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12 **UNITED STATES DISTRICT COURT**  
13 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
**EASTERN DIVISION**

14 LOG CABIN REPUBLICANS,  
15 Plaintiff,  
16 v.  
17 UNITED STATES OF AMERICA AND  
ROBERT M. GATES, Secretary of  
18 Defense,  
19 Defendants.

No. CV04-8425 VAP (Ex)  
MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT  
DATE: April 26, 2010  
TIME: 2:00 p.m.  
BEFORE: Judge Phillips

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## I. INTRODUCTION

The Log Cabin Republicans (“LCR”) pursue a facial challenge to the constitutionality of the statute (10 U.S.C. § 654, hereafter “Section 654”) and the Department of Defense’s (“DoD’s”) implementing regulations that subject service members who have engaged in homosexual conduct in the military to separation, commonly known as the “Don’t Ask, Don’t Tell” (“DADT”) policy.<sup>1</sup> Plaintiff faces a high burden. As the Supreme Court has made clear, facial challenges such as Plaintiff’s here are “disfavored,” because they “run contrary to principles of judicial restraint” and “threaten to short circuit the democratic process.” *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451, 128 S. Ct. 1184, 1190, 170 L. Ed. 2d 151 (2008). And where, as here, rational basis review applies, the only question presented is whether Congress “rationally could have believed” that the conditions of the statute would promote its objective. Unsurprisingly, every court to have decided the question has upheld the DADT statute and the implementing regulations against facial constitutional attack, and this Court is bound to do the same. As this Court is aware, the President of the United States has called for the repeal of DADT, the Secretary of Defense initiated a working group to study how to implement any such Congressional repeal, and Congress is now holding hearings to consider the *policy* question of whether to retain the current law. But those developments do not alter the fact that the statute Congress enacted in 1993 passes constitutional muster.

As an initial matter, LCR has not remedied the deficiency in standing that existed when this action commenced in 2004. LCR was permitted to amend its complaint in 2006 (Doc. 24), for the express purpose of identifying by name a

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<sup>1</sup> On March 25, 2010, DoD issued revised Instructions to refine the administrative procedures used to implement the statute. Plaintiff challenges the constitutionality of the DADT policy as reflected in the statute and the implementing regulations, and makes no separate challenge to the regulations themselves.

1 “member” who Plaintiff asserts allegedly suffered harm due to the DADT policy.  
2 Plaintiff amended and identified two individuals – John Alexander Nicholson and  
3 the anonymous John Doe. Following discovery, LCR cannot satisfy its standing  
4 burden through these individuals. Mr. Nicholson was not a member of LCR when  
5 this action commenced, and he was not a bona fide or active member of LCR at the  
6 time the complaint was amended. Discovery has shown that, at the very time LCR  
7 amended its complaint in April 2006, Mr. Nicholson merely “signed up” to add his  
8 name to the LCR database, which LCR then used as a basis to proceed with this  
9 action when it otherwise could not. As of the date of his deposition in 2010, Mr.  
10 Nicholson conceded that he had never paid dues, a requirement for membership in  
11 LCR, and thus he had never been a bona fide or active member of the LCR.

12 LCR similarly has not established standing through the anonymous John  
13 Doe. Although Defendants would want to test John Doe’s bona fides as an “active  
14 member” of LCR (especially given what discovery has shown with respect to Mr.  
15 Nicholson), his anonymity has precluded it. Even so, LCR, which has the burden  
16 of establishing that it has standing through him, cannot do so; John Doe remains an  
17 active member of the military and has not been discharged. LCR cannot show  
18 through any record evidence that the challenged statute has been applied to John  
19 Doe in any way. And LCR cannot show that John Doe made any statement that the  
20 military used for any purpose, let alone for the purpose of discharging him under  
21 Section 654. LCR has utterly failed to carry its burden to establish associational  
22 standing and Defendants are therefore entitled to summary judgment on that basis  
23 alone.

24 Should the Court even reach the merits of LCR’s claims, Defendants are  
25 nonetheless entitled to summary judgment. To survive summary judgment on the  
26 merits with respect to LCR’s facial substantive due process claim, LCR has the  
27 burden of negating each and every constitutional application of the statute and  
28 showing that Congress’s policy judgments were irrational. Ninth Circuit precedent

1 forecloses LCR from doing so here. In *Philips v. Perry*, 106 F.3d 1420 (9th Cir.  
2 1997), the Ninth Circuit observed that Congress could have rationally found the  
3 DADT policy to be necessary to “further military effectiveness by maintaining unit  
4 cohesion, accommodating personal privacy and reducing sexual tension.” *Id.* at  
5 1429. The Ninth Circuit in *Philips* continued by acknowledging that “we cannot  
6 say that the Navy’s concerns are based on ‘mere negative attitudes, or fear,  
7 unsubstantiated by factors which are properly cognizable’ by the military. Nor can  
8 we say that avoiding sexual tensions lacks any ‘footing in the realities’ of the  
9 Naval environment in which Philips served.” *Id.* (quoting *Cleburne v. Cleburne*  
10 *Living Ctr.*, 473 U.S. 432, 448, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)). In light  
11 of that conclusion, LCR cannot show that there are no legitimate applications of  
12 the policy, and that Congress’s conclusions were irrational. Because LCR cannot  
13 make that showing, Defendants are entitled to summary judgment with respect to  
14 the due process claim.

15 Defendants are also entitled to summary judgment on the merits with respect  
16 to LCR’s First Amendment claim. The Court already has recognized that Section  
17 654 is consistent with the First Amendment to the extent it permits the military to  
18 use statements as admissions of a propensity to engage in homosexual acts. The  
19 Court nonetheless has ruled that “[d]ischarge on the basis of statements not used as  
20 admissions of a propensity to engage in ‘homosexual acts’ would appear to be  
21 discharge on the basis of speech rather than conduct, an impermissible basis.”  
22 (Doc. 83 at 23). The Court suggested in that regard that LCR could pursue this  
23 claim only by showing that the military discharges service members based upon  
24 the use of a statement for a purpose other than as an admission of a propensity to  
25 engage in homosexual acts, but concluded that it could not “determine from the  
26 face of” LCR’s complaint “whether Nicholson was, or Doe could yet be,  
27 discharged” on a such a basis. *Id.*

1 Discovery has confirmed that Mr. Nicholson was discharged because his  
 2 statement that he was gay constituted an admission of his propensity to engage in  
 3 homosexual acts, a presumption that he chose not to rebut. John Doe, meanwhile,  
 4 has not been discharged (pursuant to the statute or otherwise) and remains an  
 5 active member of the military; John Doe, therefore, has not been aggrieved by the  
 6 statute that LCR challenges. The claim that the Court allowed LCR to pursue  
 7 through amendment of its complaint, therefore, is thus entirely unsupported by any  
 8 record evidence. For these reasons, LCR has failed to meet its burden, and  
 9 Defendants are entitled to summary judgment.<sup>2</sup>

## 10 **II. THE DADT POLICY**

11 The “Don’t Ask, Don’t Tell” policy (“DADT” or “policy”), as codified at 10  
 12 U.S.C. § 654, became law in 1993. It was the culmination of an effort by Congress  
 13 to examine the issue of homosexual conduct in the Armed Forces through lengthy  
 14 hearings on the issue and testimony from military commanders, gay rights  
 15 activists, experts in military personnel policy, and many interested civilians and  
 16 members of the Armed Forces. *See generally*, S. Rep. No. 112, 103rd Cong., 1st  
 17 Sess., 1993 WL 286446. Upon its extensive review of the issue, Congress  
 18 concluded that the policy was necessary to ensure privacy, reduce sexual tension,  
 19 and, ultimately to maintain unit cohesion and military preparedness. Among other  
 20 things, Congress determined that the statute was necessary because “[t]he presence  
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22 <sup>2</sup> Defendants also contend that this action cannot continue after the Ninth Circuit’s  
 23 decision in *Witt v Dep’t of the Air Force*, 527 F.3d 806 (9th Cir. 2008). First, the *Witt* panel was  
 24 careful to note that only “as-applied” substantive due process challenges to the statute can  
 25 proceed. Because LCR’s challenge to the statute is a facial challenge, its substantive due process  
 26 challenge cannot proceed as a matter of law. And second, unlike the situation in *Witt*, which was  
 27 brought by an individual, LCR seeks to establish associational standing to challenge the statute.  
 28 Inasmuch as *Witt* now makes clear that substantive due process challenges require the  
 involvement of an individual, LCR cannot satisfy its burden of establishing associational  
 standing. *See Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 343, 97 S. Ct.  
 2434, 53 L. Ed. 2d 383 (1977). The Court rejected both arguments in its June 9, 2009 Order, and  
 Defendants incorporate those arguments by reference to preserve them for appeal.

1 in the Armed Forces of persons who demonstrate a propensity or intent to engage  
2 in homosexual acts would create an unacceptable risk to the high standards of  
3 morale, good order and discipline, and unit cohesion that are the essence of  
4 military capability.” 10 U.S.C § 654(a)(15).

5 In reaching that conclusion, Congress heard from General H. Norman  
6 Schwarzkopf, U.S. Army (Ret.), who testified that unit cohesion “is the single most  
7 important factor in a unit’s ability to succeed on the battlefield.” S. Rep. No. 112,  
8 103rd Cong., 1st Sess., 1993 WL 286446, at 275. General Colin Powell similarly  
9 testified that, “[t]o win wars, we create cohesive teams of warriors who will bond  
10 so tightly that they are prepared to go into battle and give their lives if necessary  
11 for the accomplishment of the mission and for the cohesion of the group and for  
12 their individual buddies.” *Id.* Congress found that unit cohesion is improved by  
13 reducing or eliminating the potential for sexual tension to distract the members of  
14 the unit, and by protecting the personal privacy of service members.

15 For example, the Senate Armed Services Committee concluded that, among  
16 both heterosexuals and homosexuals, “[s]exual behavior is one of the most intimate  
17 and powerful forces in society,” *id.* at 281, and, “[w]hen dealing with issues  
18 involving persons of different genders . . . the armed forces do not presume that  
19 service members will remain celibate or that they will not be attracted to members  
20 of the opposite sex. On the contrary, the military provides men and women with  
21 separate quarters in order to ensure privacy because experience demonstrates that  
22 few remain celibate and many are attracted to members of the opposite sex.” *Id.* at  
23 284. Indeed, the Committee expressly noted that “[t]he separation of men and  
24 women is based upon the military necessity to minimize conditions that would  
25 disrupt unit cohesion, such as the potential for increased sexual tension that could  
26 result from mixed living quarters,” *Id.* at 277-78. In the Committee’s view, it  
27 would be “irrational . . . to develop military personnel policies on the basis that all  
28 gays and lesbians will remain celibate or that they will not be sexually attracted to

1 others.” *Id.* at 278. *Id.* Reviewing Congress’s conclusions in *Philips*, the Ninth  
 2 Circuit stated that it could not say sexual tension and concerns over privacy “lack[]  
 3 any ‘footing in the realities’” of military life. 106 F.3d at 1429 (internal citation  
 4 omitted) & n. 15 (referencing congressional testimony of General Powell  
 5 describing “communal settings that force intimacy and provide little privacy” in  
 6 military).<sup>3</sup>

7 The statutory policy is grounded in fifteen legislative findings. 10 U.S.C.  
 8 § 654(a). Those findings reflect Congress’s judgment that, among other things,  
 9 “military life is fundamentally different from civilian life” because of “the  
 10 extraordinary responsibilities of the armed forces, the unique conditions of military  
 11 service, and the critical role of unit cohesion.” *Id.* § 654(a)(8)(A). The “military  
 12 society is characterized by its own laws, rules, customs, and traditions, including  
 13 numerous restrictions on personal behavior, that would not be acceptable in  
 14 civilian society.” *Id.* § 654(a)(8)(B). These rules are necessitated by, among other  
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16 <sup>3</sup> General Powell testified that homosexual conduct in units “involves matters of privacy  
 17 and human sexuality that, . . . if allowed to exist openly in the military, would affect the cohesion  
 18 and well-being of the force.” 1993 WL 2866446 at 281. He further testified that “it would be  
 19 prejudicial to good order and discipline” if the military required heterosexuals and persons who  
 20 demonstrate that they do or are likely to engage in homosexual acts “to share the most private  
 21 facilities together,” *id.* at 283, and that “[c]ohesion is strengthened or weakened in the intimate  
 22 living arrangements we force upon our people. . . . In our society gender differences are not  
 23 considered conducive to bonding and cohesion within barracks living spaces.” *Id.* at 278.  
 24 Concluding that “[s]exual behavior is one of the most intimate and powerful forces in society,”  
 25 *id.* at 281, the Committee found that it was reasonable for the military to take these factors into  
 26 account in establishing gender-based assignment policies. *Id.* at 278. And just as “[i]t is  
 27 reasonable for the armed forces to take these factors into consideration in establishing gender-  
 28 based assignment policies,” it also “is reasonable for the armed forces to take [them] into  
 consideration when addressing issues concerning persons who engage in or have the propensity  
 or intent to engage in sexual activity with persons of the same sex.” *Id.* at 278. And while  
 separating men and women reduces sexual tension among heterosexuals, Congress could  
 rationally have concluded that such separation is not an alternative for homosexuals. *See Steffan*  
*v. Perry*, 41 F.3d 677, 692 (D.C. Cir. 1994) (“The military obviously could not eliminate the  
 difficulties of quartering homosexuals with persons of the same sex by totally segregating  
 homosexuals. Besides the troubling implications of such a separation, putting all homosexuals  
 together would not diminish their mutual sexual attractions.”).

1 things, “[t]he worldwide deployment of United States military forces, the  
2 international responsibilities of the United States, and the potential for involvement  
3 of the armed forces in actual combat routinely [which] make it necessary for  
4 members of the armed forces involuntarily to accept living conditions and working  
5 conditions that are often spartan, primitive, and characterized by forced intimacy  
6 with little or no privacy.” *Id.* § 654(a)(12). Congress’s policy judgment  
7 culminated, as noted, in its finding that “[t]he presence in the armed forces of  
8 persons who demonstrate a propensity or intent to engage in homosexual acts  
9 would create an unacceptable risk to the high standards of morale, good order and  
10 discipline, and unit cohesion that are the essence of military capability.” *Id.*  
11 § 654(a)(15).

12       Based on these Congressional findings, the statute provides for separation  
13 from service in three situations related to homosexual conduct by a member of the  
14 Armed Forces. Separation is required where the service member has:  
15 (1) “engaged in, attempted to engage in, or solicited another to engage in a homo-  
16 sexual act,” *id.* § 654(b)(1); (2) “stated that he or she is a homosexual or bisexual  
17 . . . unless . . . [the member] demonstrate[s] that he or she is not a person who  
18 engages in, attempts to engage in, has a propensity to engage in, or intends to  
19 engage in homosexual acts,” *id.* § 654(b)(2); or (3) “married or attempted to marry  
20 a person known to be of the same biological sex,” *id.* § 654(b)(3). Where a service  
21 member makes a statement that “he or she is homosexual . . . or words to that  
22 effect,” *id.* § 654 (b)(2), those words create a presumption that the service member  
23 is a “person who engages in, attempts to engage in, has a propensity to engage in,  
24 or intends to engage in homosexual acts.” *Id.* § 654(b)(2). A service member is  
25 afforded an opportunity to rebut that presumption. 10 U.S.C. § 654(b)(2).

1 **IV. ARGUMENT**

2 **A. LCR Has Failed To Satisfy The Minimum Requirements Of**  
 3 **Organizational Standing And Defendants Are Entitled To**  
 4 **Summary Judgment On That Basis Alone.**

5 The power of federal courts extends only to Cases and Controversies, *see*  
 6 U.S. Const. art. III, § 2, and a litigant's standing to sue is "an essential and  
 7 unchanging part of the case-or-controversy requirement." *See Lujan v. Defenders*  
 8 *of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992) (citation  
 9 omitted). "Standing is determined as of the commencement of litigation."  
 10 *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1171 (9th Cir. 2002). "The  
 11 party seeking to invoke the jurisdiction of the court has the burden of alleging  
 12 specific facts sufficient to satisfy" the requirements of standing. *Schmier v. U.S.*  
 13 *Court of Appeals*, 279 F.3d 817, 821 (9th Cir. 2002).

14 An organization has standing to sue on behalf of its members only when it  
 15 can demonstrate, among other requirements, that those members "would otherwise  
 16 have standing to sue in their own right." *Hunt*, 432 U.S. at 343. The persons  
 17 whose interests an organization seeks to pursue must actually be members of the  
 18 organization. *Cf. Washington Legal Found. v. Leavitt*, 477 F. Supp. 2d 202, 208  
 19 (D.D.C. 2007) (listing the "indicia of membership" in an organization without  
 20 formal members as "(i) electing the entity's leadership, (ii) serving in the entity,  
 21 and (iii) financing the entity's activities") (*citing Hunt*, 432 U.S. at 344-45)). In  
 22 addition, an organization's claim to associational standing is "weakened" if the  
 23 members on which it relies were "manufactured . . . after the fact" for purposes of  
 24 the litigation. *Washington Legal Found., id.* at 211.

25 In ruling on Defendants' earlier motion to dismiss for lack of standing, the  
 26 Court held that LCR had not identified any member of its organization who had  
 27 been personally harmed by the DADT policy (Doc. 24). The Court thus granted  
 28 the motion to dismiss without prejudice and "ordered" LCR "to identify, by name,

1 at least one of its members injured by the subject policy” (Doc. 24 at 17). That  
2 member would have to “submit a declaration establishing that he or she: (1) is an  
3 active member of the organization; (2) has served or currently serves in the Armed  
4 Forces; and (3) has been injured by the policy” (Doc. 24 at 17). In an effort to  
5 comply with the Court’s Order, LCR filed an amended complaint and a declaration  
6 from John Alexander Nicholson on April 28, 2006 (Docs. 25, 26).

7 The First Amended Complaint alleged that Mr. Nicholson was a member of  
8 LCR and that he had been discharged pursuant to the DADT policy (Doc. 25  
9 ¶¶ 13-14). Mr. Nicholson’s April 2006 declaration stated in part, “I am a member  
10 of the Log Cabin Republicans” (Doc. 26 ¶ 2). In actuality, however, LCR cannot  
11 show that Mr. Nicholson has ever been a bona fide or active member of LCR  
12 sufficient to confer organizational standing, let alone a member at the time this  
13 action was commenced or when the amended complaint was filed. The chairman  
14 of LCR’s national board of directors testified at his deposition that the  
15 organization’s bylaws, at both the national and the local level, require payment of  
16 dues to retain membership, and he testified that one becomes a member by paying  
17 dues to the national organization or to a local chapter (Hamilton Dep. 23:2-12;  
18 29:19-30:16, Mar. 13, 2010, Ex. 1).<sup>4</sup> Mr. Nicholson, for his part, testified that he  
19 has never paid dues to LCR and that he merely “signed up to be a part of [the  
20 organization’s] database” (Nicholson Dep. at 9:14-10:7, Mar. 15, 2010,  
21 Ex. 2). In his deposition, Mr. Nicholson testified that he remembered precisely  
22 when he “signed up to be a part of [the organization’s] database”: April 2006  
23 (Nicholson Dep. at 9: 17-18, Mar. 15, 2010, Ex. 2) – that is, he “signed up” the  
24 same month he signed the declaration in this case, which LCR then offered to the  
25 Court for purposes of seeking to confer standing sufficient to pursue its action.

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27 <sup>4</sup> The transcript of the deposition of Terry Hamilton and of all other depositions cited  
28 herein have previously been lodged with the Court (Doc. 129).

1 It is an irreducible requirement that a plaintiff have a personal interest in a  
2 case sufficient to confer standing from the commencement of litigation and  
3 throughout its existence, *see Friends of the Earth v. Laidlaw Envir. Servs.*, 528  
4 U.S. 167, 189, 528 U.S. 167, 145 L. Ed. 2d 610 (2000), and this is equally true in  
5 cases based on associational standing. *See Biodiversity*, 309 F.3d at 1171. This  
6 Court recognized as much when it ordered LCR to submit a declaration from  
7 someone demonstrating, among other things, that “he or she: (1) is an active  
8 member of the organization” (Doc. 24 at 17). Here, after discovery, it is  
9 undisputed that Mr. Nicholson was not “an active member” of LCR either when  
10 this action was commenced in 2004 or upon amendment in 2006. Indeed, Mr.  
11 Nicholson has *never* been a bona fide or “active member” of LCR and thus was not  
12 “an active member” even when it submitted Mr. Nicholson’s declaration to the  
13 Court; at that point, and only at that very point, Mr. Nicholson was merely  
14 “sign[ed] up to be a part of [LCR’s] database” (Nicholson Dep. at 9:21-10:4, Ex.  
15 2).

16 Even if Mr. Nicholson had been “signed up” at the time this action was  
17 commenced, or even if he was “signed up” when the Court directed LCR to submit  
18 a declaration from “an active member,” Mr. Nicholson was not, nor has he ever  
19 been, a bona fide or active member of LCR sufficient to permit the organization to  
20 qualify for associational standing. At his deposition in 2010, Mr. Nicholson  
21 conceded that he did not pay dues as required by the organization’s own bylaws  
22 (Nicholson Dep. at 9:14-10:7, Ex. 2; Hamilton Dep. at 29:19-30:16, Ex. 1).  
23 *Cf. Washington Legal Found.*, 477 F. Supp. 2d at 208 (listing “financing the  
24 entity’s activities” as one “indicia of membership”). Merely entering Mr. Nichol-  
25 son’s name into LCR’s “database” did not make him a member under the bylaws  
26 (Nicholson Dep. 9:14-10:7, Ex. 2). Indeed, LCR’s claim to associational standing  
27 is dramatically “weakened” to the extent it was “manufactured . . . after the fact”  
28 for purposes of the litigation. *Washington Legal Found.*, *id.* at 211. But under no

1 circumstances can LCR demonstrate, based on the record, that through Mr.  
 2 Nicholson it has met the “irreducible requirement” that it demonstrate standing  
 3 from the commencement of the litigation and throughout its existence. *Friends of*  
 4 *the Earth*, 528 U.S. at 189.<sup>5</sup>

5 The First Amended Complaint also alleged that another member, John Doe  
 6 (anonymous), was then enlisted in the Armed Forces (Doc. 25 ¶ 20). But LCR has  
 7 wholly failed to show that John Doe has paid dues or has been aggrieved by the  
 8 statute it challenges. John Doe is a member of the military and has never been  
 9 discharged, let alone by application of the DADT policy. There is no evidence to  
 10 demonstrate that Section 654 has ever been applied to John Doe, or that any  
 11 statement he has made has been used by the military for any purpose, let alone for  
 12 any purpose in connection with its application of the DADT policy.

13 Doe’s asserted harm is based solely upon some future, possible, conjectural,  
 14 or hypothetical application of the policy to him. But an injury must be “both  
 15 ‘concrete’ and ‘actual or imminent, not conjectural or hypothetical’” to confer  
 16 standing. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765,  
 17 771, 529 U.S. 765, 120 S. Ct. 1858 (2000) (quoting *Whitmore v. Arkansas*, 495  
 18 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)). An allegation of injury  
 19

20 \_\_\_\_\_  
 21 <sup>5</sup> Prior to filing this motion, Defendants’ counsel conferred with Plaintiff’s counsel and  
 22 advised him that one of the bases of Defendants’ motion would be that Plaintiff has failed to  
 23 identify any current member of LCR who could confer associational standing upon LCR, in part  
 24 because Mr. Nicholson testified in his deposition that he failed to pay dues required for LCR  
 25 membership. Following the conferral, Plaintiff’s counsel sent Defendants’ counsel an e-mail  
 26 stating that Mr. Nicholson’s annual dues were “presently” “paid in full.” Even if true (and  
 27 attorney representations are, of course, not evidence), the statement of Plaintiff’s counsel merely  
 28 confirms that Mr. Nicholson was not a bona fide member of LCR at the commencement of this  
 action or at the time of amendment. In any event, this recent after-the-fact attempt by LCR’s  
 counsel further weakens Plaintiff’s claim to associational standing. *Washington Legal Found.*,  
 477 F. Supp. 2d at 211 (claim to associational standing “weakened” to the extent it was  
 “manufactured . . . after the fact” for purposes of litigation). A copy of the email from counsel  
 for LCR, Patrick Hunnius, dated March 25, 2010 to counsel for Defendants, is attached hereto as  
 Exhibit 5.

1 that is “remote, contingent and speculative,” and that consists of “nothing more  
2 than the bare possibility of some injury in the future,” fails to present a justiciable  
3 question. *Gange Lumber Co. v. Rowley*, 326 U.S. 295, 305, 66 S. Ct. 125, 90 L.  
4 Ed. 85 (1945).

5 This is especially so where the relief sought is declaratory and injunctive  
6 relief. Where such relief is sought, a plaintiff must first show that “the injury or  
7 threat of injury” resulting from official conduct is both “‘real and immediate,’ not  
8 ‘conjectural’ or ‘hypothetical.’” *City of Los Angeles v. Lyons*, 461 U.S. 95, 102,  
9 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983); see *Nat’l Treasury Employees Union v.*  
10 *Dep’t of the Treasury*, 25 F.3d 237 (5th Cir. 1994) (rejecting assertion of  
11 organizational standing where allegation of any injury to members is “only  
12 hypothetical and conjectural”); see also *Hodgers-Durgin v. de la Viña*, 199 F.3d  
13 1037, 1039 (9th Cir. 1999) (finding lack of standing due to “insufficient likelihood  
14 of future injury”).<sup>6</sup> It is LCR’s burden to establish standing, and it has failed to do  
15 so here through its presentation of speculative allegations about an anonymous  
16 “member.”<sup>7</sup> Because Plaintiff has failed to demonstrate standing, this Court lacks  
17 subject-matter jurisdiction, and Defendants are entitled to summary judgment.

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20  
21 <sup>6</sup> John Doe’s alleged “fear of investigation . . . and other negative repercussions resulting  
22 from enforcement of the [DADT] Policy” (Doc. 39) is both too subjective and too speculative to  
23 be the basis for standing. *Cf. Lyons*, 461 U.S. at 102 (mere threat of prosecution is insufficient to  
24 establish harm necessary for standing).

25 <sup>7</sup> The membership deficiencies identified through discovery regarding Mr. Nicholson,  
26 moreover, should cause the Court to be skeptical of LCR’s invitation to rely on its assertions  
27 about an anonymous John Doe as the basis to adjudicate a facial constitutional challenge to a  
28 statute that the Ninth Circuit already has determined to have been supported by a rational basis.  
*See Philips*, 106 F.3d at 1429; see *Young America’s Found. v. Gates*, 560 F. Supp. 2d 39, 49-50  
(D.D.C. 2008) (expressing doubt regarding assertion of associational standing based on alleged  
harm to anonymous members, because, in light of anonymity, “[t]here [was] no way to tell”  
whether alleged members were still in a position to benefit from the relief requested).

1           **B. Because Congress Could Rationally Have Concluded That The**  
 2           **DADT Policy Is Necessary To Maintain Unit Cohesion,**  
 3           **Accommodate Personal Privacy, and Reduce Sexual Tension For**  
 4           **Military Effectiveness, LCR’s Facial Due Process Challenge Fails**

5           If the Court reaches the merits, Defendants are also entitled to summary  
 6 judgment because LCR has failed to create a triable issue of material fact about  
 7 whether the DADT statute and implementing regulations are unconstitutional in all  
 8 of their applications, as is LCR’s burden.

9           **1. Standard**

10           “A facial challenge to a legislative Act is the most difficult challenge to  
 11 mount successfully, since the challenger must establish that no set of circumstances  
 12 exists under which the Act would be valid.” *United States v. Salerno*, 481 U.S.  
 13 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).<sup>8</sup> In reviewing such a  
 14 challenge, courts must be “careful not to go beyond the statute’s facial  
 15 requirements and speculate about ‘hypothetical’ or ‘imaginary’ cases,” and should  
 16 act with caution because “facial challenges threaten to short circuit the democratic  
 17 process.” *Washington State Grange*, 552 U.S. at 449-50.

18           Plaintiff’s burden is particularly high here, because the Court has ruled  
 19 already that LCR may not “rely upon [the] heightened scrutiny standard [adopted  
 20 in *Witt*] as the Ninth Circuit limited this standard to as-applied challenges,” and  
 21 that this challenge is thus governed instead by the most deferential form of review  
 22 available – the rational basis test (Doc. 83 at 17). Under that standard, the only  
 23 question presented is whether Congress “rationally *could have believed*” that the  
 24 conditions of the statute would promote its objective. *Western & Southern Life*

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 26           <sup>8</sup> The Ninth Circuit has made clear that “[o]ur court adheres to [the *Salerno*] standard,  
 27 notwithstanding the plurality opinion in the *City of Chicago v. Morales*, 527 U.S. 41, 119 S. Ct.  
 28 1849, 144 L. Ed. 2d 67 (1999).” *United States v. Inzunza*, 580 F.3d 896, 904 n.4  
 (9th Cir. 2009).

1 *Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-72, 101 S. Ct. 2070, 68 L.  
2 Ed. 2d 514 (1981) (emphasis in original).

3 The Supreme Court has held that the rational basis test “is not subject to  
4 courtroom fact-finding,” and rational basis review “is not a license for courts to  
5 judge the wisdom, fairness, or logic of legislative choices.” *Fed. Commuc’ns*  
6 *Comm’n v. Beach Commc’ns*, 508 U.S. 307, 315, 113 S. Ct. 2096, 124 L. Ed. 2d  
7 211 (1993). The Government, therefore, has “no obligation to produce evidence to  
8 sustain the rationality of a statutory classification.” *Heller v. Doe*, 509 U.S. 312,  
9 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993). Rather, “those challenging the  
10 legislative judgment must convince the court that the legislative facts on which the  
11 classification is apparently based could not reasonably be conceived to be true by  
12 the governmental decisionmaker.” *Vance v. Bradley*, 440 U.S. 93, 111, 99 S. Ct.  
13 939, 59 L. Ed. 171 (1979). “Only by faithful adherence to this guiding principle of  
14 judicial review,” the Supreme Court has cautioned, “is it possible to preserve to the  
15 legislative branch its rightful independence and its ability to function.”  
16 *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365, 93 S. Ct 1001, 35 L.  
17 Ed. 2d 351 (1973).

18 With respect to DADT, the Ninth Circuit already has found that Congress  
19 rationally could have believed the conditions of the statute would promote its  
20 objectives, *see Philips*, 106 F.3d at 1429, and that determination is binding Circuit  
21 precedent. *Newton v. Thomason*, 22 F.3d 1455, 1460 (9th Cir. 1994). Because  
22 LCR cannot meet its burden, Defendants are now entitled to summary judgment  
23 under Federal Rule of Civil Procedure 56.

24 When it denied Defendants’ motion to dismiss in this case under Rule  
25 12(b)(6) for failure to state a claim, the Court determined that LCR’s complaint  
26 had sufficient merit to permit discovery to proceed on its claim that the DADT  
27 statute is facially unconstitutional. Plaintiff’s burden to survive summary  
28 judgment, however, is greater. To do so, Plaintiff must by this point in the

1 litigation have made “a showing sufficient to establish the existence of an element  
2 essential to” its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548,  
3 91 L. Ed. 2d 265 (1986). In this case, LCR’s burden is to “establish that no set of  
4 circumstances exists under which the Act would be valid.” *Salerno*, 481 U.S. at  
5 745. LCR has failed to meet this burden.

## 6           **2. Plaintiff’s Due Process Claim Fails as a Matter of Law**

7           In *Philips*, 106 F.3d at 1429, the Ninth Circuit already determined that  
8 “circumstances exist[] under which the [DADT policy] would be valid.” *Salerno*,  
9 481 U.S. at 745. Recognizing that “when a military regulation is challenged,  
10 courts evaluate rationality with ‘great deference to the professional judgment of  
11 military authorities concerning the relative importance of a particular military  
12 interest,’” the Ninth Circuit concluded that the DADT policy is valid because  
13 Congress could rationally have believed that it was necessary to preserve unit  
14 cohesion, to accommodate personal privacy, and to reduce sexual tension so as to  
15 enhance military preparedness and effectiveness. *Philips*, 106 F.3d at 1429.  
16 Defendants are thus entitled to summary judgment with respect to LCR’s facial due  
17 process challenge.

18           Defendants acknowledge that the Court ruled in its Order of June 9, 2009,  
19 that the Court could not “conclude Plaintiff’s substantive due process claim lacks  
20 merit” based upon existing Ninth Circuit precedent in *Philips* and in *Holmes v.*  
21 *California Army National Guard*, 124 F.3d 1126 (9th Cir. 1997), which upheld the  
22 DADT statute as fully comports with constitutional requirements (Doc. 83 at  
23 18). The Court distinguished *Philips* on the grounds that it addressed “equal  
24 protection concerns, not substantive due process” (Doc. 83 at 17 n.5). But, with  
25 respect, in this context, that is a distinction without a difference.

26           To satisfy its burden in this facial challenge under rational basis review,  
27 LCR must establish that Congress could not rationally have believed that the  
28 DADT policy serves to preserve unit cohesion, accommodate personal privacy, and

1 reduce sexual tension. But in *Philips*, without reference to the type of claim  
2 presented or the legal standard to be applied, the Ninth Circuit stated that “the  
3 Navy has explained that in its judgment separating members who engage in  
4 homosexual acts is necessary to further military effectiveness by maintaining unit  
5 cohesion, accommodating personal privacy and reducing sexual tension,” and the  
6 Court of Appeals concluded that “we cannot say that the Navy’s concerns are  
7 based on ‘mere negative attitudes, or fear,’” “[n]or can we say that avoiding sexual  
8 tensions lacks any ‘footing in the realities’ of military life. *Philips*, 106 F.3d at  
9 1429 (recognizing that same determination applies to substantive due process  
10 analysis set in *Beller v. Middendorf*, 632 F.2d 788, 810-11 (9th Cir. 1980) and  
11 subsequent equal protection challenges).<sup>9</sup>

12 The Ninth Circuit has squarely held, moreover, that because an equal  
13 protection challenge to a federal enactment arises under the Fifth Amendment’s  
14 Due Process clause, “the rational basis test is identical under the two rubrics [of  
15 equal protection and due process].” *Munoz v. Sullivan*, 930 F.2d 1400, 1404 (9th  
16 Cir. 1991). The Ninth Circuit in *Philips* thus rejected any distinction between  
17 rational basis review under the rubric of equal protection and under the rubric of  
18 substantive due process, stating that “substantive due process and equal protection  
19 doctrine. . . are intertwined for purposes of equal protection analyses of federal  
20 action.” 106 F.3d at 1427 (internal quotation marks and citation omitted).

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23 <sup>9</sup> The Ninth Circuit is not alone in finding that these bases provide a basis on which  
24 Congress could rationally have acted. *See, e.g., Steffan v. Perry*, 41 F.3d 677, 692 (D.C. Cir.  
25 1994) (en banc); *Thomasson v. Perry*, 80 F.3d 915, 929-30 (4th Cir. 1996) (en banc). Indeed,  
26 courts have consistently upheld the authority of Congress and the military under the DADT  
27 policy to discharge those who engage in homosexual conduct. *See, e.g., Holmes v. California*  
28 *Army National Guard*, 124 F.3d 1126 (9th Cir. 1997); *Philips v. Perry*, 106 F.3d 1420 (9th Cir.  
1997); *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008); *Able v. United States*, 155 F.3d 628, 631-36  
(2d Cir. 1998); *Richenberg v. Perry*, 97 F.3d 256, 260-62 (8th Cir. 1996); *Thomasson v. Perry*,  
80 F.3d 915, 927-31, 934 (4th Cir. 1996) (en banc).

1 Nor does *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d  
2 508 (2003), alter the conclusion reached in *Munoz* and *Philips*. In *Lawrence*, the  
3 Supreme Court ruled that there was no governmental interest that could support  
4 criminalizing sodomy. 539 U.S. at 576-77 (recognizing that there is no  
5 “governmental interest” served by criminalizing sodomy). But *Lawrence* does not  
6 help Plaintiff here. The Ninth Circuit has specifically rejected the contention that  
7 *Lawrence* requires “a more searching review” absent a “suspect classification.”  
8 *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1142 (9th Cir. 2009). And the Court has  
9 already rejected any claim of suspect classification here (Doc. 83 at 19). *Lawrence*  
10 thus does not alter the nature of the rational basis in this case.<sup>10</sup>

11 *Lawrence*, moreover, did not address the application of a non-criminal  
12 policy in the “special circumstances and needs of the armed forces.” *Philips*, 106  
13 F.3d at 1426 (internal quotation marks omitted). Indeed, in his opinion for the  
14 Ninth Circuit rejecting the facial substantive due process challenge in *Beller*, then-  
15 Judge Kennedy foreshadowed this very distinction – *i.e.*, between the  
16 Government’s authority to criminalize sodomy done in the privacy of the home by  
17 consenting civilian adults and Congress’s authority to require those serving in the  
18 military to refrain from engaging in homosexual conduct. Noting that the  
19 military’s then-extant separation policy, was not one “in which the state seeks to  
20 use its criminal processes to coerce persons to comply with a moral precept even if  
21 they are consenting adults acting in private without injury to each other,” the Court  
22 applied the deferential constitutional standard of review that applies to regulations  
23

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24  
25 <sup>10</sup> Indeed, the Ninth Circuit addressed a substantive due process challenge to the earlier,  
26 more restrictive policy on homosexuals in the military in *Beller*, 632 F.2d at 810-11. The Ninth  
27 Circuit in *Witt* concluded that *Beller* had been overruled by subsequent Supreme Court precedent  
28 involving as-applied challenges, and thus did not foreclose an as-applied challenge to the DADT  
statute. *See Witt*, 527 F.3d at 819-20 & n.9. But *Witt* did not abrogate *Beller*’s holding that  
facial challenges to the military’s more restrictive version of DADT would fail. And a facial  
challenge is the only type that LCR presents here.

1 in the military context and held that the Government’s policy was constitutional.  
 2 632 F.2d at 810.<sup>11</sup>

3 The Ninth Circuit’s decision in *Witt* confirms that LCR’s substantive due  
 4 process challenge cannot succeed. The *Witt* panel reaffirmed that the statute  
 5 “advances an important governmental interest. DADT concerns the management  
 6 of the military, and judicial deference to . . . congressional exercise of authority is  
 7 at its apogee when legislative action under the congressional authority to raise and  
 8 support armies and makes rules and regulations for their government is  
 9 challenged.” 527 F.3d at 821 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70, 101 S.  
 10 Ct. 2646, 69 L. Ed. 2d 478 (1981)). Because such an interest was found to satisfy  
 11 even heightened scrutiny, it necessarily satisfies rational basis review; a statute that  
 12 serves such a “legitimate governmental objective” is rational, and a party cannot  
 13 “plausibly assert a substantive due process violation.” *Lone Star Sec. & Video,*  
 14 *Inc. v. City of Los Angeles*, 584 F.3d 1232, 1236 (9th Cir. 2009). Defendants are  
 15 entitled to judgment as a matter of law on LCR’s due process claim.

16 **3. No Genuine Question of Material Fact Exists with Respect**  
 17 **To LCR’s Substantive Due Process Claim**

18 Plaintiff has not met its burden of presenting evidence that negates the  
 19 constitutionality of every possible application of the DADT statute as it is required  
 20 to do. *See Salerno*, 481 U.S. at 745.

21 Congress judged that Section 654 was necessary to address, among other  
 22 things, unit cohesion, privacy, and sexual tension. In a facial challenge to a statute  
 23 governed by rational basis, the Government “has no obligation to produce evidence  
 24

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25  
 26 <sup>11</sup> The same conclusion was reached by the First Circuit in *Cook v. Gates*, 528 F.3d 42  
 27 (1st Cir. 2008), which summarily rejected plaintiffs’ facial challenge to the DADT policy.  
 28 *See id.* at 56-57 (recognizing that the *Lawrence* Court “made it abundantly clear that there are  
 many types of sexual activity that are beyond the reach of that opinion[.]” and the legitimate  
 governmental interests served by unit cohesion within the military fall outside of *Lawrence*).

1 to sustain the rationality of a statutory classification” set forth in the statute,  
 2 *Philips*, 106 F.3d at 1425 (quoting *Heller*, 509 U.S. at 320). Such a choice is not  
 3 subject to “fact finding” – and may be based on “rational speculation unsupported  
 4 by evidence or empirical data.” *Philips*, 106 F.3d at 1425 (quotations and citations  
 5 omitted). “[C]ourts are compelled under rational-basis review to accept a  
 6 legislature’s generalizations even when there is an imperfect fit between means and  
 7 ends.” *Id.* (same). Judicial deference is greatest when, as here, legislative action is  
 8 taken under the “congressional authority to raise and support armies and [to] make  
 9 rules and regulations for their governance[.]” *Id.*<sup>12</sup>

10 The Court determined that LCR’s facial challenge is governed by rational  
 11 basis review. Supreme Court precedent instructs that courts are not “to go beyond  
 12 the statute’s facial requirements and speculate about ‘hypothetical’ or ‘imaginary’  
 13 cases.” *Washington State Grange*, 552 U.S. at 450. Section 654, furthermore,  
 14 must be reviewed at the time of enactment and is not subject to challenge on the  
 15 ground of changed circumstances. *See, e.g., United States v. Jackson*, 84 F.3d  
 16 1154, 1161 (9th Cir. 1996); *Montalvo-Huertas v. Rivera-Cruz*, 885 F.2d 971, 977  
 17 (1st Cir. 1989) (“evaluating the continued need for, and suitability of, legislation of  
 18 this genre is exactly the kind of policy judgment that the rational basis test was  
 19 designed to preclude.”). Indeed, courts have found that even where Congress has  
 20 determined that a previous enactment is no longer necessary, that finding does not  
 21 render the statute unconstitutional. *Smart v. Ashcroft*, 401 F.3d 119, 123 (2d Cir.  
 22 2005); *Howard v. U.S. Dept. of Defense*, 354 F.3d 1358, 1361-62 (Fed. Cir. 2004).  
 23 Were it otherwise, all legislation subject to rational basis review – even legislation

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24  
 25 <sup>12</sup> As Judge Noonan pointedly recognized in his concurring opinion in *Philips*,  
 26 permitting judges to weigh the merits of such a policy requires courts to “assign to [themselves]  
 27 a responsibility for a supervision of military discipline unknown to the Constitution and our  
 28 traditions and beyond [their assigned] roles as judges of the United States.” *Id.* at 1430. Such  
 judgments are based upon the professional judgment of Congress and the military – and are not  
 amenable to factual or “empirical” proof. *Id.*

1 authoritatively sustained as constitutional by the Supreme Court – could potentially  
2 be subject to periodic judicial review on the basis of changed circumstances, a  
3 prospect incompatible with these principles and the well known and repeated  
4 admonition that “a legislative choice is not subject to courtroom factfinding and  
5 may be based on rational speculation unsupported by evidence or empirical data.”  
6 *Heller*, 509 U.S. at 320. Accordingly, there is no need for a trial because the Court  
7 must adjudicate the policy based upon what Congress could have considered in  
8 1993.

9 LCR designated seven “experts” who opined on the wisdom of the policy,  
10 offering a variety of views ranging from the fiscal impact of the policy to how  
11 polls conducted recently purportedly instruct the political branches to repeal the  
12 statute.<sup>13</sup> Even if such second-guessing of military policy were appropriate at all  
13 (and even if it were admissible under Federal Rule of Evidence 702), such  
14 testimony is irrelevant to the questions in this case. The testimony does not show  
15 that there are no possible times where discharge of a member of the military who  
16 engages in homosexual conduct is appropriate to advance the interests Congress  
17 deemed paramount, or that Congress could not have rationally reached a  
18 conclusion different from that offered by Plaintiff’s experts.

19 Quite the contrary, LCR’s own experts acknowledged that Congress could  
20 rationally have considered the privacy and sexual tension rationales in enacting the  
21 statute. LCR has designated as one of its experts Dr. Nathaniel Frank of the Palm  
22 Center, who was asked in his deposition about the privacy interests that Congress  
23 identified as a basis for the policy. Dr. Frank acknowledged that privacy concerns  
24 such as those on which Congress relied were not irrational. (Frank Dep. 44:18-22,  
25  
26

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27 <sup>13</sup> LCRs “experts” ultimately seek to challenge the wisdom of the DADT policy, a  
28 challenge that is irrelevant under rational basis review.

1 Feb. 26, 2010, Ex. 3).<sup>14</sup> And Dr. Frank himself offered specific examples that  
 2 reinforce the *Philips* court’s acknowledgment that sexual tension has “footing in  
 3 the realities” of military life. 106 F.3d at 1429 (internal citation omitted). *See, e.g.*  
 4 Frank Dep. 187:14-188:17, 188:18-189:11, Ex. 3 (providing testimony of service  
 5 members); Frank Dep. 116:19-118:6, Ex. 3 (regarding feasibility of  
 6 accommodations).

7 LCR also designated Aaron Belkin, also of the Palm Center, as an expert.  
 8 Dr. Belkin acknowledged that the privacy basis is rational in circumstances such as  
 9 combat where private accommodations are not possible (Belkin Dep. 34:23-35:11,  
 10 Mar. 5, 2010, Ex. 4).<sup>15</sup> Indeed, Dr. Belkin studied the experience of the Israeli  
 11 military and found that heterosexual concern about privacy necessitated, in certain  
 12 instances, separate accommodations or work arrangements for heterosexual service  
 13 members (Belkin Dep. 74:8-75:19, Ex. 4). Dr. Belkin also acknowledged similar  
 14 findings with respect to Congress’ concern regarding sexual tension within the  
 15 military. Belkin Dep. 46:3-19; 169:7-22, Ex. 4. He also pointedly admitted that  
 16 “people in the military have sex with each other” (Belkin Dep. 134:19-20, Ex. 4),  
 17 and that members have “sex with other members of the same sex” (Belkin Dep.  
 18 168:17-19; 135:2-7; 135:6-20, Ex. 4). Thus even LCR’s own experts acknowledge  
 19

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20 <sup>14</sup> Later, Dr. Frank was asked if he felt concerns about privacy were irrational:

21 A: Let me try to answer that question this way: Some people in the  
 22 military have a desire not to serve with gay people because they feel that it  
 23 is an invasion of their privacy. I’m not comfortable concluding that some  
 24 people’s feelings and desires are irrational, that those people’s desires and  
 feelings are irrational.

25 (Frank Dep. 46:24-47:7, Ex. 3.)

26 <sup>15</sup> Dr. Belkin was questioned about the privacy rationale, and testified that the rationale is  
 27 based upon a “range of reasons” – “shyness,” “religious reasons,” discomfort, or simple  
 28 embarrassment – none of which is grounded in moral animus (Belkin Dep. 31:20-33:5; 170:16-  
 171:1; 172:5-173:19, Ex. 4).

1 that Congress could rationally have credited the privacy and sexual tension  
2 rationales when it passed Section 654. *See* Belkin Dep. 174:3-10, Ex. 4 (regarding  
3 feasibility of accommodations).

4 In short, Plaintiff's facial challenge presents no triable issue of fact. Under  
5 settled case law governing rational review generally and governing review of  
6 DADT policy in particular, the bases Congress set forth in the statute are sufficient  
7 to survive rational basis review. And Plaintiff's expert testimony, even if  
8 admissible or relevant, is insufficient to create a legitimate issue as to whether  
9 those bases are rational or whether (as Plaintiff has the burden of proving) there is  
10 no constitutional application of DADT. Defendants are thus entitled to summary  
11 judgment with respect to LCR's facial due process claim.

12 **C. Plaintiff's First Amendment Challenge Fails Because the DADT**  
13 **Policy and Testimony Establish that Service Members Are Not**  
14 **and Have Not Been Discharged for Statements Other Than to**  
15 **Show a Propensity or Intent to Engage in Homosexual Acts**

16 In addition to the due process claim addressed above, LCR alleges that the  
17 DADT policy violates the First Amendment by "restricting, punishing and chilling  
18 . . . speech that would tend to identify [LCR's] members and other members of the  
19 United States Armed Forces as gays or lesbians" (Doc. 25 ¶ 47). This Court  
20 already has dismissed LCR's First Amendment claim to the extent it asserts that  
21 DoD may not use a service member's statement of homosexuality as an admission  
22 of the service member's propensity to engage in homosexual acts (Doc. 83 at 21-  
23 22). Such use of speech, the Court held, is expressly permitted by the Ninth  
24 Circuit's decision in *Holmes*, 124 F.3d at 1136. This Court allowed LCR to pursue  
25 the First Amendment claim only insofar as it asserts that service members are  
26 discharged under Section 654 based upon a statement that they are homosexual that  
27 is not used as an admission of a propensity to engage in homosexual acts (Doc. 83  
28

1 at 23-24). Based on the record herein, the government is entitled to summary  
2 judgment on what remains of LCR's First Amendment claim as well.

3 In permitting LCR to pursue its claim that Section 654 permits discharge  
4 based on statements that are not used as an admission of a propensity or intent to  
5 engage in homosexual acts, this Court held that it was unable to resolve this claim  
6 on the pleadings, and specifically referenced LCR's allegations regarding John  
7 Alexander Nicholson and John Doe, the "members" on whom the LCR relies for  
8 its organizational standing.<sup>16</sup> The Court did not explain how the purported  
9 application of DADT to those members was relevant to LCR's First Amendment  
10 claim, which LCR has consistently maintained is a facial, not an as-applied,  
11 challenge. And the Supreme Court has recently stated that facial challenges  
12 present an inappropriate vehicle for challenging how a particular statute is applied.  
13 *See Gonzales v. Carhart*, 550 U.S. 124, 168, 127 S. Ct. 1610, 167 L. Ed. 2d 480  
14 (2007) (recognizing, in the First Amendment context, that "[i]t is neither [the  
15 court's] obligation nor within [the court's] traditional institutional role to resolve  
16 questions of constitutionality with respect to each potential situation that might  
17 develop."). The Court recognized that as-applied challenges provide "the basic  
18 building blocks of constitutional adjudication." *Id.* (citation omitted).

19 In any event, discovery has now shown that Mr. Nicholson was discharged  
20 because his statement was an admission of his propensity to engage in homosexual  
21 acts, which he chose not to seek to rebut. Mr. Nicholson testified in his deposition  
22 that he gave his commander a letter stating that "[a]fter considerable thought, [he  
23 had] come to the decision to make the very difficult disclosure that [he was] gay"

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24  
25  
26 <sup>16</sup> The Court said, "This Court cannot determine from the face of the [First Amended  
27 Complaint] whether Nicholson was, or Doe could yet be, discharged based on statements alone.  
28 The [amended complaint] does not allege Nicholson or Doe was discharged, or is subject to  
discharge, merely for a self-identifying statement regarding his homosexuality" (Doc. 83 at 23-  
24).

1 (Nicholson Dep. 43:17-44:6, 58:21-59:12, Ex. 2 & Ex. 46. Mr. Nicholson stated in  
2 the letter, moreover, that he knew this disclosure would “require[ ] [his]  
3 involuntary discharge,” but that he “chose to simply tell the truth and come out”  
4 (Nicholson Dep. 51:1-9, Ex. 2 & Ex. 46). Further, Mr. Nicholson’s attorney stated  
5 in his own letter to the commander that Mr. Nicholson had asked the attorney “to  
6 assist [him] in disclosing his sexual orientation to the Army” (Nicholson Dep.  
7 59:18-60:3, Ex. 2 & Ex. 47). The attorney’s letter also stated that Mr. Nicholson  
8 was aware that this disclosure “create[d] a rebuttable presumption that he [had] the  
9 propensity to engage in ‘homosexual conduct,’” but that Mr. Nicholson “elect[ed]  
10 not to rebut this presumption” (Nicholson Dep. 62:2-63:3, Ex. 2 & Ex. 47). Thus,  
11 as Mr. Nicholson testified, his discharge from the Army was the result of his  
12 admission of a likelihood of engaging in homosexual acts, which he chose not to  
13 rebut (Nicholson Dep. 63:4-11, 75:21-76:4, Ex. 2).

14 As for the anonymous John Doe on whom LCR also seeks to rely, the  
15 Chairman of the national board of directors of LCR, Mr. Terry Hamilton, testified  
16 at his deposition that Mr. Doe remains a member of the military, and thus has not  
17 been discharged – whether because of a statement or for any other reason  
18 (Hamilton Dep. 8:16-21, 33:17-35:20, Ex. 1). There can be no doubt, therefore,  
19 that no statement has been used as the basis to discharge John Doe under the  
20 challenged statute or otherwise.<sup>17</sup>

21 Accordingly, the undisputed facts put forth by LCR establish that service  
22 members who state that they are homosexual are discharged under the policy solely  
23 because such statements establish the service members’ propensity to engage in  
24

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25  
26 <sup>17</sup> In any event, since implementation of the DADT policy in any instance depends on  
27 conduct rather than speech, *see Holmes*, 124 F.3d at 1136, the policy does not infringe upon any  
28 First Amendment “right to communicate the core of [one’s] emotions and identity to others,” as  
invoked by both Mr. Nicholson and John Doe (Doc. 26 ¶ 8; Doc. 39 ¶ 7).

1 homosexual acts.<sup>18</sup> LCR's First Amendment claim is without merit, and  
2 Defendants are entitled to summary judgment on that claim as well.

3 **V. CONCLUSION**

4 For the foregoing reasons, Defendants are entitled to summary judgment.

5 Dated: March 29, 2010

6 Respectfully submitted,

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24 <sup>18</sup> Given that LCR has presented no member to whom the policy has been applied based  
25 upon a statement of homosexuality, where that statement was used for a purpose other than as an  
26 admission of a propensity to engage in homosexual acts, LCR also lacks associational standing  
27 to pursue its remaining First Amendment claim. *See Valley Forge Christian College v.*  
28 *Americans United for Separation of Church & State*, 454 U.S. 464, 476 n.14, 102 S. Ct. 752, 70  
L.Ed.2d 700 (1982) (where organization relies entirely on associational standing, "its claim to  
standing can be no different from those of the members it seeks to represent").