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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LOG CABIN REPUBLICANS, a)	Case No. CV 04-8425-VAP (Ex)
non-profit corporation,)	
Plaintiff,)	[Motion filed on June 12,
v.)	2006]
UNITED STATES OF AMERICA)	ORDER DENYING IN PART AND
and DONALD H. RUMSFELD,)	GRANTING IN PART MOTION TO
SECRETARY OF DEFENSE, in)	DISMISS
his official capacity,)	
Defendants.)	

Defendants United States of America and Donald Rumsfeld's ("Defendants") Motion to Dismiss ("Motion") came before the Court for hearing on March 9, 2009. After reviewing and considering all papers filed in support of, and in opposition to, the Motion, as well as the arguments advanced by counsel at the hearing, the Court grants the Motion in part and denies it in part.

Log Cabin Republicans, ("Plaintiff" or "Plaintiff association"), a nonprofit corporation whose membership

1 includes current, retired, and former homosexual¹ members
2 of the U.S. armed forces, challenges as "restrictive,
3 punitive . . . discriminatory," and unconstitutional the
4 "Don't Ask Don't Tell" policy ("DADT") of Defendants,
5 including both the statute codified at 10 U.S.C. section
6 654 and the implementing regulations appearing at
7 Department of Defense Directives ("DoDD" or "implementing
8 regulations") 1332.14, 1332.30, and 1304.26. (First
9 Amended Complaint ("FAC") ¶ 6.) Defendants' Motion to
10 Dismiss ("Motion") Plaintiff's FAC is now before the
11 Court.²

13 I. BACKGROUND

14 A. Facts

15 1. Plaintiff and its members

16 Assuming all the facts in Plaintiff's FAC are true,
17 as the Court must when considering a motion to dismiss
18 under Rule 12(b)(6), Plaintiff is a nonprofit corporation
19 dedicated to the interests of homosexuals and organized
20 under the laws of the District of Columbia. (FAC ¶ 10.)
21 Plaintiff's members include current, retired, and former
22 members of the U.S. armed forces who seek to serve
23 "without fear of investigation, discharge, stigma,

24
25 ¹The Court uses the term "homosexual" for the sake of
26 consistency with the Ninth Circuit's opinion in Witt v.
Dep't of the Air Force, 527 F.3d 806 (9th Cir. 2008).

27 ²The case was transferred to this Court's docket on
28 October 8, 2008, upon the resignation of the Honorable
George P. Schiavelli.

1 forfeiture of fundamental liberties, harassment and other
2 negative repercussions" imposed in connection with their
3 homosexuality. (FAC ¶¶ 8, 12, 17.)

4
5 **a. Current members of the armed forces**

6 Plaintiff association includes homosexual persons
7 currently in the armed forces, among them "John Doe,"
8 ("Doe") a homosexual man, who submitted a declaration in
9 support of the FAC. (FAC ¶¶ 17-21.) DADT prevents Doe
10 from "communicat[ing] the core of his emotions and
11 identity to others" and from exercising his
12 "constitutionally protected right to engage in private,
13 consensual homosexual conduct without intervention of the
14 government." (FAC ¶ 20.)³

15
16 Doe fears that making his name public in connection
17 with this action will subject him to "investigation and
18 discharge" as well as "other possible harm." (FAC ¶ 21.)

19
20 **b. Retired members of the armed forces**

21 Plaintiff's members also include retired armed forces
22 personnel who are homosexuals. They remain subject to
23 DADT and "fear exercising their constitutional rights. .
24 . or making public their own names" as they fear

25
26
27 _____
28 ³Plaintiff does not define "private, consensual
homosexual conduct."

1 Defendants might deny them retirement benefits. (FAC ¶
2 22.)

3

4 **c. Former members of the armed forces**

5 Those separated from the armed forces pursuant to
6 DADT, including John Alexander Nicholson ("Nicholson"),
7 are also members of Plaintiff association. (FAC ¶¶ 6, 7,
8 12.) Nicholson is homosexual, fluent in several
9 languages, including Arabic, and has a Bachelor's degree
10 in International Relations. He enlisted in the U.S. Army
11 in 2001 and received training in human intelligence
12 collection. (FAC ¶ 13.) While in the Army, pursuant to
13 DADT, Defendants denied him the ability to communicate
14 his emotions and identity to others as well as the right
15 to engage in private, consensual sexual conduct with the
16 sex to whom he is attracted without the government's
17 intervention. (FAC ¶ 14.) Nicholson became subject to
18 separation proceedings pursuant to DADT in 2002 and was
19 discharged. (FAC ¶¶ 14.) His discharge caused Nicholson
20 emotional distress. (FAC ¶ 14.) DADT continues to
21 prevent Nicholson from returning to the Army. (FAC ¶
22 16.)

23

24 **2. DADT**

25 DADT includes both the statutory language appearing
26 at 10 U.S.C. section 654 and the implementing regulations
27 appearing as DoDDs 1332.14, 1332.30, and 1304.26. (FAC ¶

28

1 28.) DADT can be triggered by three kinds of "homosexual
2 conduct:" (1) by "homosexual acts"; (2) statements that
3 one "is a homosexual"; or (3) marriage or an attempt to
4 marry a person of the same biological sex. 10 U.S.C. §
5 654 (b); DoDD 1332.14 at E3.A4.2.4; 1332.30 at 1-1.

6
7 **a. "Homosexual acts"**

8 First, Defendants may initiate separation proceedings
9 if a service member engages in a "homosexual act,"
10 defined as "(A) any bodily contact, actively undertaken
11 or passively permitted, between members of the same sex
12 for the purpose of satisfying sexual desires; and (B) any
13 bodily contact which a reasonable person would understand
14 to demonstrate a propensity or intent to engage in an act
15 described in subparagraph (A)." 10 U.S.C. §§ 654 (b)(1),
16 (f)(3)(A)-(B). Such acts include holding hands and
17 kissing. (FAC ¶ 31 citing DoDD 1332.14 at
18 E3.A4.1.2.4.1.)

19
20 **b. Statements one "is a homosexual"**

21 Second, Defendants may initiate separation if a
22 service member makes a statement "he or she is a
23 homosexual . . . or words to that effect." 10 U.S.C. §
24 654(b)(2). These words create a presumption the service
25 member is a "person who engages in, attempts to engage
26 in, has a propensity to engage in, or intends to engage
27 in homosexual acts." 10 U.S.C. § 654(b). A propensity
28

1 is "more than an abstract preference or desire to engage
2 in homosexual acts; it indicates a likelihood that a
3 person engages or will engage in homosexual acts." DoDD
4 1332.14 at E3.A1.1.8.1.2.2.

5

6 **c. Marriage or attempted marriage to a person**
7 **of the same sex**

8 The third route to separation under DADT, marriage or
9 attempted marriage to a person of the same sex, is self-
10 explanatory.

11

12 **d. Discharge**

13 Once Defendants find a service member has engaged in
14 "homosexual conduct," as defined above, Defendants will
15 discharge him or her unless the service member can
16 demonstrate, by a preponderance of the evidence, that,
17 inter alia, such acts are not his or her usual or
18 customary behavior and that he or she has no propensity
19 to engage in "homosexual acts." (FAC ¶¶ 30-33); 10
20 U.S.C. § 654(b)(1); DoDD 1332.14 at E3.A1.1.8.1.2.

21

22 **3. Congressional findings of fact**

23 Congress made 15 factual findings in connection with
24 the statutory embodiment of DADT. They state, in
25 relevant part:

26

27

28

- 1 ● "There is no constitutional right to serve in the
2 armed forces." 10 U.S.C. § 654 (a)(2).
3
- 4 ● "Military life is fundamentally different from
5 civilian life in that . . . the military society is
6 characterized by its own laws, rules, customs, and
7 traditions, including numerous restrictions on
8 personal behavior, that would not be acceptable in
9 civilian society." 10 U.S.C. § 654(a)(8)(B).
10
- 11 ● "The standards of conduct for members of the armed
12 forces regulate a member's life for 24 hours each day
13 beginning at the moment the member enters military
14 status and not ending until that person is discharged
15 or otherwise separated from the armed forces." 10
16 U.S.C. § 654(a)(9).
17
- 18 ● "The presence in the armed forces of persons who
19 demonstrate a propensity or intent to engage in
20 homosexual acts would create an unacceptable risk to
21 the high standards of morale, good order and
22 discipline, and unit cohesion that are the essence of
23 military capability." 10 U.S.C. § 654(a)(15).

24
25 **4. Impact of DADT**

26 According to Plaintiff, pursuant to DADT Defendants
27 have discharged nearly 10,000 members of the U.S. armed
28

1 forces, including those in non-combat positions. (FAC ¶
2 34-36.) Nevertheless, Defendants have discharged 40%
3 fewer persons pursuant to DADT since the outbreak of the
4 wars in Afghanistan and Iraq. (FAC ¶ 36.)

5
6 **B. Procedural History**

7 Plaintiff filed its Complaint on October 12, 2004.
8 On December 13, 2004, Defendants moved to dismiss the
9 Complaint, alleging, inter alia, that Plaintiff lacked
10 standing. The Honorable George P. Judge Schiavelli
11 granted the motion to dismiss the Complaint with leave to
12 amend on March 21, 2006.

13
14 On April 28, 2006, Plaintiff timely filed its FAC,
15 attaching the declaration of Nicholson, a current member
16 of Plaintiff organization and a former member of the U.S.
17 Army. According to the FAC, DADT violates the First and
18 Fifth Amendments to the U.S. Constitution by violating
19 guarantees to: (1) substantive due process; (2) equal
20 protection; and (3) freedom of speech. On June 11, 2007,
21 Plaintiff filed the declaration of Doe, a current member
22 of Plaintiff organization, a homosexual, and a current
23 U.S. Army reservist on active duty.

24
25 On June 12, 2006, Defendants filed their Motion;
26 Plaintiff opposed; Defendants replied. After conducting
27 a hearing on the Motion and receiving supplemental
28

1 authorities from both sides, the Court entered an order
2 staying this action on May 23, 2008 in light of the Ninth
3 Circuit's May 21, 2008 decision in Witt v. Dep't of the
4 Air Force, 527 F.3d 806.

5
6 After the case was transferred to this Court in late
7 2008, it held a status conference on January 28, 2009,
8 lifted the stay, set a hearing date for the Motion, and
9 permitted the parties to submit additional authority
10 regarding the substantive due process challenge.
11 Defendants filed their supplemental brief addressing the
12 issue of substantive due process on February 17, 2009
13 ("Defs.' Supp'l Br.") and Plaintiff filed its submission
14 on February 27, 2009 ("Pl.'s Supp'l Br.").

15
16 **II. LEGAL STANDARD**

17 Under Rule 12(b)(6), a party may bring a motion to
18 dismiss for failure to state a claim upon which relief
19 can be granted. As a general matter, the Federal Rules
20 require only that a plaintiff provide "'a short and plain
21 statement of the claim' that will give the defendant fair
22 notice of what the plaintiff's claim is and the grounds
23 upon which it rests." Conley v. Gibson, 355 U.S. 41, 47
24 (1957) (quoting Fed. R. Civ. P. 8(a)(2)); Bell Atlantic
25 Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1964
26 (2007). In addition, the Court must accept all material
27 allegations in the complaint - as well as any reasonable
28

1 inferences to be drawn from them - as true. See Doe v.
2 United States, 419 F.3d 1058, 1062 (9th Cir. 2005); ARC
3 Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1096
4 (9th Cir. 2005).

5
6 "While a complaint attacked by a Rule 12(b)(6)
7 motion to dismiss does not need detailed factual
8 allegations, a plaintiff's obligation to provide the
9 'grounds' of his 'entitlement to relief' requires more
10 than labels and conclusions, and a formulaic recitation
11 of the elements of a cause of action will not do." Bell
12 Atlantic, 127 S. Ct. at 1964-65 (citations omitted).
13 Rather, the allegations in the complaint "must be enough
14 to raise a right to relief above the speculative level."
15 Id. at 1965.

16
17 Although the scope of review is limited to the
18 contents of the complaint, the Court may also consider
19 exhibits submitted with the complaint, Hal Roach Studios,
20 Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19
21 (9th Cir. 1990), and "take judicial notice of matters of
22 public record outside the pleadings," Mir v. Little Co.
23 of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988).

24 25 **III. DISCUSSION**

26 Defendants move for dismissal of Plaintiff's FAC on
27 four grounds: (1) Plaintiff lacks standing to bring suit
28

1 on behalf of current members of the armed forces; and
2 Plaintiff fails to state a claim for violation of the
3 constitutional guarantees to (2) substantive due process;
4 (3) equal protection; and (4) freedom of speech.

5
6 **A. Standing**

7 Plaintiff brings suit on behalf of its members who
8 are homosexuals and current or former members of the
9 armed forces. Pursuant to Hunt v. Washington State Apple
10 Advertising Commission, 432 U.S. 333, 343 (1977),
11 Plaintiff, as an association that has not suffered any
12 injury itself, may assert associational standing to sue
13 in a representative capacity for injuries to its members
14 by showing: (1) at least one member would have standing,
15 in his or her own right, to present the claim asserted by
16 the association; (2) the interests sought to be protected
17 are germane to the association's purpose; and (3) neither
18 the claim asserted nor the relief requested requires that
19 the members participate individually in the suit. See
20 Hunt, 432 U.S. at 343, 376-79.

21
22 **1. Standing asserted under Complaint**

23 The Court dismissed the original Complaint for lack
24 of standing because Plaintiff failed to allege compliance
25 with the first prong of the Hunt test: Plaintiff
26 "fail[ed] to identify a single individual who is (1) an
27 active member of [Plaintiff]; (2) has served or currently
28

1 serves in the Armed Forces; and (3) has been injured by
2 the policy." (March 2006 J. Schiavelli Order ("2006
3 Order") 15:11-14.) The Court required Plaintiff "to
4 identify, by name, at least one of its members injured by
5 the subject policy if it wishes to proceed with this
6 action." (2006 Order 17:9-10.)

7
8 The Court explicitly rejected Plaintiff's contention
9 it ought to be able to bring suit on behalf of current
10 members of the military without naming them because they
11 fear discharge pursuant to DADT. (2006 Order 16.)

12
13 **2. Standing asserted under the FAC**

14 Plaintiff's FAC properly alleges standing to bring
15 suit. It submits the declarations of Nicholson and Doe,
16 current members of Plaintiff organization. Defendants
17 assert Plaintiff nevertheless cannot assert the claims in
18 the FAC on behalf of current service members.⁴ (Mot.
19 7:8-9.) Defendants argue the 2006 Order requires
20 Plaintiff to name a currently serving member of the armed
21 forces. The plain text of the Order, however, requires
22 Plaintiff only to name a current member of Plaintiff
23 association, not a current member of the armed forces.
24 (Mot. 8; 2006 Order 17:8-10.) Accordingly, the Court

25 _____
26 ⁴In its most recent briefing Defendants did not
27 reiterate their challenge to Plaintiff's standing to sue
28 on behalf of former service persons. Plaintiff produced
the declaration of Nicholson, a former service member
discharged pursuant to DADT.

1 denies the Motion insofar as it is based on the claimed
2 failure to amend in compliance with the 2006 Order.

3
4 Defendants also contend Plaintiff cannot assert
5 claims on behalf of currently active service members
6 because the 2006 Order granting leave to amend did not
7 permit Plaintiff to bring suit on behalf of anonymous
8 members or former members of the armed forces, despite
9 their professed fear of investigation, discharge, and
10 loss of retirement benefits. (2006 Order 16-17, Mot. 8-
11 9.)

12
13 The Court declines to find Plaintiff's new
14 allegations insufficient to justify standing. First,
15 this is "the 'unusual case' where nondisclosure of the
16 party's identity 'is necessary . . . to protect a person
17 from harassment, injury, ridicule or personal
18 embarrassment." (Contra Mot. 9.) Does I Thru XXXIII v.
19 Advanced Textile Corp., 214 F.3d 1058, 1068 (9th Cir.
20 1981).

21
22 Even leaving aside the issue of the propriety of
23 pseudonyms, however, the allegations are sufficient.
24 Pursuant to Associated General Contractors of California,
25 Inc. v. Coalition for Economic Equity, 950 F.2d 1401,
26 1406-07 (9th Cir. 1991), the declaration of one member of
27 an association that he suffered a harm, coupled with
28

1 general assertions that other members would suffer
2 similar harm, suffices to confer standing on an
3 association. Associated Gen'l Contractors, 950 F.2d at
4 1406-07 (declaration one member was discouraged from
5 bidding on contract enough to confer standing on
6 organization to challenge ordinance regulating
7 preferences in bidding). (Opp'n 4.) Here, as in
8 Associated General Contractors, Plaintiff furnishes the
9 declaration of a named member of the organization,
10 Nicholson, stating he has been harmed, and asserts other
11 members of the association will suffer similar fates.
12 This satisfies the first prong of the Hunt test. See
13 Associated Gen'l Contractors, 950 F.2d at 1406-07; Hunt,
14 432 U.S. at 333, 341-43. Accordingly, the Court finds
15 Plaintiff has standing to bring suit on behalf of current
16 and former homosexual members of the armed forces.

17

18 **B. Substantive Due Process**

19 Plaintiff asserts DADT violates the substantive due
20 process rights of its members. Defendant moves the Court
21 to dismiss this claim. Plaintiff relies on Witt, where
22 the Ninth Circuit remanded the case for an as-applied
23 substantive due process review, and Lawrence v. Texas,
24 where the Supreme Court held a Texas criminal sodomy law
25 violated substantive due process. Witt, 527 F.3d at 821;
26 Lawrence, 539 U.S. 558, 578-79 (2003). In contrast,
27 Defendants cite older Ninth Circuit precedent,

28

1 particularly Holmes v. California Army National Guard,
2 124 F.3d 1126, 1132-36 (9th Cir. 1997) and Philips v.
3 Perry, 106 F.3d 1420, 1425-29 (9th Cir. 1997), in which
4 the Ninth Circuit upheld DADT.

5
6 **1. Witt's heightened scrutiny**

7 In its 2008 Witt decision, the Ninth Circuit adopted
8 a "heightened scrutiny" standard to assess whether DADT
9 comports with the substantive due process guarantee of
10 the U.S. Constitution. Witt, 527 F.3d at 821. The Ninth
11 Circuit adopted the following test:

12 when the government attempts to intrude
13 upon the personal and private lives of
14 homosexuals, in a manner that implicates
15 the rights identified in Lawrence, the
16 government must advance an important
17 governmental interest, the intrusion must
18 significantly further that interest, and
19 the intrusion must be necessary to
20 further that interest. In other words,
21 for the third factor, a less intrusive
22 means must be unlikely to achieve
23 substantially the government's interest.

19 Witt, 527 F.3d at 819.

21 In the same discussion, the Ninth Circuit also
22 explicitly "h[e]ld that this heightened scrutiny analysis
23 is as-applied rather than facial, . . ." and the Ninth
24 Circuit emphasized "we must determine not whether DADT
25 has some hypothetical, posthoc rationalization in
26 general, but whether a justification exists for the
27 application of the policy as applied to Major Witt." The
28

1 as-applied inquiry "is necessary to give meaning to the
2 Supreme Court's conclusion that 'liberty gives
3 substantial protection to adult persons in deciding how
4 to conduct their private lives in matters pertaining to
5 sex.'" Witt, 527 F.3d at 819.

6
7 The parties dispute the effect and application of
8 Witt here. Defendants claim it limits all substantive
9 due process challenges to DADT to as-applied rather than
10 facial attacks. (Defs.' Supp'l Br. 7.) Plaintiff argues
11 it has the right to choose its own litigation strategy,
12 including a facial challenge, and points out the
13 congruity between association standing and a facial
14 challenge. (Pl.'s Supp'l Br. 5.)

15
16 Witt expresses a strong preference for as-applied
17 challenges and clearly limits the heightened scrutiny
18 standard it announces to such challenges. For example,
19 the decision stresses consideration of "the facts of the
20 individual case," an inquiry impossible in a facial
21 challenge. Witt, 527 F.3d at 819; (see Defs.' Supp'l Br.
22 8.) Nevertheless, Defendants do not direct the Court to
23 language forbidding facial challenges or forbidding
24 associations from challenging DADT.

25
26 Accordingly, nothing in Witt bars Plaintiff from
27 asserting a facial challenge to DADT, although in doing
28

1 so it will not be able to rely upon Witt's heightened
2 scrutiny standard as the Ninth Circuit limited this
3 standard to as-applied challenges. (Contra Pl.'s Supp'l
4 Br. 3.)

5

6 **2. Lawrence's impact on Holmes**

7 As Witt does not compel the Court to deny the Motion,
8 we turn next to whether Lawrence or Holmes⁵ provides
9 guidance here.

10

11 According to Defendants, Lawrence is not pertinent,
12 because it discusses application of a criminal statute in
13 a civilian setting, and is irrelevant to the validity of
14 Holmes. (See Reply 5 citing Galbraith v. County of Santa
15 Clara, 307 F.3d 1119, 1123 (9th Cir. 2002) (discussing
16 the application of Supreme Court opinions to Ninth
17 Circuit precedent) and Miller v. Gammie, 335 F.3d 889,
18 900 (9th Cir. 2003) (en banc) (same).)

19

20 Defendants rely on Holmes in vain. The Holmes Court
21 relied on Bowers v. Hardwick, 478 U.S. 186 (1986), which

22

23

24

25 ⁵Holmes upheld DADT in the face of a substantive due
26 process challenge. See Holmes, 124 F.3d at 1136. (Mot.
27 19.) Defendants also rely on Philips for the proposition
28 that DADT is not based on mere negative attitudes and
that it responds to the unique needs of military life.
However, Philips discusses equal protection concerns, not
substantive due process. (See Mot. 19; Reply 5);
Philips, 106 F.3d at 1429.

1 Lawrence overturned. Holmes, 124 F.3d at 1136;⁶
2 Lawrence, 539 U.S. at 578 ("Bowers was not correct when
3 it was decided, and it is not correct today. It ought
4 not to remain binding precedent. Bowers v. Hardwick
5 should be and now is overruled"). Lawrence unequivocally
6 overruled Bowers; therefore, it removed the foundation on
7 which Holmes rested. (Opp'n 5 citing Lawrence, 539 U.S.
8 at 578.)
9

10 As the foundation on which Holmes rested was
11 dissolved by Lawrence, the Court cannot conclude
12 Plaintiff's substantive due process claim lacks merit.
13 The Court DENIES the Motion as to the substantive due
14 process claim.
15

16 **C. Equal Protection**

17 Plaintiff claims DADT violates the Fifth Amendment's
18 equal protection clause because (1) it treats homosexual
19 service persons differently than similarly-situated
20 heterosexual persons based on impermissible
21 considerations and because (2) homosexuals either are
22

23 ⁶ At page 1136, the Holmes court relies on
24 Schowengerdt v. United States, 944 F.2d 483, 490 (9th
25 Cir. 1991) where the court found plaintiff's "substantive
26 due process claim with respect to the old" pre-DADT
27 policy was "foreclosed by Bowers v. Hardwick, 478 U.S.
28 186. . .". Holmes also relies on High Tech Gays v.
Defense Industrial Security Clearance Office, 895 F.2d
563 (9th Cir. 1990) which in turn relied on Bowers for
the proposition that persons do not have a fundamental
right to engage in intimate homosexual conduct. High
Tech Gays, 895 F.2d at 571.

1 part of a suspect class or exercise a fundamental right.
2 (Opp'n 16.)

3
4 Defendants assert Plaintiff does not state an equal
5 protection claim, as homosexuals are not a suspect or a
6 quasi-suspect class according to Ninth Circuit precedent
7 undisturbed by Lawrence, which was not decided on equal
8 protection grounds. (See Mot. 20); Witt, 527 F.3d 806
9 (discussing Lawrence). The Ninth Circuit upheld DADT
10 under rational basis review in Holmes, 124 F.3d at 1132
11 ("homosexuals do not constitute a suspect or quasi-
12 suspect class"), Philips, 106 F.3d at 1425-29, and High
13 Tech Gays v. Defense Industrial Security Clearance
14 Office, 895 F.2d 563, 571, 576-78 (9th Cir. 1990)
15 (relying on Bowers for proposition "homosexual activity
16 is not a fundamental right" and "homosexuals cannot
17 constitute a suspect or quasi-suspect class").

18
19 Plaintiff offers three reasons why the Court should
20 depart from this precedent. Plaintiff first asserts
21 Lawrence "established a fundamental right to engage in
22 intimate, consensual physical acts and relationships with
23 persons of the same gender." (Opp'n 17.) Witt
24 foreclosed this interpretation, by finding Lawrence did
25 not discuss equal protection and did not disturb
26 Philips's holding that DADT complies with the

27
28

1 Constitution's guarantee of equal protection. See Witt,
2 527 F.3d at 821.

3

4 Second, Plaintiff relies on Karouni v. Gonzales, 399
5 F.3d 1163 (9th Cir. 2005), in which the Ninth Circuit
6 considered the asylum claim of a homosexual Lebanese man.
7 Karouni is distinguishable on its facts as an asylum
8 case.

9

10 Third, Plaintiff asserts it should be permitted to
11 conduct discovery and present evidence at the appropriate
12 stage of the case on this issue. As Plaintiff has not
13 succeeded in stating an equal protection claim under
14 existing law, however, it has not shown how discovery
15 would cure the legal infirmity. Accordingly, the Court
16 GRANTS the Motion as to Plaintiff's equal protection
17 claim.

18

19 **D. First Amendment**

20 Plaintiff claims DADT violates its members' First
21 Amendment rights because it is "likely to chill the
22 exercise of constitutionally protected speech" and is
23 "overbroad," applying to "every facet" of Plaintiff's
24 members' lives. (Opp'n 19, 21, 22.) Plaintiff
25 challenges two ways Defendants use speech to discharge
26 service members: (1) statements of sexual orientation as
27 admission of propensity to engage in "homosexual acts";

28

1 (2) statements of homosexual orientation not used as
2 admissions.

3

4 **1. Statements of homosexual orientation as**
5 **admission of propensity to engage in**
6 **"homosexual acts"**

7 The Ninth Circuit has upheld Defendants' use of a
8 service member's statement he is homosexual as an
9 admission of his likelihood to engage in "homosexual
10 acts." (Mot. 21-22 citing Holmes, 124 F.3d at 1136 and
11 Philips, 106 F.3d at 1430; Reply 14.)⁷ Holmes found this
12 use of homosexual persons' statements did not implicate
13 the First Amendment while the Philips court did not reach
14 the issue. Holmes, 124 F.3d at 1136 ("because
15 [plaintiffs] were discharged for their conduct and not
16 for speech, the First Amendment is not implicated");
17 Philips 106 F.3d at 1430 (approving "the district court's
18 restraint in declining unnecessarily to reach" the First
19 Amendment issue). While the Court cannot rely on Holmes
20 for its holding rested on Bowers, Lawrence did not
21 disturb Holmes' holdings about the use of speech as
22 admissions. Instead, the proposition that it is
23 permissible to use protected speech as an admission in
24 criminal prosecutions remains good law; according to
25 Defendants, this principle extends to non-criminal
26 discharge proceedings. (Mot. 22-23 citing Wisconsin v.

27

28 ⁷ Witt did not address a First Amendment claim.

1 Mitchell, 508 U.S. 476, 489 (1993) and Wayte v. United
2 States, 470 U.S. 598 (1985).)

3

4 In Wayte, the Supreme Court upheld the government's
5 use of a young man's letters addressed to the government,
6 in which he stated he had not registered for military
7 service and had no intention to do so, to prosecute him
8 for nonregistration for military service. 470 U.S. at
9 598-601, 614. The Court found his exercise of his First
10 Amendment rights did not confer immunity from
11 prosecution. Id. at 614.

12

13 Accordingly, Wayte permits Defendants to use service
14 members' statements they are homosexual as admission of
15 their propensity to engage in "homosexual acts."

16

17 Plaintiff's contention DADT is overbroad and over-
18 inclusive, regulating even private speech, is unavailing:
19 private speech can be employed as an admission. (See
20 Opp'n 21-22.) So long it is constitutional for
21 Defendants to regulate "homosexual acts" that take place
22 anywhere through DADT, it is constitutional for
23 Defendants to use admission of homosexual orientation as
24 showing a likelihood to engage in "homosexual acts." The
25 Court GRANTS the Motion to the extent Plaintiff's FAC
26 seeks to mount a First Amendment challenge to DADT's use
27 of certain statements as admissions.

28

1 **2. Other uses of statements**

2 Plaintiff claims the First Amendment bars Defendants
3 from discharging service members for speech alone. In
4 other words, Plaintiff asserts Defendants cannot lawfully
5 use service members' statements they are homosexual for
6 uses other than showing a tendency to engage in
7 "homosexual acts." The Holmes and Philips courts did not
8 rule on this issue. (Opp'n 21;) Holmes, 124 F.3d at 1136
9 ("because [plaintiffs] were discharged for their conduct
10 and not for speech, the First Amendment is not
11 implicated"); Philips, 106 F.3d at 1430 (plaintiff "was
12 discharged because . . . he had engaged in homosexual
13 acts. . . [his] statements were used as evidence, not the
14 reason for discharge"; approving "the district court's
15 restraint in declining unnecessarily to reach" the First
16 Amendment issue). Discharge on the basis of statements
17 not used as admissions of a propensity to engage in
18 "homosexual acts" would appear to be discharge on the
19 basis of speech rather than conduct, an impermissible
20 basis. (See Opp'n 25 citing Holmes, 124 F.3d at 1138
21 (Reinhardt, J., dissenting).)
22

23 This Court cannot determine from the face of the FAC
24 whether Nicholson was, or Doe could yet be, discharged
25 based on statements alone. The FAC does not allege
26 Nicholson or Doe was discharged, or is subject to
27 discharge, merely for a self-identifying statement
28

1 regarding his homosexuality. Nevertheless, construing
2 the facts in favor of the non-moving party, the Court
3 cannot conclude Plaintiff will not be able to show these
4 facts. Accordingly, the Court DENIES the Motion insofar
5 as Plaintiff founds its FAC on service members'
6 statements alone.

7

8

IV. CONCLUSION

9 For the reasons above, the Court DENIES the Motion
10 insofar as it attacks Plaintiff's standing to bring suit;
11 DENIES the Motion as to Plaintiff's substantive due
12 process claim; GRANTS the Motion as to Plaintiff's equal
13 protection claim; and GRANTS IN PART and DENIES IN PART
14 the Motion as to Plaintiff's First Amendment claim.

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19 Dated: June 9, 2009

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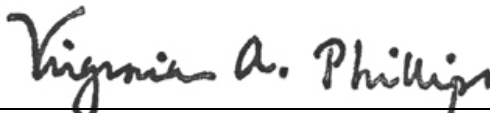
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VIRGINIA A. PHILLIPS
United States District Judge