

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LOG CABIN REPUBLICANS, a)
non-profit corporation,)
)
Plaintiff,)
)
v.)
)
UNITED STATES OF AMERICA)
and ROBERT M. GATES,)
SECRETARY OF DEFENSE, in)
his official capacity,)
)
Defendants.)
_____)

Case No. CV 04-08425-VAP (Ex)
AMENDED & FINAL
MEMORANDUM OPINION

**[Filed concurrently with Findings of
Fact & Conclusions of Law]**

1 Plaintiff Log Cabin Republicans attacks the constitutionality of the
2 statute known as the "Don't Ask, Don't Tell" Act ("the Act" or "the Policy"),
3 found at 10 U.S.C. § 654, and its implementing regulations.¹ Plaintiff's
4 challenge is two-fold: it contends the Act violates its members' rights to
5 substantive due process guaranteed by the Fifth Amendment to the United
6 States Constitution, and its members' rights of freedom of speech,
7 association, and to petition the government, guaranteed by the First
8 Amendment.²

9
10 The Court finds Plaintiff Log Cabin Republicans (sometimes referred to
11 in this Order as "Log Cabin," "LCR," or "Plaintiff"), a non-profit corporation,
12 has established standing to bring and maintain this suit on behalf of its
13 members. Additionally, Log Cabin Republicans has demonstrated the Don't
14 Ask, Don't Tell Act, on its face, violates the constitutional rights of its
15 members. Plaintiff is entitled to the relief sought in its First Amended
16 Complaint: a judicial declaration to that effect and a permanent injunction
17 barring further enforcement of the Act.

18
19
20
21

22 ¹ The Act, described in greater detail below, provides that any member
23 of the U.S. Armed Forces who engages in homosexual conduct is subject to
24 discharge unless the servicemember is able to demonstrate that he or she
25 has no propensity to engage in "homosexual conduct." Under the Act,
26 homosexual conduct includes sexual acts with persons of the same sex,
admissions that one is homosexual or bisexual, and attempts to marry a
person of the same sex.

27 ² The Court dismissed Plaintiff's claim for violation of the Equal
28 Protection Clause in an Order dated June 9, 2009 ("June 9, 2009, Order").
(Doc. No. 83.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. PROCEEDINGS

This case was tried to the Court on July 13 through 16 and July 20 through 23, 2010. After conclusion of the evidence and closing arguments on July 23, 2010, both sides timely submitted supplemental post-trial briefing on the admissibility of a pretrial declaration submitted by Log Cabin Republicans member John Doe,³ and the matter stood submitted.

II. STANDING

Plaintiff Log Cabin Republicans is a non-profit corporation founded in 1977 and organized under the laws of the District of Columbia. (Trial Exs. 109 [Bylaws], 110 [Articles of Incorporation].) Defendants challenge LCR's standing to bring and maintain this action on behalf of its members.

Plaintiff bears the burden of establishing its standing to invoke federal jurisdiction. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). To bring suit on behalf of its members, an association must establish the following: "(a) [at least one of] its members would otherwise have standing to sue in [his or her] own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977). To satisfy the first element of associational standing, a organization must demonstrate constitutional standing as to at least one member of the

³ The Court overrules Defendants' objections to Exhibit 38, the April 27, 2006 Declaration of John Doe, and considers the statements contained therein regarding Doe's then-present state of mind for the limited purpose for which they were offered, i.e., Doe's state of mind with respect to whether the Act chilled his speech and ability to petition the government for a redress of grievances. See Fed. R. Evid. 803(3).

1 organization, as follows: (1) injury in fact; (2) caused by the defendants; (3)
2 which likely will be redressed by a favorable decision by the federal court.
3 Lujan, 504 U.S. at 560-61; see also Elk Grove Unified Sch. Dist. v. Newdow,
4 542 U.S. 1, 12 (2004).

5
6 Turning first to the associational standing requirements, Plaintiff
7 established at trial that the interests it seeks to vindicate in this litigation are
8 germane to LCR's purposes, satisfying the second requirement for
9 associational standing. Plaintiff's mission includes "assist[ing] in the
10 development and enactment of policies affecting the gay and lesbian
11 community . . . by [the] federal government[. . .] and advocat[ing] and
12 support[ing] . . . activities or initiatives which (i) provide equal rights under law
13 to persons who are gay or lesbian, [and] (ii) promote nondiscrimination
14 against or harassment of persons who are gay or lesbian" (Trial Ex. 109
15 [Mission Statement, attached as Ex. A to Bylaws].) The relief sought here,
16 i.e., the ability of homosexual servicemembers to serve openly in the United
17 States Armed Forces through repeal of the Don't Ask, Don't Tell Act, relates
18 to both aspects of Log Cabin's mission.

19
20 Plaintiff also has satisfied the third requirement of associational
21 standing, "that the suit not demand the participation of individual members."
22 Associated Gen. Contractors of Cal. v. Coal. for Econ. Equity, 950 F.2d 1401,
23 1408 (9th Cir. 1991) (citations omitted). Plaintiff seeks only declaratory and
24 injunctive relief in its First Amended Complaint; when "the claims proffered
25 and relief requested do not demand individualized proof on the part of its
26 members," such as when only declaratory and prospective relief are sought,
27 the individual members of an association need not participate directly in the
28

1 litigation. Id.; see also Hunt, 432 U.S. at 343 (citing Warth v. Seldin, 422 U.S.
2 490, 515 (1975)).

3

4 Defendants directed their challenge primarily to the first requirement of
5 associational standing, i.e., whether there exists at least one member of the
6 association who could maintain this suit in his or her own right. According to
7 Defendant, neither of the two members Plaintiff relies upon to confer
8 associational standing on it meets the requirements for that role, because
9 neither was a member of Log Cabin Republicans continuously from the date
10 of the commencement of this action until the date of trial.

11

12 Plaintiff filed this action on October 12, 2004 (Doc. No. 1); after the
13 Court granted Defendants' motion to dismiss, Plaintiff filed a First Amended
14 Complaint on April 28, 2006. (Doc. No. 25.) The Court already has ruled that
15 standing in this case should be examined as of April 28, 2006, the date
16 Plaintiff filed its First Amended Complaint. (See Doc. No. 170 ["May 27,
17 2010, Order"] at 15.) For the reasons discussed below, as of that date at
18 least one of Log Cabin's members, John Nicholson, had standing and could
19 have pursued the action individually. Even if the Court looks to the date the
20 original Complaint was filed as the relevant one for standing purposes,
21 however, Plaintiff still satisfies the associational standing requirements, as
22 Plaintiff proved by a preponderance of the evidence at trial that John Doe
23 was a member in good standing as of October 12, 2004.

24

25

26

27

28

1 **A. John Nicholson's Standing**

2 John Alexander Nicholson, III, enlisted in the United States Army in
3 May 2001. (Trial Tr. 1135:6-12, July 20, 2010.) As described in more detail
4 below, he received an honorable discharge on March 22, 2002, pursuant to
5 the Don't Ask, Don't Tell Act. (Trial Tr. 1183:25-1184:3, 1185:22-1187:9, July
6 20, 2010.) Nicholson satisfies all three of the requirements for constitutional
7 standing, i.e., "injury in fact" caused by the defendants (his discharge by
8 Defendants pursuant to the Policy), which is redressable by the relief sought
9 in this lawsuit, as he testified he would rejoin the Army if the policy was no
10 longer in effect. (Trial Tr. 1209:4-5, July 21, 2010.)

11
12 Nicholson first became involved with Log Cabin Republicans in August
13 2005, when he and others embarked on a nationwide speaking tour
14 sponsored by LCR to raise awareness of the movement to repeal the Don't
15 Ask, Don't Tell Act. (Trial Tr. 1206:15-1207:11, July 21, 2010.) LCR's
16 national and Georgia state chapter leaders asked Nicholson to join the
17 organization formally after he gave a speech at LCR's national convention on
18 April 28, 2006; he did not pay dues or make a cash contribution at that time,
19 but was told his membership was granted in exchange for his services to the
20 organization. (Trial Tr. 1207:22-1208:25, 1211:25-1212:15, July 21, 2010.)
21 Later he was told his was an honorary membership. (Trial Tr. 1211:10-12,
22 1214:13-15, July 21, 2010.)

23
24 Thus, Nicholson officially joined Log Cabin Republicans on April 28,
25 2006, and has been a member continuously ever since. (Trial Tr. 1208:11-
26 15, 1214:24-1215:17, July 21, 2010.) He testified credibly that he did not
27 complete a paper membership application form that day because he gave the
28

1 necessary information to an LCR administrative assistant who entered it
2 directly into a computer. (Trial Tr. 1211:15-1212:15, July 21, 2010.) Plaintiff
3 maintains an electronic database of its membership which lists Nicholson as
4 a member of Log Cabin Republicans as of April 28, 2006. (Trial Tr. 1209:20-
5 22, 1212:16-1213:16, July 21, 2010.) Nicholson testified that he remembered
6 the precise date Log Cabin's Georgia chapter granted him honorary
7 membership because it was the same day he addressed LCR's national
8 convention. (Trial Tr. 1208:11-15, 1210:11-1212:15, July 21, 2010.)
9

10 The testimony of James Ensley, President of Plaintiff's Georgia chapter
11 since 2006 and a member of LCR's national board of directors since 2008,
12 corroborated Nicholson's testimony regarding the date he became a member
13 of LCR. (Trial Tr. 68:21-70:21, July 13, 2010.) Ensley testified that the
14 Georgia chapter conferred honorary membership on Nicholson at the 2006
15 Log Cabin Republicans national convention, in recognition of his
16 "remarkable" efforts on the nationwide speaking tour and on college
17 campuses toward repeal of the Don't Ask, Don't Tell Act. (Trial Tr. 70:2-16,
18 July 13, 2010.) Ensley specifically recalled the date the Georgia chapter
19 conferred honorary membership on Nicholson because Ensley's
20 congressman had arranged a private tour of the White House for him on the
21 morning of April 28, 2006, which was the same day Nicholson addressed the
22 convention. (Trial Tr. 70:17-71:6, July 13, 2010.) The Court found Ensley to
23 be a candid and credible witness.
24

25 Plaintiff also produced the credible testimony of Terry Hamilton, a 25-
26 year member of Log Cabin Republicans and presently chairman of its
27 national board of directors. (Trial Tr. 33:11-35:22, July 13, 2010.) He verified
28

1 that the organization's membership records reflected Nicholson's membership
2 status since April 28, 2006, and also that Nicholson regularly attended and
3 spoke at the organization's annual conventions. (Trial Tr. 43:14-45:1, July
4 13, 2010.) Based on these indicia, Hamilton understood Nicholson to be a
5 member of the organization since that date. (Trial Tr. 38:8-39:3, July 13,
6 2010.)

7
8 Thus, at the time Nicholson was conferred honorary membership, he
9 satisfied the requirements for membership under section 2.02 of the Log
10 Cabin Republican Bylaws, which states:

11 Honorary and Special Members: The Board of Directors may
12 establish other criteria for granting an Honorary Membership to Log
13 Cabin Republicans for individuals who have exhibited a unique or
14 noteworthy contribution to the Mission of the Corporation or a
15 Special Membership to Log Cabin Republicans for individuals or
16 entities that have provided assistance to the Corporation.⁴
17 (Trial Ex. 109.)

18 Accordingly, Log Cabin Republicans has standing through Nicholson,
19 who himself satisfies all the requirements for constitutional standing and has
20 been a member of LCR from the date the First Amended Complaint was filed
21 to the present.

22 ⁴ Defendants argue Nicholson's honorary membership, pursuant to
23 section 2.02 of the Bylaws, did not confer membership on him because LCR's
24 Articles of Incorporation refer only to one class of membership. (See Doc.
25 No. 186 [Defs.' Mem. Cont. Fact & Law] at 3-4.) The Court rejected this
26 argument in its May 27, 2010, Order, noting "Defendants' argument that Mr.
27 Nicholson's honorary membership is insufficient to confer standing on Plaintiff
28 fails for two reasons Defendants have not shown that the bylaw at issue
actually conflicts with Plaintiff's articles of incorporation [, and] [t]he
District of Columbia Nonprofit Corporation Act (the 'Corporation Act') provides
that a nonprofit corporation shall designate its membership class or classes
and accompanying qualifications 'in the articles of incorporation or the
bylaws.' D.C. Code § 29-301.12 (emphasis added)." (May 27, 2010, Order at
24-25.)

1 The Court rejects Defendants' suggestion that LCR "manufactured" its
2 standing for purposes of this lawsuit. (See Doc. No. 188 [Defs.' Proposed
3 Findings of Fact & Conclusions of Law] at 3.) The only authority Defendants
4 cite on this point is Washington Legal Foundation v. Leavitt, 477 F. Supp. 2d
5 202, 211 (D.D.C. 2007), holding the manufacture of standing "weakens" an
6 association's ability to maintain a lawsuit on behalf of its members. The
7 record before the district court in Washington Legal Foundation revealed
8 facts not present here, however. As that court explained, the Washington
9 Legal Foundation's board of directors explicitly decided to bring suit, and then
10 set about to find and recruit persons who would confer standing on it. By
11 contrast, Martin Meekins, a member of LCR's national board of directors,
12 testified that the initiative for filing this lawsuit came from the rank and file of
13 the organization; Meekins then interviewed members regarding the viability of
14 a lawsuit and to determine if they met the requirements to confer standing on
15 the organization and wished to bring the lawsuit. (Trial Tr. 704:8-19, 705:11-
16 707:12, July 16, 2010.)

17
18 Although not explicitly argued, Defendants' only factual basis for
19 contending that Log Cabin Republicans manufactured standing appears to be
20 the identity of dates on which John Nicholson became an LCR member and
21 the First Amended Complaint was filed. The Court found credible, however,
22 the testimony of the several witnesses who testified about the reason LCR
23 bestowed an honorary membership on Nicholson that day, as explained
24 above.

25
26
27
28

1 Washington Legal Foundation is, of course, not binding authority on this
2 Court, but to the extent it provides guidance, it only holds that "manufacture"
3 of standing weakens but does not destroy an association's ability to maintain
4 its suit. Furthermore, there is no evidence here that LCR manufactured
5 standing, so Washington Legal Foundation is factually dissimilar.

6
7 **B. John Doe's Standing**

8 For the reasons set forth in its May 27, 2010, Order, the Court looks to
9 the filing date of the First Amended Complaint to determine standing. (See
10 May 27, 2010, Order at 15.) Nevertheless, even accepting Defendants'
11 contention that standing in this case must be established as of October 12,
12 2004, when the original Complaint was filed, Log Cabin Republicans satisfies
13 that requirement through its member John Doe.

14
15 John Doe serves as a lieutenant colonel in the United States Army
16 Reserve. He joined Log Cabin Republicans in early September 2004 by
17 completing an application form (using a pseudonym) and paying annual dues
18 through Martin Meekins, then a member of Plaintiff's national board of
19 directors. Meekins accepted the application form and dues payment from
20 Doe and forwarded them to LCR's national headquarters. Doe arranged to
21 pay his membership dues in this manner because he feared he would be
22 discharged from the Army Reserve pursuant to the Don't Ask, Don't Tell Act if
23 he joined the organization openly, using his true name. (Trial Ex. 38.)

24
25
26
27
28

1 To comply with the Don't Ask, Don't Tell Act, Doe must keep his sexual
2 orientation a secret from his coworkers, his unit, and his military superiors,
3 and he may not communicate the core of his emotions and identity to others
4 in the same manner as heterosexual members of the military, on pain of
5 discharge from the Army. (Doc. No. 212 ["July 6, 2010, Order"] at 16; Trial
6 Ex. 38.)

7
8 The Court ruled in its May 27, 2010, Order that Plaintiff raised a triable
9 issue of material fact as to imminent harm related to Doe. (May 27, 2010,
10 Order at 16-19.) The Court now finds that Doe has established the three
11 elements of constitutional standing: he faces a concrete injury caused by
12 Defendants – discharge from the Army Reserve – which is likely, not
13 speculative, in nature, given the mandatory language of the Don't Ask, Don't
14 Tell Act, see 10 U.S.C. § 654 (b)(2), and which would be redressed by a
15 favorable decision by the Court in this action.

16

17 **C. Continuity of Standing**

18 Defendants contended for the first time in their closing argument that
19 Plaintiff lacks standing because it had not proven at trial that either of the
20 individual members on whom it relies to confer associational standing upon it
21 had been a member of the organization continuously from the initiation of the
22 action onwards.

23

24 Insofar as LCR relies on Nicholson's membership to confer
25 associational standing upon the organization, Defendants' argument fails.
26 Nicholson's membership in Log Cabin Republicans has been uninterrupted
27 and continuous since April 28, 2006, the date Plaintiff's Georgia chapter
28

1 conferred honorary membership upon him and also the date Plaintiff filed its
2 First Amended Complaint. In light of the Court's May 27, 2010, Order, this is
3 sufficient.

4
5 As Plaintiff relies also on Doe's membership to confer associational
6 standing upon it, the Court examines the continuity of standing question as to
7 him as well. Doe paid annual membership dues shortly before this action
8 was filed in October 2004, but LCR did not introduce evidence showing Doe
9 paid dues, or otherwise made a financial contribution, to the organization
10 after 2004. A plaintiff who has established standing must retain his or her
11 "personal stake" in the litigation throughout the proceedings. See Lewis v.
12 Cont'l Bank Corp., 494 U.S. 472, 477-78 (1990); Williams v. Boeing Co., 517
13 F.3d 1120, 1128 (9th Cir. 2008). When a plaintiff loses that "personal stake"
14 in the lawsuit, a court loses the ability to grant relief and must dismiss the
15 action on the basis of mootness because the plaintiff no longer satisfies the
16 redressability element of constitutional standing. See, e.g., Arizonans for
17 Official English v. Arizona, 520 U.S. 43, 68-72 (1997) (mootness); Williams,
18 517 F.3d at 1128 (redressability).

19
20 The cases cited above addressing loss of standing do not arise in an
21 associational standing context, however. Whether one regards Plaintiff Log
22 Cabin Republicans or John Doe as the party whose standing is at issue,
23 neither lost a "personal stake" in the litigation when Doe's annual period of
24 membership lapsed.

25
26
27
28

1 First, there was conflicting evidence regarding the effect of a member's
2 nonpayment of dues. James Ensley testified that when a member failed to
3 renew his or her annual dues payment, the Log Cabin Republicans viewed
4 the member as a "former" or "inactive" member, but the name would not be
5 stricken from LCR's membership rolls or electronic database simply because
6 of tardiness in paying annual dues. (Trial Tr. 74:12-75, July 13, 2010.) Terry
7 Hamilton, another member of the national board of directors, testified that a
8 member who failed to renew his membership timely no longer would be
9 considered a member, but his testimony did not contradict Ensley's testimony
10 regarding the mailing list or membership rolls. (Trial Tr. 57:5-8, July 13,
11 2010.)

12

13 Nevertheless, neither Log Cabin Republicans nor Doe lost the
14 necessary personal stake in this litigation merely because Doe did not pay
15 dues after the initial year. Doe still served in the Army Reserve and still was
16 subject to discharge under the Don't Ask, Don't Tell Act. Thus, he still had a
17 personal stake in the outcome of the case, and his injury – his susceptibility
18 to discharge under the Act – continued to be redressable by favorable
19 resolution of the lawsuit.

20

21 Nor is this a case where standing has been lost because of a change in
22 circumstances rendering the subject matter of the case moot: the Act has not
23 been repealed and the challenged policy is still in effect; Doe is still serving
24 and subject to discharge under it;⁵ Nicholson already has been discharged

25

26

27 ⁵ In fact, Plaintiff agreed to Defendants' request for a stay of this case if
28 Defendants would suspend discharges under the Policy, but Defendants
refused to do so.

1 under it and cannot re-enlist as he wishes to do. Finally, the dispute over the
2 constitutionality of the Act has not been resolved.

3

4 Likewise, the redressability aspect of constitutional standing remains
5 alive despite the lapse in Doe's dues-paying membership status. Doe's
6 imminent injury – the mandatory nature of his discharge under the policy –
7 would be addressed through a favorable ruling in this action.

8

9 Finally, even assuming Defendants were correct that Log Cabin
10 Republicans failed to prove standing through Doe based on the lack of
11 evidence he paid dues after 2005, this would not require a finding that
12 Plaintiff could not maintain its claims. Plaintiff had standing to file suit based
13 on the undisputed evidence of Doe's membership as of October 12, 2004, the
14 date Log Cabin Republicans filed this action. Assuming Doe's membership
15 lapsed a year later, in early September 2005, Plaintiff lacked standing
16 temporarily from that time until April 28, 2006, when Nicholson became a
17 member of Log Cabin Republicans. Courts have recognized that a plaintiff
18 who possesses standing when it brings suit, later loses it, and then regains
19 standing before entry of judgment, may still maintain its claims. See, e.g.,
20 Schreiber Foods, Inc. v. Beatrice Cheese, Inc., 402 F.3d 1198, 1203 (Fed.
21 Cir. 2005) (finding plaintiff that owned patent at outset of litigation, assigned it
22 to subsidiary, then reacquired it before judgment may maintain an
23 infringement action); see also Caterpillar, Inc. v. Lewis, 519 U.S. 61, 64, 70,
24 73 (2005). Thus, assuming that Log Cabin Republicans lacked standing at
25 some point between early September 2005 and April 28, 2006, it still may
26 maintain its claims now.

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III. EVIDENCE PRESENTED AT TRIAL

A. Plaintiff's Burden on a Facial Challenge

In United States v. Salerno, 481 U.S. 739 (1987), the Supreme Court held a plaintiff challenging the validity of a law on its face must establish that "no set of circumstances exists under which the Act would be valid." Id. at 745. The defendants in Salerno were detained pending trial under the provisions of the Bail Reform Act; they challenged the Act, on its face, claiming it unconstitutionally violated the Fifth and Eighth Amendments. More recently, in Washington State Grange v. Washington State Republican Party, 552 U.S. 442 (2008), the Supreme Court noted the criticisms leveled at the Salerno standard and recognized an alternative the test as follows: "a facial challenge must fail where the statute has a 'plainly legitimate sweep.'" Id. at 449 (citing Washington v. Glucksberg, 521 U.S. 702, 739-740 & n.7 (1997) (Stevens, J., concurring)); see also United States v. Stevens, 559 U.S. ___, ___, 130 S. Ct. 1577, 1587 (2010) (citing Glucksberg and noting the existence of two standards for facial challenges outside the First Amendment context).

The Court considers the evidence presented at trial in this facial challenge not for the purpose of considering any particular application of the Don't Ask, Don't Tell Act, but rather for the permissible purposes described in Section III(B) below. (See infra Section III(B).) Plaintiff's evidence, as described below, amply illustrates that the Act does not have a "plainly legitimate sweep." Rather, Plaintiff has proven that the Act captures within its overreaching grasp such activities as private correspondence between servicemembers and their family members and friends, and conversations between servicemembers about their daily off-duty activities. Plaintiff also

1 has proven that the Act prevents servicemembers from reporting violations of
2 military ethical and conduct codes, even in outrageous instances, for fear of
3 retaliatory discharge. All of these examples, as well as others contained in
4 the evidence described below, reveal that Plaintiff has met its burden of
5 showing that the Act does not have a "plainly legitimate sweep."
6

7 Finally, the Court notes Defendants' reliance on Salerno and its
8 progeny, particularly Cook v. Gates, 528 F.3d 42 (1st Cir. 2008), in urging the
9 Court to reject Log Cabin's facial challenge. (Defs.' Mem. Cont. Fact & Law at
10 5; Trial Tr. 1670:14-21-1671:23, 1684:12-14, July 23, 2010.) In Cook, the
11 First Circuit reasoned a facial challenge the Don't Ask, Don't Tell Act failed
12 because Lawrence "made abundantly clear that there are many types of
13 sexual activity that are beyond the reach of that opinion," and "the Act
14 includes such other types of sexual activity" because it "provides for the
15 [discharge] of a service person who engages in a public homosexual act or
16 who coerces another person to engage in a homosexual act." 528 F.3d at 56
17 (citing Lawrence, 539 U.S. at 578).

18
19 The Court is not bound to follow this out-of-Circuit authority, and in any
20 event finds the logic of Cook unpersuasive. First, Cook employed the
21 formulation from Salerno rather than the Supreme Court's more recent
22 articulation of the test for facial challenges set forth in Washington State
23 Grange. Furthermore, the examples the Cook court cited as grounds for
24 discharge "under the Act" actually are bases for discharge of any
25 servicemember, whether the conduct in question is homosexual or
26 heterosexual. In fact, the Cook decision provides no citation to any provision
27
28

1 of the Don't Ask, Don't Tell Act specifically listing either of its examples as
2 grounds for discharge under that legislation.

3

4 **B. Evidence Properly Considered on a Facial Challenge**

5 Defendants asserted relevance (and often other) objections to nearly
6 every exhibit Plaintiff sought to introduce into evidence during trial, as well as
7 to nearly all the testimonial evidence offered. According to Defendants,
8 because Plaintiff challenges the constitutionality of the statute on its face,
9 rather than challenging its application, the only evidence the Court should –
10 indeed may – consider, is the statute itself and the bare legislative history;
11 thus, according to Defendants, all other evidence is irrelevant.⁶

12

13 Defendants further contend that while examining the legislative record,
14 the Court must not pay heed to any illegitimate motivations on the part of the
15 enacting lawmakers. Defendants cite several cases as authority for these
16 assertions, beginning with United States v. O'Brien, 391 U.S. 367 (1968). In
17 O'Brien, the government charged and convicted the defendant for burning his
18 draft card; the defendant contended the law under which he was prosecuted
19 was unconstitutional because Congress enacted it for the unlawful purpose of
20 suppressing speech. Id. at 383. The Supreme Court rejected this argument,
21 holding "under settled principles the purpose of Congress, as O'Brien uses
22 that term, is not a basis for declaring this legislation unconstitutional. It is a
23 familiar principle of constitutional law that this Court will not strike down an

24

25

26

27 ⁶ Defendants maintained this position in their pretrial submissions as
28 well. (See Defs.' Mem. Cont. Fact & Law at 9-10 ("the only appropriate
material to consider with respect to plaintiff's due process claim is the statute
and its findings, as well as the statute's legislative history").)

1 otherwise constitutional statute on the basis of an alleged illicit legislative
2 motive." Id.

3

4 In part, the O'Brien Court founded its reasoning on the difficulty of
5 discerning a unified legislative "motive" underlying any given enactment:
6 "What motivates one legislator to make a speech about a statute is not
7 necessarily what motivates scores of others to enact it" Id. at 384.
8 Thus, O'Brien instructs that when "a statute . . . is, under well-settled criteria,
9 constitutional on its face," a court should not void the law based on
10 statements by individual legislators. Id.

11

12 O'Brien does not stand for the proposition urged by Defendants,
13 however, that when deciding whether a challenged law "is, under well-settled
14 criteria, constitutional on its face," this Court should limit itself to examining
15 only the statute's legislative history. In fact, in the O'Brien decision the
16 Supreme Court specifically pointed to two cases, Grosjean v. American Press
17 Co., 297 U.S. 233 (1936), and Gomillion v. Lightfoot, 364 U.S. 339 (1960),
18 noting that they "stand, not for the proposition that legislative motive is a
19 proper basis for declaring a statute unconstitutional, but that the inevitable
20 effect of a statute on its face may render it unconstitutional." O'Brien, 391
21 U.S. at 394 (emphasis added). In both Grosjean and Gomillion, the Court
22 noted, the purpose of the law was irrelevant "because [of] the inevitable effect
23 – the necessary scope and operation." Id. at 385 (citations omitted).
24 Therefore, under these authorities, the court may admit and examine
25 evidence to determine the "scope and operation" of a challenged statute;
26 nothing in O'Brien, Grosjean, or Gomillion limits the Court's discretion to
27 consider evidence beyond the legislative history.

28

1 Defendants also cite City of Las Vegas v. Foley, 747 F.2d 1294 (9th
2 Cir. 1984) as support for their position regarding the inadmissibility of
3 Plaintiff's evidence. Foley arose out of a discovery dispute in a facial
4 constitutional challenge to a Las Vegas zoning ordinance restricting the
5 location of "sexually oriented businesses." Id. at 1296. One of the affected
6 businesses sought to depose city officials regarding their motives in enacting
7 the ordinance; after the city failed in its efforts to obtain a protective order
8 from the District Court, it sought mandamus relief from the Ninth Circuit Court
9 of Appeals. Id.

10

11 The Ninth Circuit reviewed the case law prohibiting inquiry into "alleged
12 illicit legislative motive," and relying on O'Brien, granted the writ, directing the
13 district court to issue a protective order. Id. at 1299. In rejecting the
14 arguments of the party seeking to depose the legislators, the Foley court
15 described the following types of evidence appropriately considered by a court
16 asked to determine a First Amendment challenge:

17 objective indicators as taken from the face of the statute, the effect
18 of the statute, comparison to prior law, facts surrounding enactment
19 of the statute, the stated purpose, and the record of the
20 proceedings.

21 Foley, 747 F.2d at 1297 (citations omitted). And finally, the Ninth Circuit
22 noted, "basic analysis under the First Amendment . . . has not turned on the
23 motives of the legislators, but on the effect of the regulation." Id. at 1298
24 (emphasis added).

25 As Defendants correctly point out, these authorities do hold that
26 isolated (and in this case, sometimes inflammatory) statements of Senators
27 and House members during the Don't Ask, Don't Tell Act legislative hearings
28 should not be considered by the Court. Nevertheless, this does not affect,

1 much less eviscerate, the language in the authorities cited above that
2 Defendants would have the Court ignore, holding that a court deciding a
3 facial challenge can and should consider evidence beyond the legislative
4 history, including evidence regarding the effect of the challenged statute.

5
6 Finally, the case now before the Court includes a facial challenge on
7 substantive due process as well as First Amendment grounds. Therefore, it
8 should be noted that although the authorities discussed above dealt with
9 evidence properly considered by courts in resolving First Amendment facial
10 challenges, their holdings regarding the admissibility of broad categories of
11 testimonial and documentary evidence are echoed in the authorities
12 considering facial challenges on due process grounds. See, e.g., Lawrence
13 v. Texas, 539 U.S. 558 (2003); Reno v. Flores, 507 U.S. 292, 309 (1993);
14 Tucson Woman's Clinic v. Eden, 379 F.3d 531, 556-57. (9th Cir. 2004); Los
15 Angeles County Bar Ass'n v. Eu, 979 F.2d 697, 707 (9th Cir. 1992); see
16 generally, Guggenheim v. City of Goleta, 582 F.3d 996 (9th Cir. 2009).

17
18 In Lawrence, petitioners pled nolo contendere to charges under a
19 Texas statute forbidding certain sexual acts between persons of the same
20 sex. They then raised a facial challenge to the statute's constitutionality
21 under the Due Process and Equal Protection clauses of the Fourteenth
22 Amendment. In reaching its decision that the Texas statute indeed was
23 unconstitutional, the Supreme Court's majority reviewed at length the history
24 of the common law prohibiting sodomy or regulating homosexuality, the effect
25 of the statute ("The stigma this criminal statute imposes, moreover, is not
26 trivial We are advised that if Texas convicted an adult for private
27 consensual homosexual conduct under the statute here in question the

28

1 convicted person would come within the registration laws of at least four
2 States were he or she to be subject to their jurisdiction. . . ."), facts
3 surrounding enactment of the statute, and comparison with other laws.
4 Lawrence, 539 U.S. at 567-79.

5
6 Accordingly, the following discussion of Plaintiff's substantive due
7 process and First Amendment challenges to the Act refers to evidence
8 properly adduced by Log Cabin Republicans and admitted at trial. (As noted
9 above, apart from the Act itself and its legislative history, Defendants
10 admitted no evidence and produced no witnesses.)

11

12 **C. Lay Witness Testimony**

13 **1. Michael Almy**

14 Michael Almy served for thirteen years as a commissioned officer in the
15 United States Air Force, finishing his service as a major. (Trial Tr. 726:21-
16 727:11, 728:11-12, July 16, 2010.) Like several other witnesses, he came
17 from a family with a heritage of military service; his father retired as a colonel
18 in the Air Force, and two uncles served as career military officers as well.
19 (Trial Tr. 728:13-22, July 16, 2010.)

20

21 Almy entered active duty in 1993, after obtaining an undergraduate
22 degree in Information Technology while serving in the Army ROTC program.
23 He did not self-identify as a gay man until a few years later. (Trial Tr. 726:23-
24 727:2, 819:3-12, July 16, 2010.) After that, he testified, the Don't Ask, Don't
25 Tell Act created a natural barrier between himself and his colleagues, as he
26 could not reveal or discuss his personal life with others. (Trial Tr. 820:6-
27 821:4, 821:19-822:9, July 16, 2010.) While it was common for the officers to

28

1 socialize when off duty, he could not join them. (Trial Tr. 821:19-822:9, July
2 16, 2010.) All of this may have contributed to creating an aura of suspicion
3 about him, and a sense of distrust. (Trial Tr. 820:19-821:4, July 16, 2010.)
4

5 Almy's modest demeanor as a witness and matter-of-fact recitation of
6 his service record did not disguise his impressive career in the Air Force.
7 Almy was deployed three times to Saudi Arabia and helped enforce the
8 Southern "no fly" zone over Iraq. Almy set up new communications bases
9 throughout the theaters in Jordan, Saudi Arabia, and Iraq, and was deployed
10 in Saudi Arabia, serving in the Communications Directorate, during the
11 invasion of Iraq in 2003. (Trial Tr. 742:16-743:11, 746:4-747:20, July 16,
12 2010.) In 2003, after returning from his third deployment to Saudi Arabia,
13 Almy was promoted to the rank of major and accepted a position as the Chief
14 of Maintenance for the 606th Air Control Squadron in Spangdahlem,
15 Germany. (Trial Tr. 751:1-20, July 16, 2010.) In that role, Almy commanded
16 approximately 180 men in the Maintenance Directorate. (Trial Tr. 751:21-22,
17 753:7-11, July 16, 2010.) The three flights⁷ in the Maintenance Directorate
18 under his command in the 606th Air Control Squadron deployed to Iraq in
19 September 2004. His squadron was responsible for maintaining and
20 controlling the airspace during the invasion of Fallujah, Iraq, and he was
21 responsible for maintaining control over the vast majority of Iraqi airspace,
22 including Kirkuk, as well as maintaining all satellite links and voice and data
23 communications. (Trial Tr. 753:7-755:24, July 16, 2010.) While stationed at
24 Balad Air Base, his flight experienced frequent mortar attacks "usually
25 several times a week, if not daily." (Trial Tr. 756:1-2, July 16, 2010.)
26

27 ⁷ A "flight" is the Air Force term for a group of airmen, comparable to a
28 "unit" in the Army. (Trial Tr. 1335:10-12, July 21, 2010.)

1 After Almy completed his third deployment to Iraq in January 2005,
2 someone began using the same computer Almy had used while deployed;
3 that person searched Major Almy's private electronic mail message ("e-mail")
4 files without his knowledge or permission. The search included a folder of
5 Major Almy's personal e-mail messages,⁸ sent to his friends and family
6 members, and read messages, including at least one message to a man
7 discussing homosexual conduct. (Trial Tr. 764:23-766:6-767:2, July 16,
8 2010.) Almy thought the privacy of his messages was protected; he was very
9 knowledgeable about the military's policy regarding the privacy of e-mail
10 accounts because of his responsibility for information systems. (Trial Tr.
11 772:20-773:4, 794:6-15, 796:6-798:4, July 16, 2010.) He knew, for example,
12 that according to Air Force policy, e-mail accounts could not be searched
13 unless authorized by proper legal authority or a squadron commander or
14 higher in the military chain of command. (Trial Tr. 772:20-773:4, July 16,
15 2010.)

16
17 Almy only learned his private e-mail had been searched when he
18 returned to Germany and his commanding officer confronted him with the
19 messages, read him the Don't Ask, Don't Tell Act, and pressured him to admit
20 he was homosexual. (Trial Tr. 764:23-766:6, 773:13-20, July 16, 2010.) At
21 the end of the meeting, Almy was relieved of his duties, and his commanding
22 officer informed the other officers in the squadron of this. (Trial Tr. 774:7-15,
23 July 16, 2010.) Almy had attained one of the highest level security

24

25

26 ⁸ According to Major Almy's uncontradicted testimony on this point, the
27 Air Force, "for morale purposes," allows servicemembers deployed in combat
28 zones to use their government e-mail account for personal e-mail. (Trial Tr.
767:3-18, 794:6-15, 796:6-798:4, July 16, 2010.) Almy separated the
personal e-mail he received in his government e-mail account into a folder
titled "Friends." (Trial Tr. 769:20-770:15, July 16, 2010.)

1 clearances available for military personnel, "top secret SCI⁹ clearance,"
2 approximately three months after Almy was relieved of his duties, his security
3 clearance was suspended. (Trial Tr. 775:8-15, July 16, 2010.)
4

5 Initially, Almy contested his discharge, as he felt he had not violated the
6 terms of the Don't Ask, Don't Tell Act: he had never told anyone in the military
7 he was gay. (Trial Tr. 775:19-776:9, July 16, 2010.) Rather, Almy's
8 understanding was that his discharge was based solely on the e-mail
9 discovered on the computer in Iraq. (Trial Tr. 793:6-9, July 16, 2010.)
10 Accordingly, Almy invoked his right to an administrative hearing and solicited
11 letters of support from those who had worked with him in the Air Force. (Trial
12 Tr. 775:19-776:9, 777:2-8, July 16, 2010.) Everyone he asked to write such
13 a letter agreed to do so. (Trial Tr. 777:17-25, July 16, 2010.) Colonel Paul
14 Trahan, US Army (Ret.), wrote: "My view is that Major Almy has been, and
15 will continue to be an excellent officer. As a former Commander and
16 Inspector General I am well aware of the specifics of the Homosexual
17 Conduct Policy. To my knowledge, Major Almy is not in violation of any of
18 the provisions of the policy. To the contrary, it appears that in prosecuting
19 the case against Major Almy, the USAF may have violated the 'Don't Ask,
20 Don't Tell Policy,' the Electronic Privacy Act and Presidential directives
21 regarding the suspension of security clearances." (Trial Ex. 113 [Character
22 Reference Letter from Col. Paul Trahan, U.S. Army (Ret.)].)
23

24 Captain Timothy Higgins wrote about Almy: "Of the four maintenance
25 directorate chiefs I have worked with at the 606th, Major Almy is by far the
26 finest. During his tenure as the [director of logistics], he had maintenance
27

28 ⁹ "SCI" means "Sensitive Compartmented Information."

1 training at the highest levels seen to date His troops respected him
2 because they believed he had their best interests at heart." (Trial Ex. 117
3 [Character Reference Letter from Timothy J. Higgins, Capt. USAF].)
4

5 Those who served under Almy wrote equally strong praise: "I can say
6 without reservation that Maj. Almy was the best supervisor I have ever had."
7 (Trial Ex. 120 [Character Reference Letter from Rahsul J. Freeman, 1st Lt.,
8 USAF]); "I was deployed with him during the NATO Exercise CLEAN
9 HUNTER 2004. His leadership was key to our successful completion of the
10 mission. He was well liked and respected by the enlisted personnel in the
11 unit." (Trial Ex. 122 [Character Reference Letter from Leslie D. McElya,
12 SMSgt, USAF (Ret.)].) Almy's commanding officer while his discharge
13 proceedings were pending, Lt. Col. Jeffrey B. Kromer, wrote that he was
14 convinced "the Air Force, its personnel, mission and tradition remains
15 unchanged and unharmed despite his alleged [violations of the Don't Ask,
16 Don't Tell Act]." (Trial Ex. 114.)
17

18 During the course of Almy's discharge proceedings, he was relieved of
19 his command, but remained at Spangdahlem Air Base performing "ad hoc"
20 duties. (Trial Tr. 810:18-811:1, 816:5-16 July 16, 2010.) Almy testified he
21 observed the effect his abrupt removal from his duties had on his former unit:
22 the maintenance, availability, and readiness of the equipment to meet the
23 mission declined. (Trial Tr. 813:19-24, 815:2-18, July 16, 2010.) One officer
24 in the 606th Air Control Squadron observed that the squadron "fell apart"
25 after Major Almy was relieved of his duties, illustrating "how important Maj.
26 Almy was[,] not only to the mission but to his troops." (Trial Ex. 121
27
28

1 [Character Reference Letter from Bryan M. Zollinger, 1st Lt. USAF, 606th Air
2 Control Squadron].)

3

4 After sixteen months, Almy agreed to drop his request for an
5 administrative hearing and to accept an honorable discharge. He testified his
6 reasons for doing so were the risks of a less-than-honorable discharge would
7 have had on his ability to obtain a civilian job and on his retirement benefits,
8 as well as his own exhausted emotional state. (Trial Tr. 798:8-799:13, July
9 16, 2010.) Almy refused to sign his official discharge papers, however,
10 because they listed the reason for discharge as admitted homosexuality.
11 (See Trial Ex. 112; Trial Tr. 800:1-801:20, July 16, 2010.)

12

13 Major Almy received many awards and honors during his service in Air
14 Force. For example, while serving at Tinker Air Force Base in the late 1990s
15 with the Third Combat Communications Group, he was selected as "Officer of
16 the Year," chosen as the top performer among his peers for "exemplary
17 leadership, dedication to the mission, and going above and beyond the call of
18 duty." (Trial Tr. 741:1-11, July 16, 2010.) In 2001, he was one of six Air
19 Force officers chosen to attend the residential training program for officers at
20 the Marine Corps Quantico headquarters. (Trial Tr. 744:7-745:20.) In 2005
21 he was awarded the Lt. General Leo Marquez Award, which is given to the
22 Top Air Force Communications Officer serving in Europe. (Trial Tr. 760:8-
23 761:1, July 16, 2010.) Although Almy had been relieved of command, during
24 the pendency of the discharge proceedings, Colonel Goldfein, Almy's wing
25 commander, recommended that Almy be promoted to lieutenant colonel.
26 (Trial Tr. 816:19-818:1, July 16, 2010.)

27

28

1 Almy testified that if the Act were no longer in effect, he "wouldn't
2 hesitate" to rejoin the Air Force. (Trial Tr. 827:3-5, July 16, 2010.) The Court
3 found Almy a credible, candid, and forthright witness.

4

5 **2. Joseph Rocha**

6 Joseph Rocha enlisted in the United States Navy on April 27, 2004, his
7 eighteenth birthday. (Trial Tr. 473:19-23, July 15, 2010.) His family, like
8 Major Almy's, had a tradition of military service, and the September 11, 2001,
9 attacks also motivated him to enlist. (Trial Tr. 474:5-24, July 15, 2010.) He
10 wanted to be an officer in the United States Marine Corps, but was not
11 admitted to the Naval Academy directly out of high school; so he hoped to
12 enter Officer Training School through diligence as an enlisted man. (Trial Tr.
13 473:24-474:24, July 15, 2010.)

14

15 After successfully completing basic training, he was promoted to
16 seaman apprentice and received further training in counter-terrorism and
17 force protection. (Trial Tr. 475:7-476:5, July 15, 2010.) He then volunteered
18 for deployment on a military mission to Bahrain. (Trial Tr. 476:6-12, July 15,
19 2010.) Once he arrived at the Naval Support base there, Rocha sought out
20 the base's canine handler position because he wanted to specialize in
21 becoming an explosive-device handler. (Trial Tr. 477:12-22, July 15, 2010.)

22

23 The canine group is a very elite and competitive unit, for which
24 qualification is very difficult. (Trial Tr. 478:11-16, July 15, 2010.) Rocha
25 volunteered his off-duty time to earn the qualifications to interview and be
26 tested for a kennel-support assignment; during this time, his interactions with
27 members of the canine unit were limited to one or two handlers on the night

28

1 shift when he volunteered. (Trial Tr. 478:20-479:13, July 15, 2010.)
2 Eventually, Rocha took and passed oral and written examinations with Chief
3 Petty Officer Toussaint, the canine group's commanding officer; Rocha met
4 the other qualifications and received an assignment in kennel support. (Trial
5 Tr. 480:11-19, 481:4-9, July 15, 2010.) His duties were to ensure the dogs –
6 who were trained to sniff and detect explosives and explosive devices – were
7 clean, fed, medicated, and exercised. (Trial Tr. 481:10-17, July 15, 2010.)

8
9 At the same time, Rocha voluntarily participated in additional physical
10 training exercises with members of the Marine Corps, such as martial arts
11 and combat operations training, in the belief this eventually would improve his
12 chances for admission to the Naval Academy. (Trial Tr. 482:16-483:6, July
13 15, 2010.) As Rocha aspired to become a Marine officer, after receiving
14 permission through the Marine chain of command, Rocha began "more
15 formal training," eventually earning martial arts, combat, and swimming
16 qualifications. (Trial Tr. 482:21-483:12, July 15, 2010.)

17
18 Once assigned as kennel support to the canine unit and under Chief
19 Petty Officer Toussaint's command, Rocha was hazed and harassed
20 constantly, to an unconscionable degree and in shocking fashion. When the
21 eighteen-year-old Rocha declined to participate in the unit's practice of
22 visiting prostitutes, he was taunted, asked if he was a "faggot," and told to
23 prove his heterosexuality by consorting with prostitutes. (Trial Tr. 486:18-
24 487:2, 488:3-7, July 15, 2010.) Toussaint freely referred to him as "gay" to
25 the others in the unit, and others in the unit referred to him in a similar
26 fashion. (Trial Tr. 486:11-17, July 15, 2010.) When Rocha refused to answer
27 the questions from Toussaint and others in the unit about his sexuality, "it
28

1 became a frenzy," in his words, and his superiors in the canine unit would
2 gather around him, simulate sexual positions, and ask if the U.S. Marine
3 Corps soldiers performed various sexual acts on him. (Trial Tr. 487:20-
4 488:7, 488:8-19, July 15, 2010.) Toussaint ordered all of the other men in the
5 unit to beat Rocha on the latter's nineteenth birthday. (Trial Tr. 485:16-486:3,
6 July 15, 2010.)

7
8 On one occasion that Rocha testified was especially dehumanizing,
9 Toussaint brought a dozen dogs to the Department of Defense Dependent
10 School for a bomb threat training exercise. For the "training exercise" he
11 instructed Rocha to simulate performing oral sex on another enlisted man,
12 Martinez, while Toussaint called out commands about how Rocha should
13 make the scenario appear more "queer." (Trial Tr. 490:13-492:19, July 15,
14 2010.) On another occasion, Toussaint had Rocha leashed like a dog,
15 paraded around the grounds in front of other soldiers, tied to a chair, force-
16 fed dog food, and left in a dog kennel covered with feces. (Trial Tr. 521:11-
17 522:1, July 15, 2010.)

18
19 Rocha testified that during this deployment in Bahrain, he never told
20 anyone he was gay because he wanted to comply with the Don't Ask, Don't
21 Tell Act. (Trial Tr. 487:20-488:2, July 15, 2010.) He did not report any of the
22 mistreatment, although he believed it violated Navy regulations. (Trial Tr.
23 488:20-489:14, July 15, 2010.) Toussaint was his commanding officer to
24 whom he normally would direct such a report and yet was either responsible
25 for the mistreatment or at least present when others engaged in it. (Id.)
26 Rocha's only other choice was to report the misconduct to the Inspector
27 General, which he did not believe was feasible. (Trial Tr. 499:6-16, 533:2-19,
28

1 July 15, 2010.) He was eighteen to nineteen years old at the time, he
2 testified, far from home in Iraq, and all of the perpetrators were senior to him
3 in rank and led in the misconduct by his commanding officer. (Trial Tr.
4 488:20-489:14, July 15, 2010.)

5
6 Eventually Rocha received the assignment he had hoped for, returning
7 to the United States and reporting to Lackland Air Force Base for Military
8 Working Dog Training School. (Trial Tr. 499:20-500:1, July 15, 2010.) Once
9 he completed that training successfully, he returned to Bahrain, where he
10 found that although he was now a military dog handler himself, the same
11 atmosphere prevailed. (Trial Tr. 500:2-6, 16-18, July 15, 2010.) A new petty
12 officer had joined the unit, Petty Officer Wilburn, who declared openly that
13 Rocha was "everything he hated: liberal, [Roman] Catholic, and gay." (Trial
14 Tr. 501:19-502:11, July 15, 2010.) Wilburn trailed Rocha regularly as Rocha
15 tried to carry out his duties, taunting and harassing him. Rocha wrote
16 Wilburn a letter complaining about his conduct; in response, Wilburn left an
17 image of two men engaging in homosexual activity on Rocha's computer with
18 the message that if Rocha complained, "no one will care." (Trial Tr. 502:12-
19 504:5, July 15, 2010.)

20
21 When the Navy undertook an investigation of Toussaint's command
22 (apparently unmotivated by anything Rocha said or did), Rocha was
23 questioned by a captain but at first refused to answer any questions about
24 the mistreatment he was subjected to because he was afraid the
25 investigation might lead to questions about his sexual orientation and an
26 investigation on that subject. (Trial Tr. 519:16-520:10, July 15, 2010.) So
27 great was Rocha's fear of retaliation that he responded to an investigating
28

1 officer's questions regarding Toussaint only after he was threatened with a
2 court martial if he refused to do so. (Trial Tr. 520:11-15, July 15, 2010.)

3

4 The Navy recognized Rocha with several awards during his service,
5 including the Navy and Marine Corps Achievement Medal for professional
6 achievement that exceeds expectations; the Global War on Terrorism
7 Expeditionary Medal; the National Defense Service Medal; and the Navy
8 Expert Rifleman Medal. (Trial Tr. 517:23-24, 518:7-8, 14-16, 519:4-7, July
9 15, 2010.)

10

11 Rocha received consistently excellent performance evaluations and
12 reviews while he served in the Navy. (See Trial Exs. 144, 145.) In Rocha's
13 review covering February 18, 2005, through July 15, 2005, his supervisors –
14 including Toussaint – described Rocha as "highly motivated" and a
15 "dedicated, extremely reliable performer who approaches every task with
16 enthusiasm." (Trial Ex. 145; Trial Tr. 494:23-497:13, July 15, 2010.) Rocha's
17 review also stated that he was a "proven performer" who was "highly
18 recommended for advancement." (Trial Tr. 496:16-497:3, July 15, 2010.)
19 Rocha's review recommended him for early promotion, which he received
20 shortly thereafter. (Trial Tr. 497:7-22, July 15, 2010.) Toussaint signed the
21 review as Rocha's senior reviewing military officer. (Trial Tr. 495:19-23,
22 498:4-6, July 15, 2010.)

23

24 Despite the ongoing harassment, Rocha continued to receive
25 exemplary reviews from his supervisors in the canine handling unit, including
26 Chief Petty Officer Toussaint. In a review covering July 16, 2005, through
27 June 16, 2006, then-Petty Officer Rocha is described as an "exceptionally

28

1 outstanding young sailor whose performance, initiative, and immeasurable
2 energy make[] him a model Master-At-Arms." (Trial Ex. 144; Trial Tr.
3 504:23-506,19, July 15, 2010.) The review also noted that as a military
4 working dog handler, Rocha "flawlessly inspected [over 300 items of military
5 equipment,] increasing the force protection of NSA Bahrain." (Trial Ex. 144;
6 Trial Tr. 506:10-13, July 15, 2010.) As a result of his performance as a
7 military working dog handler, Rocha received the Navy and Marine Corps
8 Achievement Medal, which is given when an enlisted member exceeds
9 expectations. (Trial Tr. 517:15-518:6 July 15, 2010.)

10

11 In 2006, Rocha was chosen to receive the sole nomination from his
12 congressman for entrance into the U.S. Naval Academy, and Rocha chose to
13 apply to the Naval Academy's preparatory school in the event he was not
14 accepted directly into the Naval Academy.¹⁰ (Trial Tr. 506:1-4; 507:4-23, July
15 15, 2010.) As required, he received the nomination of everyone in his chain
16 of command for his entry into the academy and was accepted into the Naval
17 Academy's preparatory school. (Trial Tr. 508:13-509:6, July 15, 2010.) He
18 described his acceptance as "the most significant moment of [his] life . . . ,
19 [because acceptance into the Naval Academy] was the biggest dream [he'd]
20 ever had." (Trial Tr. 519:8-15, July 15, 2010.)

21

22 Once he enrolled at the preparatory academy, Rocha testified, he had
23 the opportunity to reflect on his experiences in Bahrain. (Trial Tr. 522:12-24,
24 July 15, 2010.) His instructors at the preparatory academy stressed the

25

26 ¹⁰ According to Rocha's uncontradicted testimony on this point, the
27 preparatory academy is designed to give extra academic support before entry
28 into the Naval Academy at Annapolis. (Trial Tr. 507:24-508:4, July 15, 2010.)
Once admitted into the preparatory academy, acceptance into Annapolis is
guaranteed. (Trial Tr. 508:5-12, July 15, 2010.)

1 nature of the fifteen- to twenty-year commitment expected of the officer
2 candidates. (Id.) Rocha understood he was gay when he enlisted in the
3 Navy at age eighteen, and had complied fully with the Don't Ask, Don't Tell
4 Act during his service, which he had thought would protect him. (Id.) After
5 reflecting on his experiences in the military working dog unit in Bahrain,
6 however, he decided it would be impossible for him to serve under the
7 restraints of the Act and fulfill the commitment expected of him. He then
8 decided to inform the Navy of his sexual orientation. (Trial Tr. 522:12-523:15,
9 July 15, 2010.)

10

11 He first sought permission from Ensign Reingelstein, his immediate
12 superior, to speak to the division commander; Ensign Reingelstein
13 unsuccessfully tried to persuade Rocha to change his mind. (Trial Tr.
14 523:14-524:14, July 15, 2010.) Rocha then was allowed to meet with his
15 commanding officer, Lt. Bonnieuto, who listened and told him to return to his
16 unit. (Trial Tr. 525:2-19, July 15, 2010.) Eventually, he received an
17 honorable discharge (see Trial Ex. 144), although before accepting Rocha's
18 statement, Lt. Bonnieuto tried to dissuade him, telling him he was being
19 considered for various honors and leadership positions at the preparatory
20 academy, including "battalion leadership." (Trial Tr. 525:21-526:6, 527:13-
21 528:22, 530:4-25, July 15, 2010.)

22

23 After his discharge, Rocha testified, he was diagnosed with service-
24 related disorders including "post-traumatic stress disorder with major
25 depression." (Trial Tr. 532:11-19, July 15, 2010.) He also testified he would
26 rejoin the Navy if the Don't Ask, Don't Tell Act was repealed. (Trial Tr.
27 533:24-534:2, July 15, 2010.)

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Even when recounting the mistreatment endured under Toussaint's command, Rocha testified in an understated and sincere manner. The Court found him a forthright and credible witness.

3. Jenny Kopfstein

Jenny Kopfstein joined the United States Navy in 1995 when she entered the U.S. Naval Academy; after graduation and further training, she began serving on the combatant ship USS Shiloh on March 15, 2000. (Trial Tr. 919:12-14, 926:11-927:3, 927:12-19, July 16, 2010.) She was assigned as the ship's ordnance officer, which means she "was in charge of two weapon systems and a division of [fifteen] sailors." (Trial Tr. 928:22-929:6, July 16, 2010.) When assigned to be the "officer of the deck," she was "in charge of whatever the ship happened to be doing at that time," and coordinating the ship's training exercises of as many as twenty to thirty sailors. (Trial Tr. 929:7-930:4, July 16, 2010.)

Once assigned to the USS Shiloh, she discovered the Act made it impossible for her to answer candidly her shipmates' everyday questions about such matters as how she spent weekends or leave time; to do so would place her in violation of the Act as she would necessarily be revealing the existence of her lesbian partner. (Trial Tr. 931:22-932:11, July 16, 2010.) She testified that having to conceal information that typically was shared made her feel as though other officers might distrust her, and that trust is critical, especially in emergencies or crises. (Trial Tr. 957:6-22, July 20, 2010.) The Don't Ask, Don't Tell Act's prohibition on gay and lesbian servicemembers revealing their sexual orientation affects trust among

1 shipmates, Kopfstein testified, because it causes people to "hide significant
2 parts of themselves," making it harder to establish the necessary sense of
3 teamwork. (Trial Tr. 978:16-979:18 July 20, 2010.) When she overheard
4 homophobic comments and name-calling by her shipmates, she felt she
5 could neither report them nor confront the offenders, because to do either
6 might call unwanted suspicion upon her. (Trial Tr. 932:18-933:6, July 16,
7 2010.)

8
9 After serving for four months on the USS Shiloh, Kopfstein wrote a
10 letter to Captain Liggett, her commanding officer, stating she was a lesbian;
11 she wanted Captain Liggett to learn this from her rather than hear it from
12 another source. (Trial Tr. 933:7-13, 935:8-23, July 16, 2010; Trial Ex. 140
13 ["Memorandum of Record" from Kopfstein to Liggett dated July 17, 2000].)
14 Captain Liggett did not begin any discharge proceedings after Kopfstein
15 wrote this letter; he told her this was because he did not know her well and
16 thought she might have written the letter not because she was a lesbian, but
17 rather as an attempt to avoid deployment to the Arabian Gulf. (Trial Tr.
18 935:20-937:11, July 16, 2010; 985:5-14, July 20, 2010.) Kopfstein continued
19 to serve and perform her duties in the same manner she had before writing,
20 but no longer lying or evading her shipmates' questions about her personal
21 life when asked. (Trial Tr. 950:25-951:11, July 20, 2010.)

22
23 When Liggett was leaving the USS Shiloh, to be replaced by Captain
24 Dewes, Captain Liggett not only invited her to the farewell party at his house
25 for the officers and their spouses, but made a point of telling her she was
26 welcome to bring "any guest she chose" with her. (Trial Tr. 955:12-956:8,
27 July 20, 2010.) Kopfstein and her partner attended the party, and Kopfstein
28

1 testified that Captain Liggett and his wife welcomed them both warmly, as did
2 everyone else present. (Trial Tr. 956:12-25, July 20, 2010.)

3
4 During the abbreviated course of her service, the Navy awarded
5 Kopfstein many honors. For example, she was chosen to steer the USS
6 Shiloh in a ship steering competition; after the USS Shiloh won the
7 competition, she received a personal commendation from the Admiral who
8 also ceremonially "gave her his coin," a rare and prized tribute. (Trial Tr.
9 952:14-953:20, July 20, 2010.) When she returned from overseas
10 deployment after the bombing of the USS Cole off the coast of Yemen in
11 February 2001, the Navy awarded her the Sea Service Deployment Ribbon,
12 another commendation not routinely awarded. (Trial Tr. 949:11-22, 954:5-22,
13 July 20, 2010.) She also was awarded the Naval Expeditionary Medal after
14 the Yemen deployment. (Trial Tr. 955:5-11.)

15
16 On September 11, 2001, Kopfstein was the ordnance officer on the
17 USS Shiloh, in charge of all the weapons on the ship; the captain chose her
18 to be Officer of the Deck as the ship was assigned to defend the West Coast
19 against possible attack in the wake of the attacks on New York and the
20 Pentagon. (Trial Tr. 958:17-962:19, 963:22-25, July 20, 2010.) In October
21 2001, the Navy awarded her the Surface Warfare Officer pin, during a
22 ceremony where her captain took off his pin and pinned it on her chest. (Trial
23 Tr. 968:8-970:1, July 20, 2010.)

24
25 In evaluations completed before and after Kopfstein revealed her
26 sexual orientation, her commanding officers praised her as the USS Shiloh's
27 "best [o]fficer of [the d]eck," a "[t]op [n]otch performer," "a gifted ship
28

1 handler," and the manager of "one of the best ship's led and organized
2 divisions," and a "[s]uperb [t]rainer" with a "great talent for teaching other
3 junior officers." (Trial Exs. 138, 139.) Captain W.E. Dewes, who was
4 Kopfstein's commanding officer at the time of her discharge, reported that
5 "[h]er sexual orientation has not disrupted good order and discipline onboard
6 USS SHILOH;" rather, Kopfstein was "an asset to the ship and the Navy" who
7 "played an important role in enhancing the ship[']s strong reputation She
8 is a trusted Officer of the Deck and best ship handler among her peers.
9 Possesses an instinctive sense of relative motion – a natural Seaman." (Trial
10 Ex. 139.) Captain Liggett testified at her discharge proceedings that "it would
11 be a shame for the service to lose her." (Trial Ex. 138.)
12

13 Kopfstein served in the Navy without concealing her sexual orientation
14 for two years and four months before her discharge; during that time, to her
15 knowledge, no one complained about the quality of her work or about being
16 assigned to serve with her. (Trial Tr. 984:8-12, 987:6-8, 989:9-17, July 20,
17 2010.) She did not want to leave the Navy; she enjoyed the company of her
18 shipmates and found her work rewarding. (Trial Tr. 973:16-24, July 20,
19 2010.) Two captains under whom she served came to the Board of Inquiry to
20 testify on her behalf during her discharge proceedings. (Trial Tr. 974:2-
21 977:11, July 20, 2010.) Nevertheless, she was discharged under the Don't
22 Ask, Don't Tell Act. (*Id.*) Although she appealed the decision to separate her
23 from the Navy, she did not prevail, and on October 31, 2002, she received an
24 honorable discharge. (Trial Tr. 977:9-20, July 20, 2010.) She testified she
25 "absolutely" would rejoin the Navy if the Act is repealed. (Trial Tr. 980:16-22,
26 July 20, 2010.)
27
28

1 The Court found Kopfstein an honest, candid, and believable witness;
2 she testified with modest understatement about her talent and achievements
3 as a Naval Officer and with obvious sincerity about her desire to rejoin to
4 fulfill her original commitment.

5

6 **4. John Nicholson**

7 John Nicholson enlisted in the United States Army in May 2001. (Trial
8 Tr. 1135:6-12, July 20, 2010.) At the time he enlisted, he was fluent in
9 Spanish and "fairly proficient" in Italian and Portuguese. (Trial Tr. 1129:3-
10 1130:23, 1134:10-23, 1135:13-18, July 20, 2010.) He underwent testing in
11 the military for foreign language aptitude and qualified for the most difficult
12 level of language training, Category 4. (Trial Tr. 1151:25-1152:3, 1154:4-9,
13 July 20, 2010.) While Nicholson served, and especially while he was in basic
14 training at Fort Benning, Georgia, he sometimes heard other soldiers make
15 sexist or homophobic slurs but was afraid to report these violations of military
16 conduct lest suspicion fall on him or he be retaliated against in a manner that
17 would lead to his discharge under the Act. (Trial Tr. 1138:1-1142:14, 1143:2-
18 24, July 20, 2010.) Nicholson testified that the Don't Ask, Don't Tell Act
19 prevented him from being open and candid with others in his unit; it kept him
20 under a "cloud of fear," caused him to alter who he was, and made him lie
21 about who he was. (Trial Tr. 1194:17-1196:20, July 20, 2010.)

22

23 After completing his basic training, Nicholson was assigned to Fort
24 Huachuca, Arizona, to train as a human intelligence collector. (Trial Tr.
25 1143:25-1144:3, July 20, 2010.) While completing his intelligence training at
26 Fort Huachuca, Nicholson requested and received a reassignment to
27 counterintelligence, but remained at Fort Huachuca to complete the requisite
28

1 counterintelligence training. (Trial Tr. 1148:5-14, July 20, 2010.) Nicholson
2 was waiting to start the next cycle of the counterintelligence course when
3 another servicemember started spreading a rumor that Nicholson was gay.
4 (Trial Tr. 1154:12-18, July 20, 2010.)

5
6 The rumor originated because, while off duty one day in January 2002,
7 Nicholson was writing a letter to a man with whom he had a relationship
8 before joining the Army; Nicholson was writing the letter in Portuguese to
9 prevent other servicemembers from reading it, because it contained
10 references that could reveal Nicholson's sexual orientation. (Trial Tr.
11 1134:10-23, 1161:10-1163:7, July 20, 2010.) Despite Nicholson's
12 precautions, another servicemember caught sight of the letter while chatting
13 with Nicholson. (Id.) After the two had been talking for a few minutes,
14 Nicholson realized she was one of the few persons he knew in the Army who
15 also could also read Portuguese; he gathered up the pages of his letter after
16 he noticed she appeared to be interested in it and reading it. (Id.; Trial Tr.
17 1163:8-18, July 20, 2010.)

18
19 After this incident, members of Nicholson's unit approached him and
20 told him to "be more careful" with regard to disclosure of his sexual
21 orientation. (Trial Tr. 1164:3-1165:10, July 20, 2010.) Nicholson sought his
22 platoon sergeant's assistance to stop the spread of the rumor, but instead the
23 sergeant informed the chain of command. (Trial Tr. 1166:9-1167:19, 1170:9-
24 15, July 20, 2010.) Nicholson's company commander summoned Nicholson
25 to his office and informed Nicholson that he was initiating discharge
26 proceedings. (Trial Tr. 1180:21-1182:9, July 20, 2010.) Upon leaving the
27 meeting, the platoon sergeant, who also had been present at the meeting,
28

1 ordered Nicholson not to disclose why he was being discharged from the
2 Army. (Trial Tr. 1182:11-1183:15, July 20, 2010.)

3
4 Nicholson testified that after the meeting with his company commander,
5 he was separated from his platoon and placed in a wing of the barracks
6 containing other servicemembers who were being discharged for reasons
7 such as drug use and failing to disclose criminal convictions before
8 enlistment. (Trial Tr. 1184:11-1185:11, July 20, 2010.) Two months later,
9 Nicholson was honorably discharged under the Don't Ask, Don't Tell Act.
10 (Trial Tr. 1183:25-1184:10, 1187:10-13, July 20, 2010.) Nicholson testified
11 he "absolutely" would return to the Army if the Don't Ask, Don't Tell Act were
12 invalidated. (Trial Tr. 1209:4-5, July 21, 2010.)

13
14 As noted above with respect to his testimony on the standing issue, the
15 Court observed Nicholson to be credible and forthright.

16
17 **5. Anthony Loverde**

18 Anthony Loverde joined the United States Air Force on February 13,
19 2001, making a six-year commitment and hoping to use his G.I. Bill benefits
20 to obtain a post-graduate degree eventually. (Trial Tr. 1326:19-24, 1327:16-
21 1328:22, July 21, 2010.) After completing basic training, he received
22 specialized training in electronics and further training in calibrations, after
23 which he qualified at the journeyman level as a PMEL – Precision
24 Measurement Equipment Laboratory – technician. (Trial Tr. 1329:5-24, July
25 21, 2010.) A PMEL technician calibrates the accuracy, reliability, and
26 traceability of all types of equipment, including precision warfare equipment.
27 (Trial Tr. 1335:13-1336:5, July 21, 2010.)

28

1 After completing training in December 2001, Loverde was stationed at
2 the Ramstein Air Base in Germany. (Trial Tr. 1334:18-21, July 21, 2010.)
3 While at Ramstein, Loverde's flight was responsible for calibrating and
4 ensuring the accuracy and reliability of "various equipment used throughout
5 the Air Force." (Trial Tr. 1335:13-1336:20, July 21, 2010.) Loverde was
6 stationed at Ramstein for approximately three years. (Trial Tr. 1337:5-11,
7 July 21, 2010.)

8
9 After completing his tour at Ramstein Air Base, Loverde was stationed
10 at Edwards Air Force Base in California for approximately two years. (Trial
11 Tr. 1341:17-1342:2, July 21, 2010.) While stationed at Edwards, Loverde
12 was deployed to the Al Udeid Air Base in Qatar for four months, where he
13 supported Operations Iraqi Freedom and Enduring Freedom, as well as
14 missions taking place in the Horn of Africa. (Trial Tr. 1344:8-22, 1345:17-21,
15 July 21, 2010.)

16
17 During his stint in the Air Force, Loverde received frequent promotions;
18 three and one-half years after enlistment, for example, he was promoted to
19 staff sergeant, although the usual length of time to reach that rank is six
20 years. (Trial Tr. 1337:12-1338:5, 1338:21-1339:12, July 21, 2010.) After
21 serving his initial enlistment commitment, he reenlisted and received further
22 training to qualify as a loadmaster. (Trial Tr. 1352:25-1353:15, July 21,
23 2010.) In that capacity, he flew sixty-one combat missions in Iraq, where he
24 received two Air Medals. (Trial Tr. 1357:12-17, 1359:17-25, July 21, 2010.)

25
26 Loverde testified he was raised in a religious family and his church
27 taught that homosexuality was a sin; he had not realized he was gay at the
28

1 time he joined the military at age twenty-one. (Trial Tr. 1327:16-17, 1330:13-
2 25, July 21, 2010.) After he became aware of his sexual orientation, he
3 researched the Don't Ask, Don't Tell Act and found the Servicemembers'
4 Legal Defense Network website. (Trial Tr. 1332:13-1333:4, July 21, 2010.)
5 He understood that there were three grounds for discharge under the Act –
6 marriage, conduct, and statements. (Trial Tr. 1332:17-1333:4, July 21,
7 2010.) He resolved to comply with the Act and remain in the Air Force.

8
9 The Air Force's core values are "Integrity First, Service Before Self, and
10 Excellence in All We Do." (Trial Tr. 1333:5-24, July 21, 2010; 367:20-25, July
11 14, 2010.) Loverde testified that the Don't Ask, Don't Tell Act effectively
12 made it impossible to honor the "Integrity First" value of the credo, because
13 on occasion, he felt forced to lie rather than violate the Act: Once, when with
14 other servicemembers in a bar off base in Germany, he refused the sexual
15 advances of a German civilian woman, and his colleagues asked him if he
16 was gay; on another occasion, a subordinate airman asked Loverde about
17 his sexual orientation. (Trial Tr. 1333:5-1334:16, 1349:24-1350:24, July 21,
18 2010.)

19
20 During the time he served as a loadmaster at the Ramstein Air Base in
21 Germany, he also testified that his flight chief often used offensive epithets to
22 refer to gays, as well as racist and sexist slurs. (Trial Tr. 1364:16-1365:25,
23 July 21, 2010.) Although Loverde was disturbed by this, he felt he had no
24 recourse and could not report it lest he draw attention to his sexual
25 orientation. Therefore, during the year he served under this officer, he never
26 made any formal or informal complaint about it. (Id.; Trial Tr. 1366:13-15,
27 July 21, 2010.)

28

1 Loverde also testified that during his combat deployments and during
2 his assignments to bases in Germany and California, he faced the difficulty of
3 having to hide his personal life from his colleagues and avoiding
4 conversations with them about everyday life over meals, for example. (Trial
5 Tr. 1360:1-1361:17, July 21, 2010.) He became so skilled at avoiding his
6 fellow airmen that they nicknamed him "vapor" in recognition of his ability to
7 vanish when off duty. (Id.)

8
9 In April 2008, Loverde decided he was no longer willing to conceal his
10 sexual orientation. (Trial Tr. 1366:16-20, July 21, 2010.) At that time, he was
11 deployed to the Ali Al Saleem Air Base in Kuwait, and he delayed formally
12 telling his commanding officer of his decision until his return to Germany, lest
13 his entire flight unit's mission be disrupted and their return from deployment
14 delayed. (Trial Tr. 1355:18-21, 1366:16-1367:25, July 21, 2010.) When he
15 returned to Germany from his deployment, Loverde wrote to his first
16 sergeant, stating Loverde wanted to speak to his commanding officer about
17 continuing to serve under the Don't Ask, Don't Tell Act, and that while he
18 wanted to continue serving in the Air Force, he could not do so under that
19 law. (Id.; Trial Tr. 1368:20-1369:3, July 21, 2010.)

20
21 Loverde's superiors recommended the Air Force retain him and
22 commended him for being "nothing less than an outstanding [non-
23 commissioned officer]" and "a strong asset" to the Air Force. (Trial Exs. 136,
24 137.) They praised him for demonstrating an "exceptional work ethic" and
25 "the highest level of military bearing, honest, and trustworthiness." (Id.) One
26 wrote: "If I ever had the opportunity to build my 'dream team' for work, I would
27
28

1 take an entire crew of SSgt. Loverde over most other workers. . . ." (Trial Ex.
2 137.)

3

4 Nevertheless, in July 2008 the Air Force gave Loverde an honorable
5 discharge, citing the Don't Ask, Don't Tell Act. (See Trial Exs. 129, 134, 136,
6 137; Trial Tr. 1372:20-1377:20, July 21, 2010.) Loverde testified he would
7 join the Air Force again "without a doubt" if the Don't Ask, Don't Tell Act were
8 repealed. (Trial Tr. 1389:12-18, July 21, 2010.) The Court found Loverde a
9 candid and credible witness.

10

11 **6. Steven Vossler**

12 Steven Vossler's family has a tradition of service in the Army extending
13 back to the Spanish-American War, and he enlisted in the United States
14 Army in November 2000, before graduating high school. (Trial Tr. 302:19-
15 303:5, July 14, 2010.) After basic training, the Army sent him to the Defense
16 Language Institute in Monterey, California, because of his exceptional
17 aptitude for foreign languages. (Trial Tr. 305:5-306:6, July 14, 2010.) He
18 described the close friendships he developed with other students at the
19 Language Institute, how in general it is important to have "good, open
20 relationships" and to discuss one's personal experiences and life with one's
21 colleagues in the military, and how, if one does not, it is perceived as an
22 attempt to distance one's self. (Trial Tr. 316:7-317:17, July 14, 2010.)

23

24

25

26

27

28

1 Vossler met Jerrod Chaplowski, another soldier and Korean language
2 student, at the Monterey Language Institute, and became friends with him.
3 (Trial Tr. 317:14-20, 318:16-17, July 14, 2010.) Eventually he heard a rumor
4 that Chaplowski was gay. (Trial Tr. 318:22-320:24, July 14, 2010.) Vossler
5 testified that he was initially surprised at this, because "up until that point, [he]
6 still held some very stereotyping beliefs about gays and lesbians," but also
7 testified that as a heterosexual he had no difficulty sharing living quarters with
8 Chaplowski at any of the several Army bases where they were quartered
9 together; in fact, Chaplowski was a considerate roommate and it was always
10 a "great living situation." (Trial Tr. 319:16-17, 321:2-10, 327:1-11, 329:20-25,
11 July 14, 2010.)
12

13 The difficulty Vossler did encounter, he testified, was that when he and
14 Chaplowski were with other servicemembers and the conversation turned to
15 general subjects, he had to be excessively cautious lest he inadvertently cast
16 suspicion on Chaplowski and trigger an investigation under the Don't Ask,
17 Don't Tell Act. (See Trial Tr. 327:12-328:20, July 14, 2010.) For example, if
18 a group of soldiers was discussing their respective social activities over the
19 previous weekend, Vossler had to refer to Chaplowski's dinner companion as
20 "Stephanie" rather than "Steven;" even this small deception pained Vossler
21 as it violated the Army's code of honor. (Id.) Vossler also testified that he
22 observed that the Don't Ask, Don't Tell Act infringed Chaplowski's ability or
23 willingness to enforce the Army's policy banning offensive and discriminatory
24 language. (Trial Tr. 328:22-329:4, July 14, 2010.) Homophobic slurs,
25 epithets, and "humor" were commonplace and made Vossler uncomfortable;
26 he noticed that Chaplowski did not confront those who employed them,
27 although Vossler eventually did at times. (Trial Tr. 329:5-19, July 14, 2010.)
28

1 Vossler chose not to reenlist in the active duty Army after his tour of
2 service expired, instead enlisting in the Army National Guard, which he left in
3 June 2009. (Trial Tr. 332:21-333:25, July 14, 2010.) After leaving the
4 military, Vossler became a vocal advocate for the repeal of the Don't Ask,
5 Don't Tell Act because he believes the Act "doesn't seem in line with
6 American values" and he "do[es]n't understand how it's a law in [this] country"
7 because he perceives the Act to be discriminatory. (Trial Tr. 337:14-338:20,
8 July 14, 2010.)

9
10 The Court found Vossler, in common with the other former military men
11 and women who testified at trial, a credible, candid, and compelling witness.

12
13 **IV. PLAINTIFF'S CHALLENGE UNDER THE DUE PROCESS CLAUSE**

14 Plaintiff claims the Don't Ask, Don't Tell Act violates its members'
15 substantive due process rights, identified in Lawrence as rights associated
16 with the "autonomy of self that includes freedom of thought, belief,
17 expression, and certain intimate conduct." Lawrence, 539 U.S. at 562. (FAC
18 ¶¶ 4, 38-43; Doc. No. 190 [Pl.'s Mem. Cont. Fact & Law] at 32-33.)

19
20 After taking office in 1992, President Clinton directed Secretary of
21 Defense Les Aspin to review his department's policy regarding homosexuals
22 serving in the military. Congress undertook its own review and, in 1993,
23 enacted the Don't Ask, Don't Tell Act, which regulated the service of
24 homosexual personnel in the United States military. See National Defense
25 Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, 107 Stat. 1547 §
26 571, 10 U.S.C. § 654.

27
28

1 The Act contains a series of findings that mirror the concerns of then-
2 chairman of the Joint Chiefs of Staff Colin Powell's testimony before
3 Congress: "military life is fundamentally different from civilian life;" "[s]uccess
4 in combat requires military units that are characterized by high morale, good
5 order and discipline, and unit cohesion;" and "the presence in the [A]rmed
6 [F]orces of persons who demonstrate a propensity of intent to engage in
7 homosexual acts would create an unacceptable risk to the high standards of
8 morale, good order and discipline and unit cohesion that are the essence of
9 military capability." See 10 U.S.C. § 654(a); cf. S. Rep. No. 103-112 at 283
10 (1993).

11

12 The Court begins by examining the provisions of the Act in more detail.

13

14 **A. The Act**

15 The Act is codified at 10 U.S.C. § 654; under § 654(b), the Secretary of
16 Defense is authorized to formulate the implementing regulations, which are
17 comprised of Department of Defense Directives 1332.14 (1993), 1332.30
18 (1997), and 1304.26 (1993). The Secretary of Defense recently changed the
19 implementing regulations. See Department of Defense Instruction ("DoDI")
20 1332.14 (2008) (incorporating March 29, 2010, changes); DoDI 1332.30
21 (2008) (incorporating March 29, 2010, changes).

22

23 The statute provides that a member of the Armed Forces "shall be
24 separated" from military service under one or more of the following
25 circumstances. First, a servicemember shall be discharged if he or she "has
26 engaged in, attempted to engage in, or solicited another to engage in a
27 homosexual act or acts." 10 U.S.C. § 654(b)(1). Second, a servicemember
28

28

1 shall be discharged if he or she "has stated that he or she is a homosexual"¹¹
2 or bisexual,¹² or words to that effect" 10 U.S.C. § 654 (b)(2). Finally, a
3 servicemember shall be discharged if he or she has married or attempted to
4 marry a person "known to be of the same biological sex." 10 U.S.C. § 654
5 (b)(3).

6
7 The first two routes to discharge have escape clauses; that is,
8 discharges via either subsection (b)(1) or (b)(2) create a rebuttable
9 presumption which the servicemember may attempt to overcome. Through
10 this exception, a servicemember may rebut the presumption by
11 demonstrating the homosexual conduct which otherwise forms the basis for
12 the discharge under the Act meets five criteria, including inter alia, that it is a
13 "departure" from the servicemember's "usual and customary behavior," is
14 unlikely to recur, and was not accomplished by use of force, coercion or
15 intimidation. 10 U.S.C. § 654 (b)(1)(A)-(E).

16
17 An escape route also applies to the second basis for discharge under
18 the Act, the making of a statement that one is a homosexual. It allows the
19 servicemember to rebut the presumption thus created by demonstrating that
20 "he or she is not a person who engages in, attempts to engage, or has a
21 propensity to engage in, or intends to engage in homosexual acts." 10
22 U.S.C. § 654 (2).

23

24

25 ¹¹ "The term 'homosexual' means a person, regardless of sex, who
26 engages in, attempts to engage in, has a propensity to engage in, or intends
to engage in homosexual acts, and includes the terms 'gay' and 'lesbian'." 10
U.S.C. § 654 (f)(1).

27

28 ¹² "The term 'bisexual' means a person who engages in, attempts to
engage in, has a propensity to engage, or intends to engages in homosexual
and heterosexual acts." 10 U.S.C. § 654 (f)(2).

1 **B. The Standard of Review**

2 As set out more fully in the July 6, 2010, Order, courts employ a
3 heightened standard of review when considering challenges to state actions
4 implicating fundamental rights. (July 6, 2010, Order at 6-9.) After the United
5 States Supreme Court's decision in Lawrence v. Texas, recognizing the
6 fundamental right to "an autonomy of self that includes freedom of thought,
7 belief, expression, and certain intimate conduct," 539 U.S. at 562, the Ninth
8 Circuit in Witt v. Department of Air Force, 527 F.3d 806 (9th Cir. 2008), held
9 the Don't Ask, Don't Tell Act constitutes an intrusion "upon the personal and
10 private lives of homosexuals, in a manner that implicates the rights identified
11 in Lawrence, and is subject to heightened scrutiny." 527 F.3d at 819. Thus,
12 in order for the Don't Ask, Don't Tell Act to survive Plaintiff's constitutional
13 challenge, it must "[1] advance an important governmental interest, [2] the
14 intrusion must significantly further that interest, and [3] the intrusion must be
15 necessary to further that interest." Id. Noting the Act "concerns the
16 management of the military, and judicial deference to . . . congressional
17 exercise of authority is at its apogee" in this context, Witt went on to decide
18 the Act advances an "important governmental interest." 527 F.3d at 821
19 (citations omitted). Accordingly, the Court's focus turns to the second and
20 third prongs.

21

22 **C. The Act Does Not Significantly Further the Government's Interests**
23 **in Military Readiness or Unit Cohesion**

24 **1. Defendants' Evidence: The Legislative History and the**
25 **Statute Itself**

26 Defendants relied solely on the legislative history of the Act and the Act
27 itself in support of their position that the Act passes constitutional muster.

28

1 (Defs.' Mem. Cont. Fact & Law at 9-10.) Despite Defendants' continued
2 citation to the rational basis standard, the Court has ruled that after Witt, the
3 less deferential standard identified by the Ninth Circuit in that decision
4 applies. (See July 6, 2010, Order at 6-9.) In any event, careful review and
5 consideration of the Act itself and its legislative history reveals that this
6 evidence fails to satisfy Defendants' burden of proving that the Act, with its
7 attendant infringements on the fundamental rights of Plaintiff's members,
8 significantly furthers the Government's interest in military readiness or unit
9 cohesion.

10

11 Defendants did not specifically identify any item of legislative history
12 upon which they are relying in their Memorandum of Contentions of Law and
13 Fact; Defendants only identified specific items of the legislative history during
14 their closing argument at trial. These consist of the following: (1) the
15 Crittenden Report; (2) the PERSEREC Report; (3) the Rand Report; and the
16 testimony of the following witnesses during hearings on the proposed Policy:
17 (4) Dr. Lawrence Korb; (5) Dr. David Marlowe; (6) Dr. William Henderson;
18 and (7) General Colin Powell. Defendants did not include precise citations to
19 any portion of the above-referenced materials to support the constitutionality
20 of the Policy. Below is a summary of the seven items identified as they relate
21 to the Witt standard.

22

23 **a. The Crittenden Report (Trial Ex. 4)**

24 The Crittenden Report, formally titled Report of the Board Appointed to
25 Prepare and Submit Recommendations to the Secretary of the Navy for the
26 Revision of Policies, Procedures, and Directives Dealing with Homosexuals,
27 was prepared by that Board in 1957. U.S. Navy Captain S.H. Crittenden

28

1 chaired the Board, which made detailed recommendations regarding the
2 manner in which discipline against homosexual servicemembers should be
3 imposed, including circumstances in which discharge would be appropriate,
4 and whether discharge should be honorable or otherwise. The Report does
5 not, however, discuss the impact of the presence of homosexuals serving in
6 the Armed Forces on either military readiness or unit cohesion. Instead, the
7 Board assumed, without investigation, that the presence of homosexuals had
8 a negative effect and their exclusion was desirable, without elaborating on
9 the basis for those assumptions; the Report never made any findings
10 concerning the impact of homosexual servicemembers on military operations.
11

12 Accordingly, the Crittenden Report is not evidence that discharge of
13 homosexual servicemembers significantly furthers government interests in
14 military readiness or troop cohesion, or that discharge is necessary to those
15 interests. The Report, in fact, is silent on those interests.
16

17 It did conclude, however, that assumptions that homosexuals present
18 security risks and are unfit for military service are not well-supported by
19 evidence. The Report also generally found homosexuals to be no more or
20 less likely to be qualified to serve in the Armed Forces than heterosexuals
21 according to a number of measures.
22

23 **b. The PERSEREC Report (Trial Ex. 5)**

24 The PERSEREC Report, formally titled "Nonconforming Sexual
25 Orientation in the Military and Society," was published in 1988 by the
26 Defense Personnel Security Research and Education Center and authored
27 by Theodore R. Sabin and Kenneth E. Karois. The Report is a broad survey
28

1 of then-prevailing legal trends regarding treatment of homosexuals, scientific
2 views on homosexuality, and the history of social constructions of
3 "nonconforming" sexual behavior. The Report notes a legal trend toward
4 increasingly recognizing rights of homosexuals, a scientific trend toward
5 recognizing homosexuality both as biologically determined and as a normal
6 condition not necessarily indicating physical or mental disease, and a societal
7 trend towards increasing acceptance of homosexual behavior.

8
9 The PERSEREC Report generally dismisses traditional objections to
10 service by homosexuals in the military as abstract, intangible, and tradition-
11 bound. The Report cites no evidence that homosexual servicemembers
12 adversely affect military readiness or unit cohesion. The Report discusses
13 unit cohesion, but only to state that empirical research on the effect of
14 homosexual servicemembers on unit cohesion is important and necessary in
15 the future; it points to no existing empirical data. In general, the Report
16 suggests the military begin a transition towards acceptance of homosexual
17 servicemembers.

18
19 **c. The Rand Report (Trial Ex. 8)**

20 The Rand Report was prepared by the Rand Corporation's National
21 Defense Research Institute in 1993 at the request of the Office of the
22 Secretary of Defense, Les Aspin. This summary of the Rand Report
23 discusses only "Section 10," entitled "What Is Known about Unit Cohesion
24 and Military Performance," as that is the sole section that bears on the issues
25 presented here.

26
27
28

1 Foremost among the Rand Report's conclusions is that no empirical
2 evidence exists demonstrating the impact of an openly homosexual
3 servicemember on the cohesion of any military unit. In its discussion of unit
4 cohesion, the Report distinguished between social cohesion – "the emotional
5 bonds of liking and friendship of the members of a unit" (Trial Tr. 872:3-4,
6 July 16, 2010) and task cohesion – "a shared commitment to the group's
7 mission or task goals" (Trial Tr. 872:4-6, July 16, 2010); concluded that
8 according to public literature, only task cohesion has an even moderately
9 positive correlation with unit performance; and found after controlling for task
10 cohesion, social cohesion has almost no correlation to unit performance. The
11 Report further opines that an openly homosexual servicemember is more
12 likely to affect only social cohesion, rather than task cohesion, thus having
13 little to no impact on a unit's military performance.

14

15 The Report also concluded that merely assigning openly homosexual
16 servicemembers to a unit can decrease negative feelings towards
17 homosexuals, as fellow unit members tend to hold positive views of other
18 individuals simply because they have been arbitrarily assigned to the same
19 group. Moreover, contact with a group towards which negative feelings are
20 held tends to decrease negative feelings towards that group; Professor Belkin
21 described this phenomenon as "familiarity breeds tolerance." (Trial Tr. 297:9-
22 19, July 14, 2010.) The Report opined that the relationship between negative
23 feelings toward a group would not necessarily translate into disruptive
24 behavior, and that to the extent it did so translate, such behavior could be
25 influenced and controlled by appropriate institutional attitudes and attitudes of
26 unit leaders.

27

28

1 **d. Testimony of Dr. Lawrence Korb (Trial Ex. 344 at 255)**

2 Dr. Korb testified before the Senate Armed Services Committee on
3 March 31, 1993 concerning the likely impact on unit cohesion if homosexuals
4 were permitted to serve openly. According to Dr. Korb, there was no
5 empirical research to support the view that homosexual servicemembers
6 would disrupt unit cohesion, and that such evidence could not be obtained
7 without integrating homosexuals into the military. Dr. Korb did concede,
8 however, that in the short run immediately following integration of
9 homosexual servicemembers, some negative effect on unit cohesion was
10 likely, but did not point to any evidence in support of this view. Dr. Korb
11 testified concerning the experiences of foreign militaries and domestic law
12 enforcement agencies that had integrated homosexual servicemembers, and
13 stated that their integration had not adversely affected unit cohesion or
14 performance in those entities.

15

16 **e. Testimony of Dr. William Henderson (Trial Ex. 344 at**
17 **248)**

18 Dr. Henderson testified before the Senate Armed Services Committee
19 on March 31, 1993 concerning the significance of unit cohesion. Dr.
20 Henderson testified that the "human element" is the most important factor in
21 warfare and the only force that motivates a unit to fight rather than flee or
22 take cover. Dr. Henderson testified that creation of a cohesive unit is
23 "significantly influenced by broad cultural values, norms, and characteristics
24 that are the result of a common socialization process and basic agreement
25 among unit members about cultural values." Dr. Henderson testified that two
26 types of unit cohesion exist: horizontal cohesion whereby troops identify with
27 each other, and vertical cohesion whereby troops identify with their leaders.

28

1 A member of the unit who refuses to conform to the unit's expectations will be
2 isolated, and will undermine the unit's cohesiveness. Based on the views of
3 servicemembers surveyed at that time, approximately 80% of whom opposed
4 integration of homosexuals, homosexual servicemembers were so far outside
5 the acceptable range of shared cultural values that they would not be
6 accepted within military units, and would undermine unit cohesion. Dr.
7 Henderson pointed to no specific empirical study supporting this assertion,
8 however, and measured his testimony by suggesting that a homosexual
9 servicemember who did not disclose his orientation would not disrupt unit
10 cohesion.

11

12 **f. Testimony of Dr. David Marlowe (Trial Ex. 344 at 261)**

13 Dr. Marlowe testified before the Senate Armed Services Committee on
14 March 31, 1993, concerning the significance of unit cohesion. He testified
15 similarly to Dr. Henderson in his description of the importance of unit
16 cohesion and of the two types of cohesion, i.e., horizontal and vertical
17 cohesion. While openly acknowledging that in his scientific opinion, there
18 was no empirical data conclusively deciding the question, he opined that
19 openly serving homosexuals could undermine unit cohesion because
20 homosexuality would not be an accepted cultural value among the other
21 members of the unit. Dr. Marlowe qualified his opinion more than Dr.
22 Henderson, however, as Dr. Marlowe also opined that a homosexual
23 servicemember who did not "flaunt" his or her homosexuality, acted as a
24 soldier first and foremost, and did not openly discuss his or her
25 homosexuality would not undermine unit cohesion. Dr. Marlowe foresaw no
26 problem with such a person serving in the Armed Forces.

27

28

1 **g. Testimony of General Colin Powell (Trial Ex. 344 at 707)**

2 General Powell testified before the Senate Armed Services Committee
3 on July 20, 1993. General Powell expressed his general support for the
4 Policy as then proposed by President Clinton. General Powell testified that in
5 his opinion open homosexuality was incompatible with military service and
6 would undermine unit cohesion. General Powell opined that "behavior too far
7 away from the norm undercuts the cohesion of the group." He testified to his
8 belief that military training on tolerance could not overcome the innate
9 prejudices of heterosexual servicemembers. He also testified that the Policy
10 would improve military readiness, but only in that it settled the question of
11 whether or not homosexuals could serve in the military, as the public debate
12 had been a recent distraction to the military. His testimony implied that any
13 final resolution of the issue, regardless of substance, would improve military
14 readiness.

15
16 General Powell testified that despite the official position of
17 nondiscrimination towards homosexuals in the militaries of countries such as
18 Canada, Germany, Israel, and Sweden, practice does not always match
19 policy, and homosexuals are often subjected to discrimination in those
20 militaries. General Powell also rejected attempts to draw parallels between
21 exclusion of homosexuals and historical exclusion of African-Americans,
22 because "skin color is a benign nonbehavioral characteristic, while sexual
23 orientation is perhaps the most profound of human behavioral
24 characteristics."

25
26
27
28

1 **2. Plaintiff's Evidence: Reports, Exhibits and Expert and Lay**
2 **Testimony**

3 When a governmental enactment encroaches on a fundamental right,
4 the state bears the burden of demonstrating the law's constitutionality. See
5 Witt, 527 F.3d at 819. Although Defendants bear this burden here and, as
6 described above, have relied unsuccessfully only on the statute itself and its
7 legislative history to meet it, Plaintiff introduced evidence demonstrating the
8 Act does not significantly advance the Government's interests in military
9 readiness or unit cohesion. The testimony of former servicemembers
10 provides ample evidence of the Act's effect on the fundamental rights of
11 homosexual members of the United States military. Their testimony also
12 demonstrates that the Act adversely affects the Government's interests in
13 military readiness and unit cohesion. In addition to the testimony from the lay
14 witnesses, Plaintiff introduced other evidence, from witnesses in such
15 specialties as national security policy, military sociology, military history, and
16 social psychology, on whether the Act furthered the Government's interests in
17 military readiness or unit cohesion.

18
19 **a. Discharge of Qualified Servicemembers Despite Troop**
20 **Shortages**

21 From 1993 through 2009, Defendants discharged, pursuant to the Act,
22 over 13,000 men and women serving in the United States Armed Forces.
23 During the years between 1994 through 2001, Defendants discharged at
24 least 7,856 servicemembers under the Act, according to a General
25 Accounting Office Report entitled "Financial Costs and Loss of Critical Skills."
26 (Trial Ex. 9 [2005 Government Accountability Office ("GAO") Report on the
27 "Financial Costs and Loss of Critical Skills Due to [the] DOD's Homosexual
28

1 Conduct Policy"].) The combined branches of the Armed Forces discharged
 2 the following numbers of servicemembers from 1994, the first full year after
 3 adoption of the Don't Ask, Don't Tell Act, through the calendar year 2001:
 4

Year	Number of Servicemembers Discharged
1994	616 ¹³
1995	757 ¹⁴
1996	858 ¹⁵
1997	997 ¹⁶
1998	1,145 ¹⁷
1999	1,043 ¹⁸
2000	1,213 ¹⁹
2001	1,227 ²⁰
Total discharged 1994 2001	7,856

15
16
17
18
19
20
21
22
23
24
25
26
27
28

¹³ (Trial Ex. 9, at 8; but see id. at 42 (showing 616 servicemembers discharged).)

¹⁴ (Trial Ex. 9, at 8.)

¹⁵ (Id.)

¹⁶ (Trial Ex. 85, Defs.' Objections and Resp. to Pl's. First Set of Req. for Admis. ("RFA Resp.") No. 33; Trial Ex. 9, at 8.)

¹⁷ (Trial Ex. 85, RFA Resp. No. 34; Trial Ex. 9, at 8.)

¹⁸ (Trial Ex. 85, RFA Resp. No. 35; Trial Ex. 9, at 8; but see id. at 42 (showing 1,034 servicemembers discharged).)

¹⁹ (Trial Ex. 85, RFA Resp. No. 36; Trial Ex. 9, at 8; but see id. at 42 (showing 1,213 servicemembers discharged).)

²⁰ (Trial Ex. 85, RFA Resp. No. 37; Trial Ex. 9, at 8; but see id. at 42 (showing 1,227 servicemembers discharged).)

1 Starting in 2002, after the U.S. began fighting in Afghanistan, the
 2 number of servicemembers discharged under the Act fell sharply, despite the
 3 greater raw number of military personnel. As but one example, in 2001,
 4 Defendants discharged at least 1,217 servicemembers pursuant to the Don't
 5 Ask, Don't Tell Act. In 2002, the number discharged under the Act fell to 885.

Year	Number of Servicemembers Discharged
2002	885 ²¹
2003	770 ²²
2004	653 ²³
2005	726 ²⁴
2006	612 ²⁵
2007	627 ²⁶
2008	619 ²⁷
2009	275 ²⁸
Total discharged 2002-2009	5,167

19 _____
 20 ²¹ (Trial Ex. 85, RFA Resp. No. 38; but see Trial Ex. 9, at 8 (showing
 21 884 servicemembers discharged).)

22 ²² (Trial Ex. 85, RFA Resp. No. 39; but see Trial Ex. 9, at 8 (showing
 23 769 servicemembers discharged).)

24 ²³ (Trial Ex. 85, RFA Resp. No. 40.)

25 ²⁴ (Trial Ex. 85, RFA Resp. No. 41.)

26 ²⁵ (Trial Ex. 85, RFA Resp. No. 42.)

27 ²⁶ (Trial Ex. 85, RFA Resp. No. 43.)

28 ²⁷ (Trial Ex. 85, RFA Resp. No. 44.)

²⁸ (Trial Ex. 85, RFA Resp. No. 45.)

1 The decline in discharges after 2001, according to Dr. Nathaniel Frank,
2 illustrates that during wartime the military retains servicemembers known to
3 be homosexual, despite the Don't Ask, Don't Tell Act requiring discharge,
4 because of the heightened need for troops. (Trial Tr. 196:5-198:6, 257:21-
5 258:6, July 13, 2010.)

6

7 **b. Discharge of Servicemembers with Critically Needed**
8 **Skills and Training**

9 Among those discharged were many with critically needed skills.
10 According to the Government's own data, many of those discharged pursuant
11 to the Act had education, training, or specialization in so-called "critical skills,"
12 including Arabic, Chinese, Farsi, or Korean language fluency; military
13 intelligence; counterterrorism; weapons development; and medicine. (Trial
14 Tr. 199:24-200:5, 204:23-24, July 13, 2010; Trial Ex. 9.) Far from furthering
15 the military's readiness, the discharge of these service men and women had
16 a direct and deleterious effect on this governmental interest.

17

18 For example, relying on the 2005 GAO Report on the "Financial Costs
19 and Loss of Critical Skills Due to [the] DOD's Homosexual Conduct Policy"
20 (Trial Ex. 9), Professor Frank pointed out that through fiscal year 2003,
21 several hundred medical professionals had been discharged pursuant to the
22 Act, yet a 2003 Senate report described a lack of medical care for wounded
23 troops returning from the Arabian Gulf and the resulting negative impact on
24 physical health and troop morale. (Trial Tr. 258:10-259:2, July 15, 2010.)
25 And at the same time that more than one-hundred thousand U.S. troops were
26 deployed to serve in combat in Iraq and Afghanistan, several hundred
27 servicemembers with "critical" language skills, including many qualified as
28

1 Farsi and Arabic speakers and interpreters, were discharged under the Act.
2 (Trial Ex. 9; Trial Tr. 199:24-200:5, 204:23-24, July 13, 2010.)

3

4 **c. The Act's Impact on Military Recruiting**

5 Dr. Lawrence Korb, currently a senior fellow at the Center for American
6 Progress, with an extraordinary background in military preparedness and
7 national security issues,²⁹ including an appointment under President Ronald
8 Reagan as an Assistant Secretary in the Department of Defense, testified
9 before Congress in 2007 about the difficulty the military was experiencing in
10 finding and retaining enough qualified recruits. The crisis in recruiting
11 qualified candidates became particularly severe after combat began in 2001,
12 he testified. (Trial Tr. 1027:24-25, 1028:1-2, July 20, 2010.)

13

14 In general, successful military recruiting efforts come with a very high
15 price tag; Dr. Korb pointed to advertisements various branches of the Armed
16 Forces run during the televised Super Bowl football games as an example of
17 an effective but very costly recruiting tool. Successful recruiting includes not
18 only the costs for sending out military recruiters all around the country, he
19 testified, but also the costs of conducting medical and educational testing on
20 recruits as well as the expense of their basic training. The size of the
21 financial investment needed to prepare a servicemember for an operational
22 unit can reach "millions of dollars," Dr. Korb testified. (Trial Tr. 1028:18-

23

24

25 ²⁹ In addition to the appointments described above, Dr. Korb is on the
26 faculty at Georgetown University. He also has served as dean of the
27 Graduate School of Public and International Affairs at the University of
28 Pittsburgh, on the Council for Foreign Relations, as Director of the Center for
Public Policy Education at the Brookings Institution, and as Director for
Defense Policy Studies for the American Enterprise Institute. This is only a
partial list of his appointments and service. (Trial Ex. 350.) The Court found
Dr. Korb an extraordinarily well-credentialed and powerfully credible witness.

1 1029:13, July 20, 2010.) Citing a Pentagon study, he opined that for every
2 person discharged after ten years of service, six new servicemembers would
3 need to be recruited to recover the level of experience lost by that discharge.
4 (Trial Tr. 1029:6-23, July 20, 2010.)

5
6 With that background, Dr. Korb opined the Don't Ask, Don't Tell Act
7 negatively affects military recruiting in two ways: its existence discourages
8 those who would otherwise enlist from doing so, and many colleges and
9 universities will not permit military recruiting or Army ROTC programs on
10 campus because the Act's requirements violate their employment
11 nondiscrimination policies. (Trial Tr. 1030:12-21, July 20, 2010.)

12
13 Dr. Korb estimated that the military loses 5,000 men and women
14 annually due to the Don't Ask, Don't Tell Act, if one includes both those who
15 are discharged under it and those who decide not to re-enlist because of it.
16 He conceded, however, that it is very difficult to quantify the number of those
17 who decide not to enlist because of the Policy. (Trial Tr. 1030:1-10, July 20,
18 2010.) Professor Frank also testified on this subject, and based on data from
19 the U.S. Census, the UCLA School of Law Williams Institute, and other
20 sources, opined that if the Act were repealed, the military would gain
21 approximately 40,000 new recruits and approximately 4,000 members would
22 re-enlist every year rather than leave voluntarily. (Trial Tr. 205:6-17, July 13,
23 2010.)

24
25 The 2005 GAO Report estimated that over the ten-year period after
26 enactment of the Act, "it could have cost the [Department of Defense] about
27 \$95 million in constant fiscal year 2004 dollars to recruit replacements for
28

1 service members separated under the policy. Also the Navy, Air Force, and
2 Army estimated that the cost to train replacements for separated service
3 members by occupation was approximately \$48.8 million, \$16.6 million, and
4 \$29.7 million, respectively." (Trial Ex. 85, RFA Resp. No. 21.)

5

6 **d. Admission of Lesser Qualified Enlistees**

7 As discussed above, Defendants discharged over 13,000 members of
8 the Armed Forces under the Don't Ask, Don't Tell Act since 1993. (Trial Tr.
9 195:5-8, 203:21-204:5.) Plaintiff introduced evidence that while Defendants
10 continued to enforce the Act by discharging servicemembers under it – albeit
11 in dramatically reduced numbers – after 2001, they also began to admit more
12 convicted felons and misdemeanants into the Armed Forces, by granting so-
13 called "moral waivers"³⁰ to the policy against such admissions. (Trial Tr.
14 199:1-17, July 13, 2010; see supra notes 13-28 and accompanying text.)

15

16 In addition to the increased numbers of convicted felons and
17 misdemeanants allowed to join the ranks of the military forces, Professor
18 Frank testified that increased numbers of recruits lacking the required level of
19 education and physical fitness were allowed to enlist because of troop
20 shortages during the years following 2001. (Trial Tr. 199:1-11, July 13,
21 2010.) Log Cabin's evidence went uncontradicted that those who are allowed
22 to enlist under a "moral waiver" are more likely to leave the service because
23 of misconduct and more likely to leave without fulfilling their service
24 commitment than others who joined the Armed Forces. (Trial Tr. 209:2-13,

25

26

27 ³⁰ "Moral waivers" are used to admit recruits who otherwise would not
28 have been eligible for admission because of their criminal records, *i.e.*,
convictions for felonies and serious misdemeanors, or admitted past
controlled substance abuse. (Trial Tr. 207:7-208:24, July 13, 2010.)

1 July 13, 2010.) Dr. Korb testified that eventually the troop shortages after
2 2001 caused the U.S. Armed Forces to lower educational and physical
3 fitness entry standards as well as increase the number of "moral waivers" to
4 such an extent that, in his opinion, it became difficult for the military to carry
5 out its mission. (Trial Tr. 1020:22-1021:11, July 20, 2010.) At the same time,
6 discharging qualified servicemembers under the Don't Ask, Don't Tell Act
7 simply "does not make sense" in terms of military preparedness because, in
8 his words, the military is "getting rid of those who are qualified to serve and
9 admitting those who aren't." (Trial Tr. 1025:15-20, July 20, 2010.)

10

11 **e. Other Effects of the Policy**

12 Dr. Korb testified about other effects the Don't Ask, Don't Tell Act has
13 on military preparedness. He opined that in order for the military to perform
14 its mission successfully, it must mold persons from vastly different
15 backgrounds who join it into a united and task-oriented organization. He
16 described the military as a meritocracy, but testified that the Don't Ask, Don't
17 Tell Act detracts from the merit-based nature of the organization, because
18 discharges under the Act are not based on the servicemember's failure to
19 perform his or her duties properly, or on the effect of the soldier's presence
20 on the unit's morale or cohesion. (Trial Tr. 1031:2-1033:10, July 20, 2010.)

21

22 **f. Decreased and Delayed Discharge of Suspected**
23 **Violators of the Act**

24 LCR also produced evidence demonstrating that Defendants routinely
25 delayed the discharge of servicemembers suspected of violating the Act's
26 provisions until after they had completed their overseas deployments. In
27 other words, if Defendants began an investigation of a servicemember

28

1 suspected of violating the Act, the investigation would be suspended if the
2 subject received deployment orders; not until he or she returned from combat
3 – assuming this occurred, of course – would the investigation be completed
4 and the servicemember discharged if found to have violated the Act. Thus,
5 Defendants deployed servicemembers under investigation for violating the
6 Act to combat missions or, if they were already so deployed, delayed the
7 completion of the investigation until the end of the deployment. (Trial Tr.
8 196:5-24, July 13, 2010; 573:7-17, July 15, 2010; Brady Dep. 184:13-185:11,
9 188:13-190:9, Apr. 16, 2010.)

10

11 This evidence, in particular, directly undermines any contention that the
12 Act furthers the Government's purpose of military readiness, as it shows
13 Defendants continue to deploy gay and lesbian members of the military into
14 combat, waiting until they have returned before resolving the charges arising
15 out of the suspected homosexual conduct. If the warrior's suspected violation
16 of the Act created a threat to military readiness, to unit cohesion, or to any of
17 the other important Government objectives, it follows that Defendants would
18 not deploy him or her to combat before resolving the investigation. It defies
19 logic that the purposes of the Act could be served by suspending the
20 investigation during overseas deployments, only to discharge a
21 servicemember upon his or her return to a non-combat station.

22

23 Taken as a whole, the evidence introduced at trial shows that the effect
24 of the Act has been, not to advance the Government's interests of military
25 readiness and unit cohesion, much less to do so significantly, but to harm
26 that interest. The testimony demonstrated that since its enactment in 1993,
27 the Act has harmed efforts of the all-volunteer military to recruit during

28

1 wartime. The Act has caused the discharge of servicemembers in
2 occupations identified as "critical" by the military, including medical
3 professionals and Arabic, Korean, and Farsi linguists. At the same time that
4 the Act has caused the discharge of over 13,000 members of the military,
5 including hundreds in critical occupations, the shortage of troops has caused
6 the military to permit enlistment of those who earlier would have been denied
7 entry because of their criminal records, their lack of education, or their lack of
8 physical fitness.

9

10 **D. The Act is Not Necessary to Advance the Government's Interests**

11 The Witt court held that to justify the infringement on the fundamental
12 rights identified in Lawrence, a defendant must satisfy both the requirement
13 that the Act "significantly furthers" the Government's interests and the
14 requirement that it is "necessary" to achieve them. To the extent that
15 Defendants have made a distinct argument here that the Act is necessary to
16 achieve the Government's significant interest, they have not met their burden
17 as to this prong of the Witt test, either.

18

19 **1. Defendants' Admissions**

20 In fact, Defendants have admitted that, far from being necessary to
21 further significantly the Government's interest in military readiness, the Don't
22 Ask, Don't Tell Act actually undermines that interest. President Obama, the
23 Commander-in-Chief of the Armed Forces, stated on June 29, 2009:

24 "Don't Ask, Don't Tell" doesn't contribute to our national security . .
25 . preventing patriotic Americans from serving their country weakens
26 our national security [R]eversing this policy [is] the right thing
27 to do [and] is essential for our national security.
(Trial Ex. 305; Trial Ex. 85, RFA Resp. Nos. 1, 2, 9.) President Obama also
28 stated, regarding the Act on October 10, 2009, "We cannot afford to cut from

1 our ranks people with the critical skills we need to fight any more than we can
2 afford – for our military's integrity – to force those willing to do so into careers
3 encumbered and compromised by having to live a lie." (Trial Ex. 306; Trial
4 Ex. 85, RFA Resp. No. 12.)

5
6 Admiral Mike Mullen, chairman of the Joint Chiefs of Staff, echoed
7 these sentiments through a verified Twitter account, posted to the Joint
8 Chiefs of Staff website: "Stand by what I said [testifying in the U.S. Senate
9 Armed Services Committee on February 2, 2010]: Allowing homosexuals to
10 serve openly is the right thing to do. Comes down to integrity." (Trial Ex.
11 330.)

12
13 **2. Defendants' Contention that the Act is Necessary to Protect**
14 **Unit Cohesion and Privacy**

15 Defendants point to the Act's legislative history and prefatory findings
16 as evidence that the Policy is necessary to protect unit cohesion and
17 heterosexual servicemembers' privacy. In particular, they quote and rely on
18 General Colin Powell's statements in his testimony before Congress in 1993.

19
20 General Powell expressed his qualified support for the continued
21 service of gays and lesbians in the Armed Forces and the narrow nature of
22 his concerns. (Trial Ex. 344 [Policy Concerning Homosexuality in the Armed
23 Forces: Hearings Before the S. Comm. on Armed Servs., 103rd Cong.
24 (statement of General Colin Powell, Chairman, Joint Chiefs of Staff)] at 709).
25 He emphasized his concern that "active military service is not an everyday
26 job in an ordinary workplace There is often no escape from the military
27 environment for days, weeks and often months on end. We place unique
28

1 demands and constraints upon our young men and women not the least of
2 which are bathing and sleeping in close quarters." (Id. at 762; 709 ("Our
3 concern has not been about homosexuals seducing heterosexuals or
4 heterosexuals attacking homosexuals").)

5

6 First, it must be noted that Plaintiff introduced uncontradicted testimony
7 that General Powell has changed his views since 1993 on the necessity of
8 the Policy and agrees with the current Commander-in-Chief that it should be
9 reviewed. (Trial Tr. 221:7-11, July 13, 2010.)

10

11 More importantly, however, Plaintiff produced powerful evidence
12 demonstrating that the Act is not necessary in order to further the
13 governmental interest that General Powell expressed, i.e., unit cohesion and
14 particularly the concern that cohesion might be eroded if openly homosexual
15 servicemembers shared close living quarters with heterosexuals.

16

17 Michael Almy, who during thirteen years of active service lived in
18 dozens of different types of military housing on at least three continents,
19 testified his quarters ranged from a villa in Eskan Village, Saudi Arabia,
20 where he and the others quartered there each had private bedrooms and
21 bathrooms, to a dormitory-type facility at the Prince Sultan Air Base in Saudi
22 Arabia, where at first he had a private room and bath until the troop build-up
23 before the invasion of Iraq led to several men sharing a room, with a private
24 bathroom that was used by only one person at a time, to temporary quarters
25 in a tent at Balad Air Base in Iraq shared by six to eight men who obtained
26 limited privacy by hanging up sheets. Almy testified that in his deployments
27 to Saudi Arabia and Iraq he was never quartered in housing that had open

28

1 bay showers, nor did he ever see such housing for enlisted members or
2 officers. (Trial Tr. 748:3-750:25, July 16, 2010.) The typical arrangement in
3 Saudi Arabia was for enlisted servicemembers and officers to have the same
4 type of facilities, including bathroom and shower facilities; officers typically
5 did not have to share rooms, and enlisted personnel usually shared a
6 bedroom and bathroom. (Trial Tr. 750:14-25, July 16, 2010.) Almy testified
7 that open bay showers are the exception in military quarters and the only
8 time he actually used one was during basic training in Fort Benning, Georgia,
9 in 1992. (Trial Tr. 759:12-19, July 16, 2010.)

10

11 Similarly, John Nicholson testified that while he was in basic training in
12 Fort Benning, the recruits slept in a large open room with sixty bunk beds and
13 shared a large communal bathroom with toilets in individual stalls and semi-
14 private showers. (Trial Tr. 1154:25-1155:15, July 20, 2010.) Anthony
15 Loverde testified that only during basic training was he housed in barracks
16 where open bay showers were the only option; he had access to single stall
17 shower facilities even when stationed at Bagram Air Base in Afghanistan and
18 at Balad Air Base in Iraq. (Trial Tr. 1378:3-15, 1385:18-1386:12, July 21,
19 2010.)

20

21 Other servicemembers confirmed this testimony. Stephen Vossler
22 testified regarding his living quarters while he served as an enlisted man in
23 the Army; he shared a "not spacious" bedroom and also a bathroom with a
24 roommate. (Trial Tr. 330:4-11, July 14, 2010.) Although Vossler learned his
25 roommate was gay, Vossler had no problems sharing quarters with him and
26 thought he was a good roommate. (Trial Tr. 329:20-330:21, July 14, 2010.)

27

28

1 Professor Aaron Belkin confirmed this evidence in his testimony; his
2 research into military architecture revealed that apart from basic training sites
3 and service academies where there are open showers, servicemembers
4 usually have access to single stall showers. (Trial Tr. 617:21-619:1, July 15,
5 2010.) According to Professor Belkin, "the army, in recent years, has
6 implemented something called the one-plus-one barracks design standard.
7 What that means is that servicemembers are housed in an arrangement
8 where they each have their own bedroom and there is a bathroom between
9 the two bedrooms that they share." (Trial Tr. 618:8-13, July 15, 2010.)
10 Three-fourths of the troops quartered in combat zones in Afghanistan and
11 Iraq had access to single stall showers, according to his research. (Trial Tr.
12 626:3-8, July 15, 2010.)

13

14 Plaintiff's evidence regarding unit cohesion was equally plentiful and
15 persuasive. The testimony of both its lay and expert witnesses revealed that
16 the Act not only is unnecessary to further unit cohesion, but also harms the
17 Government's interest.

18

19 After Michael Almy was relieved of his command abruptly under the
20 Act, he witnessed firsthand what occurred when an unprepared junior officer
21 was forced to take over. He testified that "[t]he maintenance of the
22 equipment, the mission overall, the availability – the up time of the
23 equipment, the availability of the equipment to meet the mission suffered"
24 and there was "a huge detrimental effect to the morale" of the troops he
25 commanded after he was relieved of his command. (Trial Tr. 813:21-25, 814:
26 1-6, July 16, 2010.) Almy testified, "Virtually every day on my base on
27 Spangdahlem, I would encounter one of my former troops who wanted me
28

1 back on the job as their officer and leader." (Trial Tr. 814:2-6, July 16, 2010.)
2 His assessment was confirmed by another officer in the squadron, who wrote
3 that the squadron "fell apart" after Major Almy was relieved of his duties,
4 illustrating "how important Maj. Almy was[,] not only to the mission but to his
5 troops." (Trial Ex. 121 [Character Reference Letter from Bryan M. Zollinger,
6 1st Lt., USAF, 606th Air Control Squadron].)
7

8 Jenny Kopfstein's commanding officer wrote that she was a "hard
9 working and dedicated junior officer who excelled as an Officer of the Deck"
10 who "played an important role in enhancing the ship's strong reputation."
11 (Trial Ex. 139 [Jenny L. Kopfstein Fitness Report and Counseling Record];
12 Trial Tr. 966:14-17.) He specifically noted that "[h]er sexual orientation has
13 not disrupted good order and discipline on board USS SHILOH." (Trial Ex.
14 139; Trial Tr. 966:23-24.) Kopfstein testified that after she stopped
15 concealing her homosexuality while serving on the USS Shiloh, she had
16 many positive responses, and the ability of her fellow crew members to trust
17 her improved, thus aiding the establishment of teamwork. (Trial Tr. 951:10-
18 11, 979:8-21, 25, 980:1, July 20, 2010.)
19

20 Anthony Loverde's superiors unquestionably felt that his discharge
21 pursuant to the Don't Ask, Don't Tell Act did not further the Government's
22 interest in unit cohesion. In recommending the Air Force retain Loverde, they
23 commended him for being "nothing less than an outstanding [non-
24 commissioned officer]" and "a strong asset" with "an exceptional work ethic"
25 and "the highest level of military bearing, honesty, and trustworthiness."
26 (Trial Exs. 136 [Letter from Michael Yakowenko, CM Sgt.], 137 Letter from
27 Richard Horn, SM Sgt.].) One wrote: "If I ever had the opportunity to build my
28

1 'dream team' for work, I would take an entire crew of SSgt. Loverde over
2 most other workers" (Trial Ex. 137.)

3
4 Finally, Robert MacCoun, Professor of Law and Public Policy at the
5 University of California, Berkeley, and one of the contributors to the 1993
6 Rand Report on the Don't Ask, Don't Tell Act, testified regarding social and
7 task cohesion. (Trial Tr. 864:11-866-17, 870:22-875:25, July 16, 2010.)
8 Professor MacCoun holds a Ph.D. in psychology from Michigan State
9 University, was a post-doctoral fellow in psychology and law at Northwestern
10 University, spent seven years as a behavioral scientist at the RAND
11 Corporation,³¹ and has a distinguished research and publication record.
12 (Trial Tr. 856:16-864:7, July 16, 2010.) The Court found his testimony cogent
13 and persuasive.

14
15 According to Professor MacCoun, the RAND working group concluded
16 that task cohesion was paramount; it was a more important predictor of
17 military performance than social cohesion, and service in the Armed Forces
18 by openly homosexual members was not seen as a serious threat to task
19 cohesion. (Trial Tr. 871:23-872:6, 873:24-875:4, 875:21-25, 876:13-21, July
20 16, 2010.) Therefore, the recommendation to Secretary of Defense Les
21 Aspin from the RAND Corporation in the 1993 Report was that sexual
22 orientation should not be viewed as germane to service in the military; the
23 1993 Report made various recommendations regarding the implementation
24 of this change. (Trial Ex. 8 [Sexual Orientation and U.S. Military Personnel

25

26

27 ³¹ The RAND Corporation is a nonpartisan private nonprofit research
28 corporation, conducting public policy research. (Trial Tr. 858:2-3, July 16,
2010.)

1 Policy: Options and Assessment] at 368-94; Trial Tr. 865:8-879:9, July 16,
2 2010.)

3
4 Thus, the evidence at trial demonstrated that the Act does not further
5 significantly the Government's important interests in military readiness or unit
6 cohesion, nor is it necessary to further those interests. Defendants'
7 discharge of homosexual servicemembers pursuant to the Act not only has
8 declined precipitously since the United States began combat in Afghanistan
9 in 2001, but Defendants also delay individual enforcement of the Act while a
10 servicemember is deployed in a combat zone. If the presence of a
11 homosexual soldier in the Armed Forces were a threat to military readiness
12 or unit cohesion, it surely follows that in times of war it would be more urgent,
13 not less, to discharge him or her, and to do so with dispatch. The abrupt and
14 marked decline – 50% from 2001 to 2002 and steadily thereafter – in
15 Defendants' enforcement of the Act following the onset of combat in
16 Afghanistan and Iraq, and Defendants' practice of delaying investigation and
17 discharge until after combat deployment, demonstrate that the Act is not
18 necessary to further the Government's interest in military readiness.

19
20 In summary, Defendants have failed to satisfy their burden under the
21 Witt standard. They have not shown the Don't Ask, Don't Tell Policy
22 "significantly furthers" the Government's interests nor that it is "necessary" in
23 order to achieve those goals. Plaintiff has relied not just on the admissions
24 described above that the Act does not further military readiness, but also has
25 shown the following:

26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- by impeding the efforts to recruit and retain an all-volunteer military force, the Act contributes to critical troop shortages and thus harms rather than furthers the Government's interest in military readiness;

- by causing the discharge of otherwise qualified servicemembers with critical skills such as Arabic, Chinese, Farsi, and Korean language fluency; military intelligence; counterterrorism; weapons development; and medical training, the Act harms rather than furthers the Government's interest in military readiness;

- by contributing to the necessity for the Armed Forces to permit enlistment through increased use of the "moral waiver" policy and lower educational and physical fitness standards, the Act harms rather than furthers the Government's interest in military readiness;

- Defendants' actions in delaying investigations regarding and enforcement of the Act until after a servicemember returns from combat deployment show that the Policy is not necessary to further the Government's interest in military readiness or unit cohesion;

- by causing the discharge of well-trained and competent servicemembers who are well-respected by their superiors and subordinates, the Act has harmed rather than furthered unit cohesion and morale;

1 ● the Act is not necessary to protect the privacy of servicemembers
2 because military housing quarters already provide sufficient protection
3 for this interest.

4
5 The Don't Ask, Don't Tell Act infringes the fundamental rights of United
6 States servicemembers in many ways, some described above. The Act
7 denies homosexuals serving in the Armed Forces the right to enjoy "intimate
8 conduct" in their personal relationships. The Act denies them the right to
9 speak about their loved ones while serving their country in uniform; it
10 punishes them with discharge for writing a personal letter, in a foreign
11 language, to a person of the same sex with whom they shared an intimate
12 relationship before entering military service; it discharges them for including
13 information in a personal communication from which an unauthorized reader
14 might discern their homosexuality. In order to justify the encroachment on
15 these rights, Defendants faced the burden at trial of showing the Don't Ask,
16 Don't Tell Act was necessary to significantly further the Government's
17 important interests in military readiness and unit cohesion. Defendants failed
18 to meet that burden. Thus, Plaintiff is entitled to judgment in its favor on the
19 first claim in its First Amended Complaint for violation of the substantive due
20 process rights guaranteed under the Fifth Amendment.

21
22
23
24
25
26
27
28

V. PLAINTIFF'S FIRST AMENDMENT CHALLENGE TO THE ACT

Congress shall make no law . . . abridging the freedom of speech,
. . . or the right of the people peaceably to assemble, and to petition
the Government for a redress of grievances.
U.S. Const. amend. I.

1 Plaintiff claims that the Don't Ask, Don't Tell Act violates its members'
2 First Amendment rights to these freedoms. (FAC ¶¶ 1, 6, 45-49; Pl.'s Mem.
3 Cont. Fact & Law at 32-33.)

4

5 **A. The Standard of Review in First Amendment Challenges**

6 Plaintiff challenges the Act as overbroad and as an unconstitutional
7 restriction on speech based on its content. (FAC ¶¶ 47; Pl.'s Mem. Cont.
8 Fact & Law at 35, 40.)

9

10 Laws regulating speech based on its content generally must withstand
11 intense scrutiny when facing a First Amendment challenge:

12 At the heart of the First Amendment lies the principle that each
13 person should decide for himself or herself the ideas and beliefs
14 deserving of expression, consideration, and adherence. Our
15 political system and cultural life rest upon this ideal. Government
16 action that stifles speech on account of its message, or that requires
17 the utterance of a particular message favored by the Government,
18 contravenes this essential right. Laws of this sort pose the inherent
19 risk that the Government seeks not to advance a legitimate
20 regulatory goal, but to suppress unpopular ideas or information or
21 manipulate the public debate through coercion rather than
22 persuasion. These restrictions rais[e] the specter that the
23 Government may effectively drive certain ideas or viewpoints from
24 the marketplace. For these reasons, the First Amendment, subject
25 only to narrow and well-understood exceptions, does not
26 countenance governmental control over the content of messages
27 expressed by private individuals. Our precedents thus apply the
28 most exacting scrutiny to regulations that suppress, disadvantage,
or impose differential burdens upon speech because of its content.
Turner Broad. Sys. v. FCC, 512 U.S. 622, 641-42 (1994) (emphasis added)
(citations omitted).

23

24 In Simon & Schuster, Inc. v. Members of New York State Crime Victims
25 Board, 502 U.S. 105 (1991), the Supreme Court considered whether New
26 York's "Son of Sam" law purporting to strip authors of profits gained from
27 books or other publications depicting their own criminal activities constituted

28

1 content-based regulation. Holding the law was not content neutral, the Court
2 held that "[i]n order to justify such differential treatment, 'the State must show
3 that its regulation is necessary to serve a compelling state interest and is
4 narrowly drawn to achieve that end.'" Id. at 118 (citing Arkansas Writers'
5 Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987)).

6
7 Log Cabin Republicans urges the Court to strike down the Don't Ask,
8 Don't Tell Act as an impermissibly content-based statute. (See Pl.'s Mem.
9 Cont. Facts & Law at 35.) The Court turns first to the threshold question of
10 whether or not the Act constitutes a content-based restriction on speech.

11
12 **B. Judicial Definitions of Content-Based Regulation**

13 "Deciding whether a particular regulation is content-based or content-
14 neutral is not always a simple task. We have said that the principal inquiry in
15 determining content-neutrality . . . is whether the government has adopted a
16 regulation of speech because of [agreement or] disagreement with the
17 message it conveys." Turner, 512 U.S. at 642 (citations omitted). The
18 Supreme Court in Turner distilled the rule as follows: a law that by its terms
19 "distinguish[es] favored speech from disfavored speech on the basis of the
20 ideas or views expressed [is] content-based." Id. at 643 (citing Burson v.
21 Freeman, 504 U.S. 191, 197 (1992); Boos v. Barry, 485 U.S. 312, 318-19
22 (1988)).

23
24 Defendants did not address directly the question of content neutrality,
25 but relied instead on authorities that, for various reasons, fail to counter the
26 clear weight of the case law discussed above. Defendants repeatedly cited
27 the Ninth Circuit's decisions in Witt v. Department of Air Force, 527 F.3d 806
28

1 (9th Cir. 2008), Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997), and Holmes v.
2 California National Guard, 124 F.3d 1126 (9th Cir. 1997), although the
3 plaintiff in Witt brought no First Amendment claim and the Court in Philips
4 expressly declined to reach the First Amendment issue, noting the district
5 court also had stopped short of resolving it.

6
7 In Holmes, the Ninth Circuit disposed of the plaintiffs' free speech
8 claims in summary manner, holding because the plaintiffs "were discharged
9 for their conduct and not for speech, the First Amendment is not implicated."
10 124 F.3d at 1136 (citations omitted). Holmes relied on the Fourth Circuit's
11 decision in Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996), which rejected a
12 First Amendment challenge to the Don't Ask, Don't Tell Act on the basis that it
13 "permissibly uses the speech as evidence," and "[t]he use of speech as
14 evidence in this manner does not raise a constitutional issue – the First
15 Amendment does not prohibit the evidentiary use of speech to establish the
16 elements of a crime, or, as is the case here, to prove motive or intent." Id. at
17 931 (citations omitted). Holmes also relied on Pruitt v. Cheney, 963 F.2d
18 1160 (9th Cir. 1991), although acknowledging that decision was based not on
19 the Don't Ask, Don't Tell Act but a superseded policy. See Holmes, 124 F.3d
20 at 1136 (citing Pruitt, 963 F.2d at 1164).

21
22 In other words, Holmes and the cases from other circuits have found
23 the Don't Ask, Don't Tell Act does not raise a First Amendment issue to be
24 analyzed under a content-neutral versus content-based framework. None of
25 these authorities, however, considered whether there might be any speech,
26 other than admissions of homosexuality subject to being used as evidence in
27 discharge proceedings, affected by the Act. Furthermore, Holmes was
28

1 decided before Lawrence and was "necessarily rooted" in Bowers v.
2 Hardwick, 478 U.S. 186 (1986), which Lawrence overruled. See Holmes, 124
3 F.3d at 1137 (Reinhardt, J., dissenting).

4
5 Lawrence struck down a Texas statute making felonious certain sexual
6 acts between two persons of the same sex; the Supreme Court held in part
7 that the Constitution recognized certain substantive due process rights,
8 associated with the "autonomy of self that includes freedom of thought, belief,
9 expression, and certain intimate conduct." Lawrence, 539 U.S. at 562
10 (emphasis added). The Holmes decision, finding the Act did not implicate the
11 First Amendment, and the Act's provisions, appear at odds with the Supreme
12 Court's decision in Lawrence. As Holmes explains:

13 Homosexual conduct is grounds for separation from the Military
14 Services under the terms set forth [in the DOD Directives.]
15 Homosexual conduct includes homosexual acts, a statement by a
16 member that demonstrates a propensity or intent to engage in
17 homosexual acts, or a homosexual marriage or attempted marriage.
18 A statement by a member that demonstrates a propensity or intent to
19 engage in homosexual acts is grounds for separation not because it
20 reflects the member's sexual orientation, but because the statement
21 indicates a likelihood that the member engages in or will engage in
22 homosexual acts.
23 124 F.3d at 1129 (quoting DOD Directive 1332.30 at 2-1(c) (emphasis
24 added)).

25 The Holmes Court found the Act does not punish status, despite the
26 presumption embodied within it that declared homosexual servicemembers
27 will engage in proscribed homosexual conduct, finding the assumption was
28 "imperfect" but "sufficiently rational to survive scrutiny" 124 F.3d at
1135.

1 Thus, Holmes's foundations – rational basis scrutiny, acceptance of an
2 assumption of sexual misconduct based on admitted homosexual orientation,
3 and the Bowers decision – all have been undermined by Lawrence,
4 particularly in light of its explicit protection of "expression." See Lawrence,
5 539 U.S. at 562. Furthermore, if the proscription in subsection (b)(1) of the
6 Act violates substantive due process as set forth above, then the limitation on
7 speech in subsection (b)(2) necessarily fails as well. "Plainly, a limitation on
8 speech in support of an unconstitutional objective cannot be sustained." Able
9 v. United States, 88 F.3d 1280, 1300 (2d Cir. 1996). Holmes, decided before
10 Lawrence, therefore does not shield Defendants from Plaintiff's First
11 Amendment claim.

12
13 **C. The Don't Ask, Don't Tell Act is Content Based**

14 The Act in subsection (b)(2) requires a servicemember's discharge if he
15 or she "has stated that he or she is a homosexual or bisexual, or words to
16 that effect . . ." 10 U.S.C. § 654 (b)(2) (emphasis added). The Act does not
17 prohibit servicemembers from discussing their sexuality in general, nor does
18 it prohibit all servicemembers from disclosing their sexual orientation.
19 Heterosexual members are free to state their sexual orientation, "or words to
20 that effect," while gay and lesbian members of the military are not. Thus, on
21 its face, the Act discriminates based on the content of the speech being
22 regulated. It distinguishes between speech regarding sexual orientation, and
23 inevitably, family relationships and daily activities, by and about gay and
24 lesbian servicemembers, which is banned, and speech on those subjects by
25 and about heterosexual servicemembers, which is permitted.

26
27
28

1 The First Amendment's hostility to content-based regulation "extends
2 not only to restrictions on particular viewpoints, but also to prohibition of
3 public discussion of an entire topic. As a general matter, 'the First
4 Amendment means that government has no power to restrict expression
5 because of its message, its ideas, its subject matter, or its content.'" Consol.
6 Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 537 (1980)
7 (quoting Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972)).

8
9 In evaluating the constitutionality of such regulations in a military
10 context, however, courts traditionally do not apply the strict scrutiny described
11 above. Rather, courts apply a more deferential level of review of military
12 restrictions on speech.

13 Our review of military regulations challenged on First Amendment
14 grounds is far more deferential than constitutional review of similar
15 laws or regulations designed for civilian society. The military need
16 not encourage debate or tolerate protest to the extent that such
17 tolerance is required of the civilian state by the First Amendment; to
18 accomplish its mission the military must foster instinctive obedience,
19 unity, commitment, and esprit de corps.
20 Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (citations omitted).

21 Although careful to point out that the "subordination of the desires and
22 interests of the individual to the needs of the service," which is "the essence
23 of military life," does not entirely abrogate the guarantees of the First
24 Amendment, the Supreme Court emphasized the "great deference [courts
25 must afford] to the professional judgment of military authorities concerning
26 the relative importance of a particular military interest." Id. (citations omitted).
27 The Goldman decision relied in part on Rostker v. Goldberg, 453 U.S. 57
28 (1981), oft-cited for the principle that "judicial deference . . . is at its apogee
when legislative action under the congressional authority to raise and support

1 armies and make rules and regulations for their governance is challenged."
2 Id. at 70.

3

4 In keeping with this well-established rule of deference, regulations of
5 speech in a military context will survive Constitutional scrutiny if they "restrict
6 speech no more than is reasonably necessary to protect the substantial
7 government interest." Brown v. Glines, 444 U.S. 348, 348, 355 (1980) (citing
8 Greer v. Spock, 424 U.S. 828 (1976); Procurier v. Martinez, 416 U.S. 396
9 (1974)).

10

11 **D. The Act Does Not Survive the Level of Constitutional Scrutiny**
12 **Applied to Speech in a Military Context**

13 The Don't Ask, Don't Tell Act fails this test of constitutional validity.
14 Unlike the regulations on speech upheld in Brown and Spock, for example,
15 the sweeping reach of the restrictions on speech in the Don't Ask, Don't Tell
16 Act is far broader than is reasonably necessary to protect the substantial
17 government interest at stake here. In Brown, the Supreme Court upheld an
18 Air Force regulation that required Air Force personnel first to obtain
19 permission from the base commander before distributing or posting petitions
20 on Air Force bases, 444 U.S. at 348; in Greer, the Court upheld a similar
21 regulation on Army bases, banning speeches, demonstrations, and
22 distribution of literature, without prior approval from post headquarters. 424
23 U.S. at 828. In both cases, the Court rejected facial challenges to the
24 regulations, holding they protected substantial Governmental interests
25 unrelated to the suppression of free expression, i.e., maintaining the respect
26 for duty and discipline, and restricted speech no more than was reasonably
27 necessary to protect that interest.

28

1 By contrast to the relatively narrow regulations at issue in Brown and
2 Greer, however, the Don't Ask, Don't Tell Act encompasses a vast range of
3 speech, far greater than necessary to protect the Government's substantial
4 interests.

5
6 For example, Michael Almy and Anthony Loverde, as well as other
7 witnesses, described how the Act prevented them from discussing their
8 personal lives or comfortably socializing off duty with their respective
9 colleagues; this in turn created a certain "distance" and perhaps an aura of
10 distrust. (Trial Tr. 820:6--821:4;821:19-822:9, July 16, 2010 (Almy); Trial Tr.
11 1360:1-1361:17, July 21, 2010 (Loverde).) Steven Vossler testified that the
12 Act made it difficult for him to spend time off duty with other members of his
13 unit, as the Act prevented him from talking openly about spending time with
14 his friend Jerrod Chaplowski because of the need to disguise the identity of
15 Chaplowski's companion. (Trial Tr. 327:12-328:20, July 14, 2010.)

16
17 Similarly, Jenny Kopfstein testified that before she decided not to
18 conceal her sexual orientation, the Act made it impossible for her to respond
19 to her shipmates' questions about mundane matters such as how she spent
20 her leisure time, as doing so would necessarily reveal the existence of her
21 lesbian partner. (Trial Tr. 931:22-932:11, July 16, 2010.) She testified that
22 having to conceal information that typically was shared made her feel as
23 though others on the ship might distrust her, and that trust is critical,
24 especially in emergencies or crises. (Trial Tr. 957:6-22, July 20, 2010.)

25
26
27
28

1 In other words, all of these examples demonstrate that the Act's
2 restrictions on speech not only are broader than reasonably necessary to
3 protect the Government's substantial interests, but also actually serve to
4 impede military readiness and unit cohesion rather than further these goals.

5
6 Many of the lay witnesses also spoke of the chilling effect the Act had
7 on their ability to bring violations of military policy or codes of conduct to the
8 attention of the proper authorities. Joseph Rocha, eighteen years old and
9 stationed in Bahrain, felt restrained from complaining about the extreme
10 harassment and hazing he suffered because he feared that he would be
11 targeted for investigation under the Act if he did so. (Trial Tr. 488:20-489:14,
12 July 15, 2010.) In fact, his fear was so great that he initially refused to
13 answer the questions of an investigating officer. (Trial Tr. 519:16-510:10-15,
14 July 15, 2010.) John Nicholson and Anthony Loverde also testified about a
15 similar chilling effect on their speech when overhearing or being subjected to
16 homophobic slurs or taunts. (Trial Tr. 1138:1-1142:14, 1143:2-24, July 20,
17 2010 (Nicholson), Trial Tr. 1364:16-1365:25, July 21, 2010 (Loverde).)

18
19 The Act prevents servicemembers from openly joining organizations
20 such as the plaintiff in this lawsuit that seek to change the military's policy on
21 gay and lesbian servicemembers; in other words, it prevents them from
22 petitioning the Government for redress of grievances. John Doe, for
23 example, feared retaliation and dismissal if he joined the Log Cabin
24 Republicans under his true name or testified during trial; thus, he was forced
25 to use a pseudonym and to forgo testifying during trial. (Ex. 38 [Doe Decl.]
26 ¶¶ 6-8; see Trial Tr. 88:19-90:15, July 13, 2010; 708:21-709:4, July 16,
27 2010.)

28

1 Furthermore, as discussed above, the Act punishes servicemembers
2 with discharge for writing a private letter, in a foreign language, to a person of
3 the same sex with whom they shared an intimate relationship before
4 volunteering for military service. It subjects them to discharge for writing
5 private e-mail messages, in a manner otherwise approved, to friends or
6 family members, if those communications might lead the (unauthorized)
7 reader to discern the writer's sexual orientation. These consequences
8 demonstrate that the Act's restrictions on speech are broader than
9 reasonably necessary to protect the Government's interest. Moreover, the
10 Act's restrictions on speech lead to the discharge of servicemembers with
11 qualifications in critically-needed occupations, such as foreign language
12 fluency and information technology. The net effect of these discharges, as
13 revealed not only in the testimony of the lay witnesses but also of the experts
14 who testified and Defendants' own admissions regarding the numbers of
15 servicemembers discharged and the costs of recruiting and maintaining an
16 all-volunteer military force, compel the conclusion that the Act restricts
17 speech more than reasonably necessary to protect the Government's
18 interests.

19

20 Finally, it again must be noted that Defendants called no witnesses, put
21 on no affirmative case, and only entered into evidence the legislative history
22 of the Act. This evidence, discussed in Section IV(C)(1) above, does not
23 suffice to show the Act's restrictions on speech are "no more than is
24 reasonably necessary" to achieve the goals of military readiness and unit
25 cohesion. (See supra Section IV(C)(1).)

26

27

28

1 For these reasons, Plaintiff is also entitled to judgment on its claim for
2 violation of the First Amendment's guarantees of freedom of speech and
3 petition.

4

5

VI. CONCLUSION

6

7

8

9

10

11

12

13

14

15

16

17

18

IT IS SO ORDERED.

19

20

21

Dated: October 12, 2010

22

23

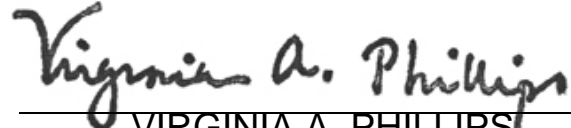
24

25

26

27

28



VIRGINIA A. PHILLIPS
United States District Judge