Exhibit A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION-RIVERSIDE

HONORABLE VIRGINIA A. PHILLIPS, JUDGE PRESIDING

LOG CABIN REPUBLICANS, Plaintiff,	)	
V.	)	DOCKET NO. CV 04-8425-VAP
UNITED STATES OF AMERICA, et al., Defendants.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Riverside, California
Monday, July 6, 2009

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United States District Court
3470 Twelfth Street
Riverside, California 92501

APPEARANCES

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MONDAY, JULY 6, 2009, RIVERSIDE, CALIFORNIA

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THE CLERK: CV 04-8425-VAP, Log Cabin Republicans versus United States of America.

Counsel, please state your appearance.

MR. WOODS: Good afternoon, Your Honor. Dan Woods from White & Case for the Log Cabin Republicans.

THE COURT: Good afternoon.

MR. FREEBORNE: Good Afternoon, Your Honor. Paul Freeborne for the Government.

THE COURT: Good afternoon.

This matter is on the Court's calendar for a scheduling conference. And I've reviewed the parties' joint report. And I know the parties have differing positions about discovery in this case, and I'm just getting someone to pull a copy of the Tenth Circuit Dias case which the plaintiff cited for the proposition that, at least in that case, which was a facial challenge, that the Court found that -- the Tenth Circuit found that it was appropriate to look at evidence.

I also don't have in front of me -- let me just pull it up, the parties' positions about -- well, let's see. Two things. First, why don't you tell me why I shouldn't have you engage in a mediation; that is, that you think that the parties' positions are so fixed that there's no

possibility that a mediation would be successful.

Who wants to blink first, I guess?

MR. FREEBORNE: Well, I think this is one point that we're in agreement on. We don't -- given this is a statute, Your Honor, there doesn't really seem to be any middle ground, any room for compromise. While the Government, as you know, is always open to settlement, this is just not the case that can resolve itself through that means. So I'll give the floor to Mr. Woods.

THE COURT: Mr. Woods, is that something you would agree on; that is, that a mediation most likely would not be successful?

MR. WOODS: That's correct, Your Honor.

THE COURT: Well --

MR. WOODS: If you have ideas about how this case could be resolved, we'd love to hear them, but I have to agree with Mr. Freeborne that the case does challenge the constitutionality of federal law and it would be hard to mediate a settlement of that claim.

THE COURT: Well, it's difficult for the Court to even make a suggestion here. The only thought that occurred to me is the one that I asked counsel about I think the very first time that you appeared in front of me on this case; and that is, whether a change in administration might have signaled a change in the Government's position.

And I think you answered that at the time, Mr. Freeborne. So, unless you get a different direction, I guess, and if so, then, of course, you can bring that to the Court's attention. Because that almost involves a political question, then I feel like it's not really appropriate for the Court to -- as much as the Court has a duty to try to get cases resolved short of trial, when there's a political question involved, it's not appropriate for the Court to -- and there's a challenge, obviously, to the statute here, so it's not appropriate to get involved too much in that sense.

Let me just leave it at this: I'm going to make an exception in this case to the general rule that we have in this District that every case has to have an ADR proceeding. I'm not going to order the parties to participate because I'll respect counsel's representation to me that it just wouldn't be fruitful. But if you sense there's a change in either side's position and you would like the Court to arrange for the Court's resources by using a judge, not me, but another judge on the court to assist you, let me know and I'll be happy to get involved. Fair enough?

MR. FREEBORNE: Fair enough.

MR. WOODS: That's fine.

THE COURT: All right. The joint report at page 8, I think -- yes, page 8, contains a list of several subject matters that the plaintiff intends to seek discovery on,

five or six bullet points that have topics that the plaintiff intends to seek discovery on which I track some of the paragraphs in the first amended complaint.

Then the plaintiff also sets forth in the joint report in more general terms that the plaintiff wants to take discovery, I suppose in the manner of taking depositions from persons who were involved in formulating the policy and then expert witness discovery. I'll let the parties be heard. I'll just say generally, I have the following inclinations, although, as the parties begin to get involved in discovery and there are motions, those motions would be heard by Judge Eick, the discovery motions.

I'm inclined to think that the topics that the plaintiff has set forth in terms of discovery, in terms of areas in which it wants to do discovery, seem appropriate. I would be less inclined to think that -- or I am less inclined to think that there would be a need to depose any individuals who were involved in formulating the policy, including those who now have a different position, because I, frankly, don't see the relevance of that.

And then lastly, what would be the topics of expert discovery and how would they relate to the topics that are set forth, such as the -- I think you could characterize some of the topics that the plaintiff has set forth as sort of a disparate impact. Well, I think the way the plaintiff has

worded it is a disproportionate impact; for example, of the policy upon women.

And I believe one of the plaintiff's other theories is that -- and I think this is reflected in the topics which the plaintiff has stated it wishes to do discovery, the enforcement of the policy before and then during the current engagements in Iraq and Afghanistan. I'm puzzled by or I'm in the dark as to what expert discovery would be related to that.

So I'll let plaintiff speak to those issues.

MR. WOODS: Thank you, Your Honor.

I've actually had a little more time to think about a discovery plan since we filed the report, so let me elaborate a little bit more. I think our goal here is to gather enough information so that we could make a solid factual record for you and for the inevitable appeal that's going to come from whatever decision you might reach in this case so that there is ample factual evidence to bear on the questions raised by the complaint.

Some of it will deal with the history of the policy and how it has been implemented in the past. And some of that will involve how gay people served in the military during times of conflict in the past and how after those times of conflict they were then discharged. In other words, we believe we'll find evidence proving that the military knew

it was sending gay people into World War II, the Korean War, Vietnam War, and the first Gulf War, and then after those conflicts ended those people were then discharged.

We think we will be able to show you studies that were in possession of the military prior to the enactment of the current policy. Those studies were often covered up or camouflaged by the government, but they will show, we think, that the policy was known by the military to be unnecessary at the time it was implemented. And we will show you, I believe, that the policy was implemented in large part due to the moral or religious views of the military and some members of Congress. Some expert testimony may be helpful in this regard to the Court to summarize or capture a lot of those historical information and data. That's one possible way.

We also, as you saw, believe we have evidence about what has happened and what has been the experience of other countries who have a different policy than ours. And there's really two dimensions to this, I believe. One is that our Armed Forces fight side by side with openly gay soldiers from other countries. And, indeed, there are instances where they take command from openly gay soldiers from other countries.

The other dimension is --

THE COURT: For example, in the current conflict in Iraq?

MR. WOODS: Yes. We have American soldiers taking

direction from openly gay British commanders, for example.

The other dimension to this, though, is that when the current policy in our country was enacted, the policies in many of the other countries were the same. And they were based at the time on the same rationale used to justify the policy here.

THE COURT: When you say the same, you mean the same as the policy --

MR. WOODS: A ban on openly gay service.

Now, we have 24 countries across the world who allow openly gay service. And in those countries they have not had any problems with unit cohesion or troop morale as was predicted. And so we have studies that have been done on this that are in the possession of our government that are helpful, we believe, to show you that the unit cohesion and troop morale justification is not a rational basis for the policy.

THE COURT: It --

MR. WOODS: And it's --

THE COURT: Well, go ahead.

MR. WOODS: And it's even the case, Your Honor, that the countries or at least some of the countries that had a policy similar to ours that have changed it are countries that are perhaps more conservative than ours in their views about homosexuality in the general population. So there are

other countries that had the same stated policy -- degrees of policy justification for the equivalent of "Don't Ask, Don't Tell," and those countries have repealed it and the effects have been anticlimactic.

THE COURT: So the purpose of all of this discovery which -- I guess I have two questions and I'm trying to formulate both of them in a way that's not too confusing.

One question goes to the breadth of what you're proposing for discovery, and my other question is, the purpose, what all this discovery has to be aimed towards. So taking up the latter point, I guess my question to you is, all of this discovery that you're alluding to, how is all of it designed to get to the question of: Is the policy, the "Don't Ask, Don't Tell Policy," going to survive a rational basis inquiry?

MR. WOODS: The idea is that when we accumulate all of this information, you will see that the only true reason for the policy is discrimination; that is, animus against homosexuals, a fear of homosexual menace, a fear that there would be some rampant gay promiscuity in the Armed Forces or something of that sort. But that is the only reason that exists today for the policy, that other countries who have changed their policies have not suffered anything in terms of unit cohesion or troop morale and things of that sort.

THE COURT: In other words, though, the Court in

deciding whether there is a rational basis for this policy doesn't -- that's the inquiry. Is there a rational basis tied to a permissible government goal?

MR. WOODS: Right.

THE COURT: So, you really have to prove that there is no rational basis. You don't have to prove that there's a bad basis. You have to prove that there's no rational basis.

MR. WOODS: That's right.

THE COURT: The Court doesn't have to make a determination that there's a bad basis, that there is invidious discrimination, but that -- so my question really is, the discovery that you're seeking or saying is necessary would go to dispelling the Government's position that all of its stated bases that they claim are rational really aren't rational?

MR. WOODS: Correct. They're pretextual.

THE COURT: And then to get to the first question, which is, you want to do -- and I'm not sure I remember all of the things that you said you wanted to do in the way of discovery or all of the things you want to find out. You want to find out or discover the policies of other countries that our troops serve with?

MR. WOODS: Right. We have those. I mean, they are readily available to us. There is literature about them, there are studies done, and we have all of that. To say it's

discovery is not much. Now, as I say, there may be an expert needed to tell you about how the changes in the policy in Britain, Canada, Israel, Australia --

THE COURT: The Netherlands.

MR. WOODS: The Netherlands, whichever country we want to use, might bear on the issues, as opposed to --

THE COURT: That example really goes to my question about experts.

Then in terms of what you would be seeking from the government --

MR. WOODS: We have, for example, information that we would like to verify with government information about the number of discharges in peacetime, wartime, after 9/11. The evidence we have, which I think is publicly available through the government, shows that the number of discharges under "Don't Ask, Don't Tell," decreased by approximately 50 percent after 9/11, after the war started. That, again, undermines the stated purpose of the policy, which is, again, unit cohesion and troop morale.

If it was really the government's interest to protect farm boys from Iowa from being in close quarters with gay Americans, then you would think that the policy would apply evenhandedly in peacetime and wartime, but no. When the gay soldiers are needed for wartime events, this is overlooked.

THE COURT: Well --

MR. WOODS: So we have that information, too.

THE COURT: But that's a very different example time-wise than the example you gave earlier which went all the way back, as I recollect, to World War II.

MR. WOODS: Right.

THE COURT: Not to split hairs, but if you were talking about the period from September 11th or let's just say from January 1st of 2000 to the present, is that an eight-year period, roughly, eight-and-a-half-year period, but if you were talking from the onset of World War I in 1941 to the present, then that's a very different time period.

MR. WOODS: I don't think we would be asking the government, Your Honor, to do any brand new original calculations. The data is available within the government, we believe. And so it's simply a matter of the government locating it and identifying it. This is not the first time that the government has been asked through a Freedom of Information Act request or otherwise about the number of discharges during past periods. Historians have studied this, for example. And so we have data that we think is accurate. And part of the discovery process might be to send the Government, for example, an interrogatory that says, is it correct that, you know, from date X to date Y, X service members were discharged pursuant to the policy.

THE COURT: Of course, there wasn't a "Don't Ask, Don't Tell Policy" until the 1990s.

MR. WOODS: Correct. There was some other variation of those things.

THE COURT: Well, if you're challenging this policy, though --

MR. WOODS: Right.

THE COURT: -- then wouldn't your discovery period be limited to -- I'm sorry, was it '94 that this policy was adopted?

MR. WOODS: It became effective in '94. It was, I think passed in '93, yes.

THE COURT: So wouldn't the discovery be limited for the period from 1994 onward, if you're challenging this policy?

MR. WOODS: Yes. We are, of course, Your Honor. Again, part of our effort is to show what information the government had in its possession at the time this policy was enacted, too, to show that at the time it was enacted even then the government didn't have a rational basis. We think that we can amass enough evidence in this particular case, perhaps unlike other cases, to prove that now that we have enough time that has passed where more of this information has come out since the policy was first enacted.

THE COURT: I guess that's another question. I

don't mean to make it sound like it's a rhetorical question, but one of the other different -- as I perceive it, one of the other issues between the parties here is the issue of whether information that has developed since the policy was adopted is what's to be looked at. And, you know, since it's the defendant's position that it's actually the -- it's not after -- I guess I would call it after developed information, then that would lend some strength to the plaintiff's position that -- well, that it's the information that was available to the military or the government at the time that it adopted this policy. And then the question is, how far back in time do we go before 1994 in looking at what information the government had when it adopted this policy.

MR. WOODS: I'm trying to be quite clear. We're trying to go at this in both directions.

THE COURT: I know that's what you're trying to do.

MR. WOODS: And there's other, if I could, areas I think that will be fruitful, too. The report talks about the disproportionate impact on women, and I think what we'll find here is that it has a disproportionate impact on women for a reason that is somewhat surprising, which is that unmarried women service members are approached by heterosexual male service members. The closeted gay service member would decline the advances. And then, of course, the male service member thinks, oh, something must be wrong here. The female

must be gay if she turned me down. And we'll see a lot of evidence of that, I believe, Your Honor, as people then use that rejection of an advance to start or launch an investigation.

We will also I think find in the more recent information, the post-enactment, more polls that have been done by the military to show military attitudes towards the policy changing. That's another fruitful line of discovery. There are also going to be public opinion polls that will have changed from 1993 to the present, although we don't need to get those from the government. The government has lots of studies about the policy and how it's worked or not worked. Some of those --

THE COURT: How does that affect -- pardon me for interrupting you, but how does this after-developed or after-acquired information affect the issue of whether the policy was -- doesn't the Court look at whether the policy had a rational basis when it was adopted?

MR. WOODS: That's one of the things you do. But today, in light of Lawrence, you have to look at whether there is a rational basis for it today, just as we showed you Lawrence did itself, and just as, for an example, that Dias case from the Tenth Circuit did. It's more to the point, again, of not only what was it rational at the time, which we are challenging, but also, and perhaps more importantly, is

it rational today. And that's what those things go to.

We mentioned in there the relationships through a comparison to other agencies that do not ban gays, the FBI, the CIA, and things like that. Another area that's relevant here is a situation where people are in close quarters, like fire departments. Again, that evidence will come but not from the government, but that will be part of what we're doing.

We mentioned also that we had talked about depositions of people who were involved in the formulation or creation of the policy. And you suggested that maybe that's not a fruitful line of discovery, even in situations where they have now changed their minds, and believe me, several of them have changed their minds. The point is not that they've changed their minds. The point is what they might say or might admit about the existence of the policy when it was first formulated.

One of the architects of the policy, one of President Clinton's advisors was a fellow named Charles Moskos and he has been quoted as saying when asked about the true justification for the policy: "F" unit cohesion. I don't care about that. And admitting that it was never about unit cohesion even though that was the stated policy.

So there may be some fruitful lines of inquiry there. I'm not suggesting that we're going to go off

tomorrow and depose Janet Reno, President Clinton, and those kinds of people, but there may be some fruitful lines of discovery there, too.

So these are some of the kinds of things that we want to get at. We also have the free speech issues to get at. Your order recognized some factual development there was necessary. We have seen and heard of cases where investigations were launched because someone had, in these cases, female service members had posters in their rooms of gay singers like k.d. lang and Melissa Etheridge. There was one service member who was investigated after she attended a Dinah Shore Golf Classic Tournament in Palm Springs. And these are the kinds of things that we want to find out about, too.

We also want to find out about the occupations of the people who were discharged pursuant to the policy, as we find it hard to understand how unit cohesion and troop morale were crucial to the discharge of an opthalmologist, a linguist, and there were some 300 linguists and translators discharged pursuant to the policy, things like that.

We're really talking about unit cohesion and troop morale, Your Honor. One of the things that we have discovered so far is that while 12,000 gay members of the Armed Forces have been discharged pursuant to this policy, because that created a shortage in the ranks, the military

had to lower its standards for enlistees, and so we now have 4,000 felons serving in the Armed Forces.

So, this is all designed to show you --

THE COURT: Could I ask you what -- I'm sorry. I don't quite follow the argument about the linguists.

MR. WOODS: Sure. These are people --

THE COURT: They don't really serve in a unit, is that your point?

MR. WOODS: They are translating documents, for example.

THE COURT: I understand what a linguist does.

MR. WOODS: They're not, you know, in a foxhole for 30 days in close quarters in combat with somebody where they have to share limited water, showers, and things like that.

THE COURT: It's the nature of the assignment or the nature of the work that a linguist does, is that your point?

MR. WOODS: Yes.

THE COURT: I'm sorry.

MR. WOODS: That is the point, Your Honor.

And, of course, the discharge of that many linguists has left us short-handed with particularly Arab translators and linguists so that we are unprepared to fight today's wars.

THE COURT: All right. Thank you.

Mr. Freeborne, let me let you respond to some of these points. And, in particular, among other things, if you could focus on the issue of the time limits and what I perceive as the tension between the -- or the issue of the after-developed or after-acquired information as to the policy. And what I mean when I say "tension" is that it's a shorter period of time if we focused on 1994 onwards, which I think the Government would be in favor of a shorter period of time, but then that's really after-acquired or after-developed information.

MR. FREEBORNE: Well, in fact, Your Honor, it's an as-applied challenge, which again, plaintiff has made a litigation choice to pursue a facial challenge.

THE COURT: Exactly.

MR. FREEBORNE: Also, Your Honor has ruled that the rational basis standard of review applies here.

I just circle back to what Your Honor said at the beginning of this status conference. What plaintiff is asking me to do is to revisit a decision that was made back in 1993, 1994. There were months of testimony that gave rise to this statute. And even the cases that they cite to you today recognize that statutes such as this come with them a presumption of constitutionality. What plaintiff is asking you to do is rule that Congress and the Executive acted uniformly with animus towards homosexuals. Nothing short of

that. And I just find that to be astounding and which is why we --

THE COURT: Excuse me, but that's the clarification I made a moment ago. If the Court were to rule in favor of the plaintiff, it would be ruling that this policy was enacted -- that it does not have a rational basis.

MR. FREEBORNE: And, Your Honor, we've pointed -- we believe the congressional findings coupled with the statute are the only appropriate focus for this Court. We cited cases which demonstrate that when the Court is analyzing a statute through a rational basis lens, the Court is not to second-guess the wisdom, logic of Congress. But that is exactly what plaintiff is asking you to do. They are seeking to reap the benefits of an as-applied challenge through a facial challenge which they cannot do, which is why we've objected to their discovery.

In our mind, the only question that remains is a legal one. Facially, looking at this statute, is there any conceivable constitutional application of the statute? We have pointed to at least one, which is the reduction of sexual tension that the Court -- the Ninth Circuit recognized as being a rational basis in the Philips decision. I understand Your Honor ruled that that only applied in the equal protection context. With all due respect, we believe that equally applies to the substantive due process context

here.

I've addressed the animus and I won't repeat, Your Honor, but again, what plaintiff is asking you to do is to allow them to engage in discovery to show that Congress and the Executive acted uniformly with animus in enacting this statute.

Second, Mr. Woods' intended discovery as it relates to other countries and how they've addressed this question in their own military, that is completely irrelevant. There was testimony on this very subject when Congress took up this issue back in 1993 and 1994. There is no need to reinvent the wheel on that. That testimony is there.

With regard to the disparate impact, Your Honor has dismissed their equal protection claim. And among other problems they have in pursuing that claim is they haven't even pointed to one woman who has been disproportionately impacted by this policy. They simply don't have standing to even pursue that claim.

And on that note, even if they were to challenge, for example, the conduct based aspect of the statute, Mr. Nicholson, by their own admission, was discharged based upon the statements prong, was afforded the opportunity to rebut the presumption that's afforded in the statute, and waived that right.

THE COURT: I'm sorry, Mr. Nicholson --

MR. FREEBORNE: Major Nicholson is the identified officer.

THE COURT: Right.

MR. FREEBORNE: I make that point, Your Honor, because this is getting out of control. I mean, they have now said, we're pursuing a facial challenge, but again, they are trying to reap the benefits of an as-applied challenge through discovery in this case.

And as I offered up during oral arguments in March, the reason we have the constitutional building blocks that we do, which is individualized cases, is so that we can have an individualized analysis in each circumstance, individualized circumstance. They want to have a congressional hearing at trial. That is completely inappropriate, with all due respect.

THE COURT: Well, if somebody is making a facial challenge to a statute, as they are here, I agree with you, then I guess your position comes down to an argument that all they're entitled to do is to point to the congressional record and to argue that what's contained there is not enough to sustain a finding that Congress -- I guess that Congress' findings are rational.

MR. FREEBORNE: The law is even more liberal than that, Your Honor, whether Congress could have believed, for example, that the policy was necessary to accommodate sexual

tension, that the military could accommodate in the heterosexual context through separate barracks but could not accommodate it in the homosexual context. That was one of the congressional findings at issue here, which again, the Philips court pointed to and found that's more than plausible, that's rational.

So, again, yes, the appropriate inquiry is to look at the congressional findings and the voluminous congressional testimony that, by the way, had heard testimony from not only eventual proponents of the policy, but opponents. This was a well-balanced congressional hearing that should not be revisited in the context of a trial, much less in discovery.

Lastly, Your Honor, with regard to the statements claim that is left, as we pointed out in our portion of the 26(f) statement, Your Honor recognized that the way the statements prong works is that if somebody makes the statement that he or she is homosexual, that gives rise to the presumption that they will act upon that. They will engage in homosexual acts. That presumption can and has been rebutted.

They're positing a misapplication of the statute which, A, doesn't give rise to a constitutional claim because it's based upon misapplication of the statute and the governing regulations. B, they haven't pointed to anyone

among their membership who has had that type of misapplication occur to them. Mr. Nicholson is not in that category.

THE COURT: So, your argument is that they don't have standing to raise it because they haven't identified a member of their association who has suffered that injury?

MR. FREEBORNE: That's A. And then B, it would be dismissed anyway because their claim is premised upon a misapplication of the statute which cannot give rise --

THE COURT: I'm sorry, which isn't a facial challenge.

MR. FREEBORNE: It doesn't give rise to a cause of action, at least a constitutional claim. It may give rise to something else, but it certainly doesn't give rise to a constitutional claim. Because the constitutional claim assumes that the statute is operating as it should under the law.

So, we believe that the statements claim should be dismissed outright, which is why we said on all matters we think the appropriate next move for both parties is to move for summary judgment or, in our case, 12(c). We believe that all that remains are legal questions that can and should be resolved based upon the congressional record. If they believe, as Mr. Woods has said, they have plenty of evidence to show that this statute has no rational basis and they can

show that it has no conceivable constitutional application, they should go for it. But there's no need for discovery. Congress has spoken, the Executive has spoken, and that should be honored.

THE COURT: Mr. Woods.

MR. WOODS: Your Honor, what counsel hasn't addressed are the cases that we cited to you in our section of the report that allow for discovery in such a rational basis challenge when the circumstances have changed. The cases cited by the Government in its section of the report do not address discovery at all. Not one of the cases cited by the Government says anything about prohibiting discovery in a situation like this where years have passed and the situation is different. It's different because of Lawrence and it's different for other reasons as well.

Now, most facial challenges to a statute are brought immediately after the statute is passed. It's the logical thing to do. But here, we have a different situation. We have a challenge to the statute that's now being litigated 14 years later, and the universe has changed, because we now have the Supreme Court in Lawrence ruling as it did, and we now have this other information that we think we will be able to gather for you.

Again, let me just say this: We're here today for, you know, this status conference. And I think the Government

is trying to, A, reargue the motion that you've already ruled on, and B, try to preempt the universe of discovery issues that might or might not come up in this case.

All we're really asking for is a chance to gather evidence so that we can make a factual record for you when it is time for Mr. Freeborne to file a motion for summary judgment, as he says he intends to do. So, all we're really asking for, Your Honor, is a little bit of time to do some discovery, just like any other civil case, after a motion to dismiss has been decided.

THE COURT: Well, the one thing I'm going to do today -- well, not today, but I hope to do this week is to, when I issue the scheduling order, make a decision about discovery, because it doesn't make sense to issue an order that gives time for discovery only to have you go through the exercise of propounding discovery, then have the Government bring a motion saying discovery shouldn't be allowed and you go before Judge Ike, the loser then appeals that to me. So, I'm going to rule on that when I issue the order, because you've briefed it, you've argued it, so I might as well rule on that. And then I'll set the dates. So that will be more efficient for everyone.

MR. FREEBORNE: Your Honor, if I could just have two minutes to respond to Mr. Woods' point about the cases that they cite.

Our cases, we cited Ninth Circuit authority which recognizes that where the rational basis standard of review applies, the Court does not look to change circumstances. They cite to the Carolene Products case. But that makes it clear that the Court is not to second-guess a congressional determination. It's not to weigh evidence one way or the other. It recognizes, as I stated before, that a statute such as this is entitled to the presumption of constitutionality.

Leary, another case that they cite, there Congress did not have a record supporting the determination. There at issue was whether or not someone's possession of marijuana came with it a knowing or an acknowledgement that the marijuana was illegally imported. There was no legislative determination, no legislative record such as we have here. So that case doesn't stand for the proposition.

And by the way, in Carolene Products and in Leary, there was no determination, as Mr. Woods represented, that discovery was somehow permitted.

Dias, the Tenth Circuit case --

THE COURT: That's the pit bull case.

MR. FREEBORNE: That's the pit bull case. All the Court ruled there was simply that the plaintiff had set forth a plausible substantive due process claim that could get past a Rule 12 motion. The sentence that the plaintiff quotes

noted skepticism about whether or not their claim could ultimately prevail, but they could marshal evidence. Didn't talk about discovery, just simply said marshal evidence. We are not disputing that Mr. Woods can marshal evidence in opposition to this statute. What he is not entitled to do, though, is engage in discovery.

So, Your Honor, those are the cases that they cite, and they don't stand for the proposition that they are entitled to wide range of discovery.

Your Honor, page 11 of the Dias decision is what the plaintiff cites to.

THE COURT: Right.

MR. FREEBORNE: The sentence that they cite to is whether the plaintiffs can marshal evidence to prevail on the merits of their claim that the ordinance is irrational is an entirely different matter. And they note that in that paragraph that notes skepticism about whether or not it would ultimately prevail, but they're entitled to go ahead and attempt to make that showing and get past a Rule 12(b)(6). It doesn't talk about discovery.

THE COURT: Well, I think in terms of timing, even if the Court did not permit discovery, I would think that in terms of analyzing the record the parties would need -- well, let me back up.

If discovery is permitted, the plaintiff wants six

months to perform discovery. So the plaintiff's proposed schedule would be a discovery cutoff of, I would say probably January 31st. And I would set -- that would be fact discovery. And then expert disclosures sometime in January, and expert discovery cutoff in mid-March, with a summary judgment hearing date at the end of April, and a trial date in June.

If I find that no discovery is appropriate, then I would set a motion for summary judgment cutoff date for probably around the 1st of December, early December, and without setting a trial date, see if any issues remain at the time of the hearing on the motion for summary judgment.

Without conceding your respective positions, does the timing of those two scenarios seem about right?

MR. WOODS: Yes, Your Honor.

MR. FREEBORNE: Yes, Your Honor.

THE COURT: All right. The other thing I'm considering doing is, if I allow discovery, I may actually vacate the referral. I just couldn't think more highly than I think of Judge Eick, but because of the nature of this dispute and how familiar I am with it, I might vacate the referral and hear any discovery motions myself. It just might be a little more efficient, not that he's not incredibly efficient, but this is such a peculiar case and there's already been too many delays in it, not that he would

delay it, but because I anticipate everything -- well, for all the reasons I think you're familiar with, I might hear the discovery motions. In the unhappy event that there are any, I might hear them myself. If I decide to do that, I will put that in the order about discovery.

All right. Anything further from either side?

MR. WOODS: No, Your Honor. Thank you.

THE COURT: All right. Thank you very much.

Did you have something?

MR. FREEBORNE: Your Honor, we submitted a stipulation regarding the answer. Our answer date -- the plaintiff stipulated to an extension of the answer date.

THE COURT: When did you submit that?

MR. FREEBORNE: Last week. We asked for July 16th.

THE COURT: If I haven't already signed it, I will. Thank you very much.

(Proceedings concluded)

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C E R T I F I C A T E

DOCKET NO. CV 04-8425-VAP

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and accurate transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

PHYLLIS A. PRESTON, CSR
Federal Official Court Reporter
License No. 8701

DATED: August 31, 2009