

1 TONY WEST
Assistant Attorney General
2 ANDRE BIROTTE, Jr.
United States Attorney
3 JOSEPH H. HUNT
VINCENT M. GARVEY
4 PAUL G. FREEBORNE
W. SCOTT SIMPSON
5 JOSHUA E. GARDNER
RYAN B. PARKER
6 U.S. Department of Justice
Civil Division
7 Federal Programs Branch
P.O. Box 883
8 Washington, D.C. 20044
Telephone: (202) 353-0543
9 Facsimile: (202) 616-8460
E-mail: paul.freeborne@ usdoj.gov

10 *Attorneys for Defendants United States*
11 *of America and Secretary of Defense*

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

TABLE OF CONTENTS

	<u>page</u>
I. INTRODUCTION	1
II. THE DADT POLICY	4
III. ARGUMENT	8
A. LCR Has Failed To Satisfy The Minimum Requirements Of Organizational Standing And Defendants Are Entitled To Summary Judgment On That Basis Alone.	8
B. Because Congress Could Rationally Have Concluded That The DADT Policy Is Necessary To Maintain Unit Cohesion, Accommodate Personal Privacy, and Reduce Sexual Tension For Military Effectiveness, LCR's Facial Due Process Challenge Fails	13
1. Standard	13
2. Plaintiff's Due Process Claim Fails as a Matter of Law	15
3. No Genuine Question of Material Fact Exists with Respect To LCR's Substantive Due Process Claim	18
C. Plaintiff's First Amendment Challenge Fails Because the DADT Policy and Testimony Establish that Service Members Are Not and Have Not Been Discharged for Statements Other Than to Show a Propensity or Intent to Engage in Homosexual Acts	22
IV. CONCLUSION	25

TABLE OF AUTHORITIES

CASES

<i>Able v. United States</i> , 155 F.3d 628 (2d Cir. 1998)	16
<i>Beller v. Middendorf</i> , 632 F.2d 788 (9th Cir. 1980)	16, 17, 18
<i>Biodiversity Legal Found. v. Badgley</i> , 309 F.3d 1166 (9th Cir. 2002)	8, 10
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. E2d (1986)	15
<i>City of Chicago v. Morales</i> , 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999)	13
<i>City of Los Angeles v. Lyons</i> , 461 U.S. 95, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)	12
<i>Cook v. Gates</i> , 528 F.3d 42 (1st Cir. 2008)	16, 18
<i>Fed. Commuc'ns Comm'n v. Beach Commc'ns</i> , 508 U.S. 307, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993)	14
<i>Friends of the Earth v. Laidlaw Envir. Servs.</i> , 528 U.S. 167, 328 U.S. 167, 145 L. Ed. 2d 610 (2000)	10, 11
<i>Gange Lumber Co. v. Rowley</i> , 326 U.S. 295, 66 S. Ct. 125, 90 L. Ed. 85 (1945)	12
<i>Gonzales v. Carhart</i> , 550 U.S. 124, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007)	23
<i>Heller v. Doe</i> , 509 U.S. 312, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993)	14, 20
<i>Hodgers-Durgin v. de la Via</i> , 199 F.3d 1037 (9th Cir. 1999)	12
<i>Holmes v. California Army National Guard</i> , 124 F.3d 1126 (9th Cir. 1997)	<i>passim</i>
<i>Howard v. U.S. Dept. of Defense</i> , 354 F.3d 1358 (Fed. Cir. 2004)	19
<i>Hunt v. Washington State Apple Advertising Comm'n</i> , 432 U.S. 333, 97 S. Ct. 2434, 53 L.Ed.2d 383 (1977)	4, 8
<i>Ileto v. Glock, Inc.</i> , 565 F.3d 1126 (9th Cir. 2009)	17

1	<i>Lawrence v. Texas,</i>	
2	539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)	17
3	<i>Lehnhausen v. Lake Shore Auto Parts Co.,</i>	
4	410 U.S. 356, 93 S. Ct 1001, 35 L. Ed. 2d 351 (1973)	14
5	<i>Lone Star Sec. & Video, Inc. v. City of Los Angeles,</i>	
6	584 F.3d 1232 (9th Cir. 2009)	18
7	<i>Lujan v. Defenders of Wildlife,</i>	
8	504 U.S. 555, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992)	8
9	<i>Montalvo-Huertas v. Rivera-Cruz,</i>	
10	885 F.2d 971 (1st Cir. 1989)	19
11	<i>Munoz v. Sullivan,</i>	
12	930 F.2d 1400 (9th Cir. 1991)	16
13	<i>Nat'l Treasury Employees Union v. Dep't of the Treasury,</i>	
14	25 F.3d 237 (5th Cir. 1994)	12
15	<i>Newton v. Thomason,</i>	
16	22 F.3d 1455 (9th Cir. 1994)	14
17	<i>Philips v. Perry,</i>	
18	106 F.3d 1420 (9th Cir. 1997)	<i>passim</i>
19	<i>Richenberg v. Perry,</i>	
20	97 F.3d 256 (8th Cir. 1996)	16
21	<i>Schmier v. U.S. Court of Appeals,</i>	
22	279 F.3d 817 (9th Cir. 2002)	8
23	<i>Smart v. Ashcroft,</i>	
24	401 F.3d 119 (2d Cir. 2005)	19
25	<i>Steffan v. Perry,</i>	
26	41 F.3d 677 (D.C. Cir. 1994)	6, 16
27	<i>Thomasson v. Perry,</i>	
28	80 F.3d 915 (4th Cir. 1996)	16
	<i>United States v. Inzunza,</i>	
	580 F.3d 896	13
	<i>United States v. Jackson,</i>	
	84 F.3d 1154 (9th Cir. 1996)	19
	<i>United States v. Salerno,</i>	
	481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)	13, 15, 18
	<i>Valley Forge Christian College v. Americans United for</i>	
	<i>Separation of Church & State,</i>	
	454 U.S. 464, 102 S. Ct. 752, 70 L.Ed.2d 700 (1982)	25

<i>Vance v. Bradley</i> , 440 U.S. 93, 99 S. Ct. 939, 59 L. Ed. 171 (1979)	14
<i>Vt. Agency of Natural Res. v. United States ex rel. Stevens</i> , 529 U.S. 765, 529 U.S. 765, 120 S. Ct. 1858 (2000)	11
<i>Washington Legal Found. v. Leavitt</i> , 477 F. Supp. 2d 202 (D.D.C. 2007)	8, 10, 11
<i>Washington State Grange v. Washington State Republican Party</i> , 552 U.S. 442 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008)	1, 13, 19
<i>Western & Southern Life Ins. Co. v. State Bd. of Equalization</i> , 451 U.S. 648, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981)	14
<i>Witt v Dep't of the Air Force</i> , 527 F.3d 806 (9th Cir. 2008)	<i>passim</i>
<i>Young America's Found. v. Gates</i> , 560 F. Supp. 2d 39 (D.D.C. 2008)	12

STATUTES

10 U.S.C. § 654	<i>passim</i>
-----------------------	---------------

FEDERAL RULE OF CIVIL PROCEDURE

Rule 12(b)(6)	14
Rule 56	14

LEGISLATIVE MATERIAL

S. Rep. No. 112, 103rd Cong., 1st Sess., 1993 WL 286446	4, 5, 6
---	---------

1 **I. INTRODUCTION**

2 The Log Cabin Republicans (“LCR”) pursue a facial challenge to the
3 constitutionality of the statute (10 U.S.C. § 654, hereafter “Section 654”) and the
4 Department of Defense’s (“DoD’s”) implementing regulations that subject service
5 members who have engaged in homosexual conduct in the military to separation,
6 commonly known as the “Don’t Ask, Don’t Tell” (“DADT”) policy.¹ Plaintiff
7 faces a high burden. As the Supreme Court has made clear, facial challenges such
8 as Plaintiff’s here are “disfavored,” because they “run contrary to principles of
9 judicial restraint” and “threaten to short circuit the democratic process.”
10 *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442,
11 451, 128 S. Ct. 1184, 1190, 170 L. Ed. 2d 151 (2008). And where, as here, rational
12 basis review applies, the only question presented is whether Congress “rationally
13 could have believed” that the conditions of the statute would promote its objective.
14 Unsurprisingly, every court to have decided the question has upheld the DADT
15 statute and the implementing regulations against facial constitutional attack, and
16 this Court is bound to do the same. As this Court is aware, the President of the
17 United States has called for the repeal of DADT, the Secretary of Defense initiated
18 a working group to study how to implement any such Congressional repeal, and
19 Congress is now holding hearings to consider the *policy* question of whether to
20 retain the current law. But those developments do not alter the fact that the statute
21 Congress enacted in 1993 passes constitutional muster.

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

26 ¹ On March 25, 2010, DoD issued revised Instructions to refine the administrative
27 procedures used to implement the statute. Plaintiff challenges the constitutionality of the DADT
28 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.²

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
21

22 ² 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).³

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
15

16 ³ 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).

26
27
28

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).⁴ 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.

26
27
28 ⁴ The transcript of the deposition of Terry Hamilton and of all other depositions cited
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 189.⁵

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 ⁵ Prior to filing this motion, Defendants’ counsel conferred with Plaintiff’s counsel and
21 advised him that one of the bases of Defendants’ motion would be that Plaintiff has failed to
22 identify any current member of LCR who could confer associational standing upon LCR, in part
23 because Mr. Nicholson testified in his deposition that he failed to pay dues required for LCR
24 membership. Following the conferral, Plaintiff’s counsel sent Defendants’ counsel an e-mail
25 stating that Mr. Nicholson’s annual dues were “presently” “paid in full.” Even if true (and
26 attorney representations are, of course, not evidence), the statement of Plaintiff’s counsel merely
27 confirms that Mr. Nicholson was not a bona fide member of LCR at the commencement of this
28 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”).⁶ 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.”⁷ Because Plaintiff has failed to demonstrate standing, this Court lacks
17 subject-matter jurisdiction, and Defendants are entitled to summary judgment.

21 ⁶ 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
establish harm necessary for standing).

24 ⁷ The membership deficiencies identified through discovery regarding Mr. Nicholson,
25 moreover, should cause the Court to be skeptical of LCR’s invitation to rely on its assertions
26 about an anonymous John Doe as the basis to adjudicate a facial constitutional challenge to a
27 statute that the Ninth Circuit already has determined to have been supported by a rational basis.
28 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).

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

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

1. Standard

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

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

⁸ The Ninth Circuit has made clear that "[o]ur court adheres to [the *Salerno*] standard, notwithstanding the plurality opinion in the *City of Chicago v. Morales*, 527 U.S. 41, 119 S. Ct. 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).⁹

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).

23 ⁹ 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.¹⁰

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

24 ¹⁰ Indeed, the Ninth Circuit addressed a substantive due process challenge to the earlier,
25 more restrictive policy on homosexuals in the military in *Beller*, 632 F.2d at 810-11. The Ninth
26 Circuit in *Witt* concluded that *Beller* had been overruled by subsequent Supreme Court precedent
27 involving as-applied challenges, and thus did not foreclose an as-applied challenge to the DADT
28 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 810.¹¹

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

25
26 ¹¹ 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.*¹²

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
24

25 ¹² 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.¹³ 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

27 ¹³ 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).¹⁴ 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).¹⁵ 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

20 ¹⁴ 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 ¹⁵ 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.¹⁶ 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"

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

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

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

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

¹⁷ In any event, since implementation of the DADT policy in any instance depends on conduct rather than speech, *see Holmes*, 124 F.3d at 1136, the policy does not infringe upon any 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).

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

V. CONCLUSION

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

Dated: March 29, 2010

Respectfully submitted,

TONY WEST
Assistant Attorney General

ANDRÉ BIROTTE, Jr.
United States Attorney

JOSEPH H. HUNT
Branch Director

VINCENT M. GARVEY
Deputy Branch Director

/s/ Paul G. Freeborne
PAUL G. FREEBORNE
W. SCOTT SIMPSON
JOSHUA E. GARDNER
RYAN B. PARKER
Trial Attorneys
U.S. Department of Justice,
Civil Division
Federal Programs Branch
20 Massachusetts Ave., N.W.
Room 6108
Washington, D.C. 20044
Telephone: (202) 353-0543
Facsimile: (202) 616-8202
paul.freeborne@usdoj.gov

*Attorneys for Defendants United States of
America and Secretary of Defense*

¹⁸ Given that LCR has presented no member to whom the policy has been applied based upon a statement of homosexuality, where that statement was used for a purpose other than as an admission of a propensity to engage in homosexual acts, LCR also lacks associational standing to pursue its remaining First Amendment claim. *See Valley Forge Christian College v. 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").