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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' REPLY IN SUPPORT OF MOTION TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL AND STAY OF PROCEEDINGS PENDING RESOLUTION OF MOTION AND APPEAL

DATE: November 16, 2009

TIME: 10:00 A.M.

BEFORE: Judge Phillips

Dockets.Justia.com

INTRODUCTION

The Court should certify the June 9, 2009 order for interlocutory appeal. Given the substantial Ninth Circuit precedent cited in the government's brief, plaintiff cannot dispute that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion." 28 U.S.C. 1292(b). Nor can plaintiff seriously dispute that certification now, which would save the Court and the parties the substantial burdens of discovery and trial, would "materially advance the ultimate termination of the litigation." Id. Plaintiff is thus left in its opposition to raise a series of largely procedural objections that fail to address the merits of the government's motion.

ARGUMENT

I. THE COURT SHOULD REJECT PLAINTIFF'S LOCAL RULE 7-3 OBJECTION TO DEFENDANTS' MOTION

Plaintiff devotes a substantial portion of its opposition to arguing that the government's motion somehow caught plaintiff off guard and that further consultation pursuant to L.R. 7-3 would have been fruitful. Neither argument has merit.

The government's statement in the Rule 26(f) report of the parties put plaintiff on notice that it intended to seek 1292(b) certification should this case proceed into burdensome discovery. In that report, the government made it clear that this case is susceptible to resolution as a matter of law without discovery. See Dkt. No. 86, at 4. The government went on to state in the parties' joint report that, if the Court disagreed and permitted discovery to proceed, the government "reserve[d] the right to seek certification under 28 U.S.C. § 1292(b) to obtain appellate review[.]" Id. at 5. Plaintiff, moreover, acknowledges, see Pl's Opp. at 6, that the government's motion presents "no new arguments or new decisions" in support of the motion to certify than the parties briefed in connection with the

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government's motion to dismiss and prior to the July 6, 2009 discovery conference. L.R. 7-3 is fulfilled. See O'Connor v. Boeing North American, No. CV97-1554, 2003 WL 25691035, at *9 (C.D. Cal. 2003) (recognizing that there is no need to consult a second time where same legal arguments are raised at different stages of litigation and resolution is not possible).

Indeed, for L.R. 7-3 to even have application to the government's motion, "the issues raised [must be] susceptible to resolution in a face-to-face meeting." Stewart v. Wachowski, No. CV03-02873, 2005 WL 6186374, at *10 (C.D. Cal. 2005); see also In re Heritage Bond Litig., 220 F.R.D. 624, 626 (C.D. Cal. 2004). As evidenced by this and earlier briefing and argument on these issues, resolution (or a narrowing of the dispute) is unfortunately not possible. Finally, plaintiff cannot show prejudice. Plaintiff was afforded and has taken the full amount of time permitted by the rules to respond. See Fitzgerald v. City of Los Angeles, 485 F. Supp. 2d 1137, 1140 (C.D. Cal. 2007) (recognizing that no prejudice was shown under L.R. 7-3 where party was provided full time to respond to motion).

II. THE COURT SHOULD GRANT DEFENDANTS' MOTION TO CERTIFY THE JUNE 9 ORDER FOR INTERLOCUTORY APPEAL

A. CERTIFICATION WILL PERMIT THE COURT OF APPEALS TO RESOLVE THE CONTROLLING LEGAL ISSUES

Turning to the merits of the government's motion, plaintiff fails to rebut the government's showing that the first prong necessary for certification–the existence of "a controlling question of law as to which there is substantial ground for difference of opinion," 28 U.S.C. § 1292(b)–is satisfied. Indeed, given the substantial Ninth Circuit precedent cited in the government's motion, no such rebuttal is possible. Plaintiff nonetheless suggests that the government has somehow failed to satisfy the first prong of section 1292(b) because the Court previously ruled against the government that dismissal of the Substantive Due Process and First Amendment claims presented in the First Amended Complaint is

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appropriate. See Pl's Opp. at 6 ("the government offers no new arguments or new decisions in support of the argument that its motion was wrongly decided"). But that is not the test. "[A]ll that must be shown for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in district court." In re Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1982). That the Court disagrees with the government's reading of Ninth Circuit precedent does not defeat section 1292(b) certification, which requires only "substantial ground for difference of opinion." If the mere fact that the Court had rejected the government's argument were a bar to certification, section 1292(b) would be a nullity.

B. CERTIFICATION MAY MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE CASE

With respect to the second prong of section 1292(b)–that an appeal now "may materially advance the ultimate termination of the litigation"–plaintiff's central argument is that the government's effort to avoid the time and expense associated with responding to plaintiff's burdensome and inappropriate discovery is somehow improper or irrelevant to the certification analysis. Pl's Opp. at 6-9. But as plaintiff recognizes (Pl's Opp. at 5, citing, In re Cement Antitrust Litig., 673 F.2d at 1926), Congress enacted section 1292(b) precisely to "avoid protracted and expensive litigation," including discovery and ultimately, here, a trial that may prove to be unnecessary. Avoiding discovery that ultimately may not be necessary for a resolution of this case is thus an appropriate use of the certification process.

That an appeal in the Ninth Circuit might take additional time, see Pl's Opp. at 7-8, does not preclude certification. If that were the rule, certification would never be granted in the Ninth Circuit. And with respect to plaintiff's repeated arguments that the government has delayed in bringing this motion, the government sought certification within a month of receiving plaintiff's requests

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for production of documents on September 21, 2009.

Indeed, plaintiff's discovery requests demonstrate that clarifying the law at this stage before this case proceeds any further is the only appropriate course. See e.g., Dalie v. Pulte Home Corp., 636 F. Supp. 2d 1025, 1030 (E.D. Cal. 2009) (recognizing that interlocutory appeal is appropriate during early stage of litigation so as to clarify law and avoid the time and expense associated with unnecessary litigation). In request after request, the discovery contemplated by plaintiff is inappropriate under existing law. See generally Def's Mem. of Points and Authorities, at 4-5.

Much of plaintiff's discovery, for example, seeks to probe the intent of Congress in enacting the DADT policy and the intent of the Executive Branch in promulgating regulations implementing the law in an attempt to purportedly show animus. But such discovery is entirely inappropriate here. Well-established Supreme Court precedent squarely provides that inquiry into congressional motives is a "hazardous matter" and that courts will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive. United States v. O'Brien, 391 U.S. 367, 383-84 (1968); Board of Educ. of the Westside Community Schools v. Mergens, 496 U.S. 226, 249 (1990) (in evaluating constitutionality of statute, "what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law") (emphasis in original); Las Vegas v. Foley, 747 F.2d 1294, 1298 (9th Cir. 1984) (same). The same is true of attempts to probe the motivations of the Executive Branch. See e.g., Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 268 n.18 (1977) ("judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government").

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Plaintiff seeks to evade that precedent, claiming that Chief Judge Walker of the United States District Court for the Northern District of California recently sanctioned such discovery in Perry v. Schwarzenegger, __ F.R.D. __, 2009 WL 3234131 at *7 (N.D. Cal. 2009). See Pl's Opp. at 8-9 n. 5. But the Perry plaintiffs sought discovery of communications between Proposition 8's *private* proponents and their political consultants–not members of Congress and the Executive branch. Thus Perry cannot justify the discovery into motive that plaintiff seeks here..

Likewise inappropriate is plaintiff's effort to seek discovery into the "continued rationality" of the Don't Ask, Don't Tell ("DADT") statute. As the cases cited by the government in the parties' joint Rule 26 report make clear, classifications subject to rational basis review are not subject to challenge on the ground of changed circumstances. See Dkt. No. 86, at 1-3 (citing cases). Nor is plaintiff correct that this Court has already ruled that "continued rationality" is an appropriate topic for inquiry. The Minute Order resulting from the July 6, 2009 Rule 26(f) conference states that "[p]laintiff is entitled to conduct discovery in this case to develop the basis for its facial challenge," see Dkt. No. 91, at 3, but nowhere states that "continued rationality" – or indeed any other specific area of inquiry – is an appropriate subject for discovery.

Other examples abound. For example, among the documents that plaintiff asserts are "critical to the issues to be tried in June" are studies relating to the application of the DADT policy to women in the United States Armed Forces to purportedly show that the policy disproportionately impacts women. See Pl's Opp. at 3 (referencing Request No. 9). Yet, plaintiff has not identified any women among its membership who purportedly have been affected by the policy; the only member plaintiff has identified among its membership is Mr. Nicholson–a male. Because plaintiff's associational standing only extends to the type of harm suffered by its members, see Hunt v. Washington State Apple Adver. Comm'n v.

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Advertising Comm'n, 432 U.S. 333, 343 (1977) (recognizing that associational plaintiff's standing only extends to matters that "members would otherwise have standing to sue in their own right[]"), clarification of standing principles will dictate the proper scope of plaintiff's challenge and the scope of discovery.

Plaintiff also seeks extensive discovery into the treatment of individual service members. As the Court is aware, however, plaintiff has made a tactical litigation decision to bring a facial challenge, and thus plaintiff's discovery into particular applications of the policy to particular service members is inappropriate.

More broadly, this Court has ruled that plaintiff's facial substantive due process claim is subject to rational basis review. As the Supreme Court has recognized, "[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 (1987). To prevail, plaintiff would have to show that there is no legitimate constitutional application of the statute based upon the facial requirements of the statute. See Washington State Grange v. Washington State Republican Party, 128 S.Ct. 1184, 1190 (2008). Given these principles, it is the government's view that no discovery at all is appropriate beyond the legislative record that was before Congress.[1]

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[1] The legislative compromise embodied in the DADT statute is "not subject to courtroom fact-finding." Federal Communications Comm'n v. Beach Communications, 508 U.S. 307, 315 (1993) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)). This Court has held that the standard of review is the rational basis test, and the government is under no "obligation to produce evidence to sustain the rationality of a statutory classification." Heller v. Doe, 509 U.S. 312, 320(1993). Analysis under this standard of review instead asks the legal question whether the Congress "rationally could have believed" that the conditions of the statute would promote its objective. Western and Southern Life Ins. v. State Bd. of Equalization of California, 451 U.S. 654, 671-72 (1981)

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In short, resolution of the overarching legal issues is necessary for proceedings in this Court to proceed in an appropriate manner. Prompt certification could well resolve the issues identified above, and could well render moot other unnecessary discovery battles such as whether plaintiff may obtain deliberative and otherwise privileged documents from the government. Likewise, certification now will help avoid an unnecessary trial on issues that in the government's view are amenable to resolution based upon precedent. Accordingly, the Court should grant the government's motion for section 1292(b) certification and should certify its June 9, 2009 Order for interlocutory appeal.

III. THE COURT SHOULD STAY PROCEEDINGS PENDING APPEAL

Further proceedings before this Court should also be stayed while the Court of Appeals rules. The factors for a stay all lean in favor of staying proceedings while the Court of Appeals rules. The government "has made a strong showing that [it] is likely to succeed on the merits." Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

Although plaintiff has exhibited an eagerness to proceed to trial upon issues that might later be found amenable to legal resolution, plaintiff has failed to claim that it risks the loss of any evidence if discovery awaits further clarification from the Court of Appeals or identify any other harm resulting from a stay of discovery. On the other hand, if discovery proceeds, the military will be forced to devote untold hours and expense searching for documents and possibly producing

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(emphasis in original). Judicial review under this standard is accordingly "not a license for courts to judge the wisdom, fairness, or logic of legislative choices." Beach Communications Comm'n, 508 U.S. at 313. The burden is instead placed upon the plaintiff to "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(1979).

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witnesses in a matter that can and should be resolved now based upon applicable Ninth Circuit law. Weighing the respective interests of the parties thus further argues in favor of a stay of proceedings. See Hilton, 481 U.S. at 777 (recognizing that, while factors for a stay "cannot be reduced to a set of rigid rules" harm to applicant and other parties are considerations in determining whether a stay should be granted).

As does the final consideration–the "public interest." Id. The public is better served by staying this case now so that public resources and time can be preserved and so that the Court of Appeals is permitted to rule on the controlling legal issues presented in the Court's June 9, 2009 Order, and guide, if necessary, resolution of the government's objections to the discovery recently propounded by plaintiff.

CONCLUSION

The Court should accordingly certify its June 9, 2009 for interlocutory appeal, and stay all district court proceedings pending resolution of that appeal.

Dated: November 9, 2009

Respectfully submitted,

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