be discharge on the basis of speech rather than conduct, an impermissible basis." Op. 23. The Court therefore permitted plaintiff's First Amendment claim to proceed to the extent that the DADT policy permitted discharge on the basis of speech alone. Op. 23-24.

In the wake of the Court's June 9th Order, the government asked the Court to limit plaintiff's discovery, given that plaintiff's facial constitutional challenge does not depend on any particular facts. On July 24, 2009, the Court rejected that proposal, ruling that plaintiff is entitled to discovery. Discovery Order 2. Plaintiff has subsequently accepted the Court's invitation, and recently served on the government broad-ranging discovery.

While the government would likely object to such discovery, Plaintiff's First Set of Requests for Production of Documents purports to require the government to produce every document relating to the policy. *See* Log Cabin Republicans' Requests for Production of Documents Propounded to United States of America, attached. For example, the requests routinely parrot the congressional findings and ask for every document in the United States government that in any way relates to those findings. *See e.g.*, Request Nos. 1, 6, 10-22. A reasonable search for these documents alone would take untold hours and effort to uncover and include many documents, including the discharge folders of individual members, subject to protection.

Other requests refer to publicly available reports and memoranda concerning the policy and ask for any document housed within the government that refers or relates to such reports and memoranda, including drafts of such documents. *See e.g.*, Requests 24-31, 38, 43, 44, 45, 48, 52, 53, 54, 60, 62, 63, 68, 78, 79. Searching for these documents, particularly drafts, would impose an additional layer of burden upon the government that is wholly unnecessary and

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improper, particularly where most, if not all, of the documents are deliberative documents subject to the assertion of privilege. The requests also ask for all documents relating to the development of the statute and regulations implementing the law, *see e.g.*, Requests Nos. 1-5, 59, as well as all statements made by the government from January 1, 2003 to the present "on the subject of United States Armed Service personnel and homosexual conduct or homosexual orientation," including all drafts or prior versions of those public statements. *See e.g.*, Request No. 58.

As framed by plaintiff, therefore, this litigation is headed on a course that will involve potentially massive discovery and a drain on military resources, all arising from what defendants believe is a erroneous construction of Circuit law.

III. ARGUMENT

The Court Should Certify For Interlocutory Appeal Its Order Denying The Government's Motion To Dismiss

The Court's order denying the government's motion to dismiss satisfies the requirements for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), which permits this Court to certify an order for interlocutory appeal if it "involves a controlling question of law as to which there is substantial ground for difference of opinion" and if "an immediate appeal from the order may materially advance the ultimate termination of the litigation."

As the Ninth Circuit has recognized, an order deciding the legal standard applicable to the merits of a case is appropriate for certification under § 1292(b). *See Steering Comm.* v. *United States*, 6 F.3d 572, 575 (9th Cir. 1993). "[A]ll that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982).

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A. There Is A Substantial Basis For Disagreeing With the Court's Denial Of The Government's Motion To Dismiss

The Court's order denying the government's motion to dismiss involves controlling legal questions, and there is, at the very least, a substantial basis for disagreeing with the Court's resolution of those questions.

1. Substantive Due Process

The Court ruled that plaintiff's facial substantive due process challenge could proceed. Op. 18-20. As the government urged in its supplemental memorandum on that issue, *see* Dkt. No. 77, at 8-10, Ninth Circuit precedent forecloses that facial challenge even after *Witt*. Although *Witt* applied heightened scrutiny to the DADT statute in permitting an *as-applied* substantive due process challenge to DADT to proceed, 527 F.3d at 819, *Witt* "expresses a strong preference for as-applied challenges and clearly limits the heightened scrutiny standard it announces to such challenges." Op. 16. Plaintiff–which brings a facial rather than an as-applied challenge to DADT–accordingly cannot "rely on *Witt*'s heightened scrutiny standard as the Ninth Circuit limited this standard to as-applied challenges." Op. 17.

Moreover, the other Ninth Circuit precedent–particularly Justice (then-Judge) Kennedy's opinion in *Beller*–casts substantial doubt on the viability of plaintiff's facial substantive due process challenge. In *Beller*, the Ninth Circuit rejected a substantive due process challenge to the more restrictive policy on homosexuals in the military that predated DADT. *See* 632 F.2d at 810-11. The Ninth Circuit in *Witt* concluded that *Beller* had been overruled by subsequent Supreme Court precedent involving as-applied challenges, and thus did not foreclose an as-applied challenge to the DADT statute. *See* 527 F.3d at 819-20 & n.9. But *Witt* did not abrogate *Beller*'s holding that facial challenges to the military's more restrictive version of DADT would fail. And a facial challenge is

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1 the only type that plaintiff presents.

2 In holding that plaintiff's complaint stated a viable facial substantive due
3 process claim, the Court relied on Justice Kennedy's opinion for the Supreme
4 Court in *Lawrence* v. *Texas*, 539 U.S. 558 (2003). *Lawrence* sustained a
5 substantive due process challenge to a statute that criminalized homosexual
6 conduct among consenting civilian adults, thus overruling *Bowers* v. *Hardwick*,
7 478 U.S. 186, 106 S.Ct. 2841, 92 L. Ed. 2d 140 (1986), which had reached the
8 opposite conclusion for a similar criminal statute. *Id.* at 578. This Court reasoned
9 that *Lawrence* implicitly overruled *Holmes* v. *California Army National Guard*,
10 124 F.3d 1126, 1136 (9th Cir. 1997), because *Holmes* had relied on *Bowers* in
11 rejecting a substantive due process challenge to DADT. Op. 17-18. But *Lawrence*
12 does not undermine the reasoning on which then-Judge Kennedy relied 23 years
13 earlier to reject the facial substantive due process challenge in the *Beller* case.
14 *Beller* concluded that the issue presented in *Lawrence*–(whether the government
15 may criminalize sodomy done in the privacy of the home by consenting civilian
16 adults)–is distinct from the issue in this case–(whether Congress may require those
17 serving in the military to refrain from engaging in homosexual conduct). *Beller*
18 stated that other "cases might require resolution of the question whether there is a
19 right to engage in this conduct in at least some circumstances." 632 F.3d at 810.
20 "The instant cases," the court was observed, "however, are not ones in which the
21 state seeks to use its criminal processes to coerce persons to comply with a moral
22 precept even if they are consenting adults acting in private without injury to each
23 other." *Id.*

24 Given the deferential constitutional standard of review that applies to
25 regulations in the military context, "the importance of the government interests
26 furthered, and to some extent the relative impracticality at this time of achieving
27 the Government's goals by regulations which turn more precisely on the facts of an
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1 individual case," *Beller* said those interests "outweigh whatever heightened
2 solicitude is appropriate for consensual private homosexual conduct." 632 F.3d at
3 810.

4 *Witt* confirms that plaintiff's facial challenge cannot succeed. The *Witt*
5 panel reaffirmed that the statute "advances an important governmental interest.
6 DADT concerns the management of the military, and judicial deference to . . .
7 congressional exercise of authority is at its apogee when legislative action under
8 the congressional authority to raise and support armies and makes rules and
9 regulations for their government is challenged." 527 F.3d at 821 (*quoting Rostker*
10 *v. Goldberg*, 453 U.S. 57, 70, 101 S.Ct. 2646, 69 L. Ed. 2d 478 (1981)). Because
11 such an interest was found to satisfy heightened scrutiny, it necessarily satisfies
12 the rational basis standard of review that the Court has found applies to plaintiff's
13 facial challenge.

14 The Court's conclusion that plaintiff's substantive due process challenge
15 may proceed is also doubtful in light of *Philips v. Perry*, 106 F.3d 1420 (9th Cir.
16 1997). As the Court's order recognizes, rational basis is the appropriate standard
17 of review applicable to plaintiff's substantive due process challenge. Op. 17
18 (holding that plaintiff "will not be able to rely upon *Witt*'s heightened scrutiny
19 standard as the Ninth Circuit limited this standard to as-applied challenges").
20 Given that conclusion, it is doubtful that plaintiff's claim that DADT lacks a
21 rational basis may proceed, because *Philips* held that DADT has a rational basis.
22 *Id.* at 1425-29.

23 The Court's order distinguished *Philips* on the grounds that *Philips* was an
24 equal protection case rather than a substantive due process case. Op. 17 n.5. But
25 whatever differences there may be between substantive due process and equal
26 protection claims as a general matter, the two are the same for purposes of this
27 case. Indeed, *Philips* rejected any distinction between rational basis review under
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the rubric of equal protection, and under the rubric of substantive due process. "[S]ubstantive due process and equal protection doctrine," *Philips* said in the course of rejecting that distinction, "are intertwined for purposes of equal protection analyses of federal action." 106 F.3d at 1427 (internal quotation marks and citation omitted). In light of the Ninth Circuit's precedent, there is therefore a substantial reason to disagree with the Court's conclusion that *Philips* permits plaintiff's facial substantive due process claim to proceed.

2. First Amendment

There is also substantial reason to doubt the Court's conclusion that Ninth Circuit precedent permits plaintiff's facial First Amendment challenge.

Plaintiff has steadfastly maintained throughout this litigation that it brings facial constitutional claims, including a facial First Amendment claim. *See*, *e.g.*, Dkt. No. 79, at 5 (representing that "Log Cabin Republicans has not advanced an 'as-applied' claim'"). This Court nonetheless allowed plaintiff's First Amendment claim to proceed based on the possibility that the DADT policy had been unconstitutionally applied to two of its members. Op. 23-24. The Court suggested that DADT was unconstitutional to the extent it required the military to discharge service members based on statements alone, and stated that it could not "determine from the face of" plaintiff's complaint "whether Nicholson was, or Doe could yet be, discharged based on statements alone." Op. 23. (Nicholson and "Doe" are the members of plaintiff's organization whose declarations plaintiff submitted to show standing.)

There is substantial ground for difference of opinion with respect to the Court's conclusion. To the extent the Court was suggesting that plaintiff could assert an as-applied First Amendment claim on behalf of its members, plaintiff has said in any event that it is not bringing an as-applied claim. And even if plaintiff were to change its position, plaintiff has no standing to bring such a claim even if

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it wanted to. Plaintiff claims standing here on the basis of "associational standing," which requires plaintiff to demonstrate that (1) at least one of its members would have standing in his own right to challenge the policy; (2) the interests sought to be protected by the suit are germane to the organization's purpose; and (3) the claim asserted and the relief requested do not require the members to participate individually in the lawsuit. *See Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L. Ed. 2d 383 (1977). An as-applied challenge would necessarily require the participation in the suit of the individuals–in this case Nicholson and Doe–to whom the policy was allegedly misapplied. *See Washington Legal Found.* v. *Legal Found. of Washington*, 271 F.3d 835, 849-50 (9th Cir. 2001). Neither individual makes any claim of misapplication in their affidavits, nor is such an allegation contained in the First Amended Complaint. Plaintiff accordingly has no standing to bring such an as-applied claim.

To the extent the Court was suggesting that plaintiff's complaint stated a viable facial First Amendment claim, there is also substantial ground for a difference of opinion with respect to that conclusion as well. As the Court recognized, the Ninth Circuit's decision in *Holmes* rejected a facial First Amendment challenge to DADT to the extent that DADT "use[s] the admission of homosexual orientation as showing a likelihood to engage in 'homosexual acts.'" Op. 22. The Court also suggested, however, that DADT unconstitutionally burdened speech because "[d]ischarge on the basis of statements not used as admissions of a propensity to engage in 'homosexual acts' would appear to be a discharge on the basis of speech rather than conduct, an impermissible basis." Op. 23.

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By its terms, however, DADT does not provide for discharge based on "statements not used as admissions of a propensity to engage in 'homosexual acts.'" The statute provided that the military can separate an individual who states that he or she is homosexual on the grounds that such a statement gives rise to a presumption that the individual will engage in homosexual acts, and that presumption can be rebutted with evidence that the individual does not have a propensity to engage in homosexual acts. *See* 10 U.S.C. § 654(b)(2). The Ninth Circuit has observed that the military has implemented the statutory mandate by prescribing separation for "a statement by a member that demonstrates a propensity or intent to engage in homosexual acts." *Holmes*, 124 F.3d at 1129 (*quoting* DOD Directive 1332.30, at 2-1(C)). As the Court of Appeals further recognized, "[a] statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts." *Id.* (quoting DOD Directive 1132.30, at 2-1(C)). The Ninth Circuit has thus held that the statute and the implementing policy are thus not directed at speech for its own sake, but rather only at speech as a proxy for homosexual conduct. As this Court recognized, that use of speech is consistent with the First Amendment. Op. 21-22; *see also Holmes*, 124 F.3d at 1136.

Even if there were some conceivable applications of the statute that would subject a service member to discharge on the basis of "pure speech" (and even if those applications were unconstitutional), that would not be a basis for invalidating the DADT statute on its face, which could be done only if it deterred a "substantial" amount of protected speech "relative to the statute's plainly legitimate sweep." *United States* v. *Williams*, 128 S. Ct. 1830, 1838, 170 L. Ed. 2d 650 (2008). And it is especially unlikely that DADT is constitutionally

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overbroad given that the Ninth Circuit has upheld applications of the DADT statute and its predecessor policy as consistent with the First Amendment. *See Holmes*, 124 F.3d at 1136; *Pruitt* v. *Cheney*, 963 F.2d 1160, 1164 (9th Cir. 1992).

B. An Interlocutory Appeal Would Materially Advance The Ultimate Termination Of This Litigation

An interlocutory appeal would also "materially advance the ultimate termination of this litigation." 28 U.S.C. § 1292(b). Indeed, absent certification and interlocutory appeal it is plain that this case is headed down a path of lengthy and burdensome discovery, all of which is inappropriate under Circuit precedent.

In an order dated July 24, 2009, the Court permitted plaintiff to pursue discovery. Discovery Order 2. As noted above, plaintiff's discovery attempts to obtain every document in the government that pertains to the policy, including every discharge folder, every deliberative document relating to the enactment of the statute, and any other document that in any way references the policy. Beyond being wide-ranging and unduly burdensome, plaintiff's requests seek discovery of deliberative documents including documents that seek to inquire into Congress' subjective motivations in enacting the statute, the Executive Branch's motivations in promulgating regulations implementing the law, and other documents that seek to probe the continuing rationality of the DADT policy. Such discovery is inappropriate. "The relevant governmental interest is determined by *objective* indicators . . . 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." *City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984) (emphasis supplied). It is thus inappropriate to inquire into the subjective motivations of Congress and the Executive in enacting DADT or in promulgating the regulations implementing the law. Classifications subject to rational-basis review, moreover, are not subject to challenge on the ground of

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changed circumstances. *See United States v. Jackson*, 84 F.3d 1154, 1161 (9th Cir. 1996) (Congress's initial decision to enact the 100:1 ratio on crack and powder offenses "was rational, even though it differs from the Sentencing Commission's current recommendation regarding the magnitude of the disparity."). Plaintiff's discovery into the continuing rationality of DADT is thus also without any basis in the law. The government will oppose such requests, and any attempt by plaintiff to depose (and possibly present as trial witnesses) high-level military and government officials on such inappropriate subjects.

Congress intends in the near future to hold hearings on the continued wisdom of the DADT statute, and the President has stated that he supports repealing that statute. The discovery plaintiff seeks on its facial constitutional claims is not only inappropriate in its own right, but would also interfere with the work of the political branches as they deliberate over changing the military's policy on homosexual conduct in the military. The government respectfully submits that the Court should not permit burdensome and protracted discovery on the continuing wisdom of the DADT policy without giving the Ninth Circuit an opportunity to rule on the controlling legal questions this case presents. The government therefore requests that the Court order certification pursuant to 28 U.S.C. § 1292(b) and stay all proceeding pending resolution of this motion and appeal on the substantial questions of law. *See Jarvis v. Regan*, 833 F.2d 149, 153 (9th Cir. 1987) (affirming order by district court staying discovery pending resolution of dispositive legal issues in case).

IV. CONCLUSION

For the foregoing reasons, the Court should amend its June 9, 2009 order to certify that order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The Court should also stay all proceedings, including discovery, pending resolution of this motion and appeal.

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Dated: October 16, 2009

Respectfully submitted,

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