Case No. 10-56634

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOG CABIN REPUBLICANS,
a non-profit corporation

Plaintiff-Appellee,

vs.

UNITED STATES OF AMERICA; ROBERT M. GATES,
SECRETARY OF DEFENSE, in his official capacity

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
No. CV 04-8425, Honorable Virginia A. Phillips, Judge

PRELIMINARY RESPONSE OF APPELLEE LOG CABIN REPUBLICANS TO GOVERNMENT'S REQUEST FOR TEMPORARY "ADMINISTRATIVE" STAY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, counsel for Log Cabin Republicans certifies that:

1. Log Cabin Republicans is a not-for-profit corporation organized pursuant to the District of Columbia Nonprofit Corporation Act and section 501(c)(4) of the Internal Revenue Code.

2. Log Cabin Republicans issues no stock and has no parent corporation. No publicly-held corporation owns ten percent or more of the stock of Log Cabin Republicans.

Dated: October 20, 2010

Respectfully submitted,

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Log Cabin Republicans ("Appellee" or "Log Cabin"), opposes the request of appellants the United States of America and Robert M. Gates, Secretary of Defense ("Appellants") for a temporary administrative stay pending appeal of the judgment entered by the District Court on October 12, 2010, in the case captioned, *Log Cabin Republicans v. United States of America and Gates*, Case No. CV 04-08425-VAP, United States District Court for the Central District of California.

The government's request for an "administrative stay" (by which it apparently means a temporary stay pending fuller briefing on its wider request for a stay of the district court's permanent injunction pending appeal) should be denied. Each argument that the government asserts as a basis for a stay has already been raised to the district court, which rejected them all – not cursorily, or in passing at an oral argument, but in extensive reasoned opinions at multiple stages of the proceedings below. The district court's thoughtful analysis of each argument the government makes here should not be rejected in a summary proceeding, on less than one day's consideration.

Furthermore, the district court's injunction does not require appellants to take any affirmative steps (such as re-designing facilities, revising military pay and benefits scales, or anything else); nor does the injunction require them to refrain from developing the training and educational materials and policy revisions that

the Stanley Declaration claims they need to do. The only thing the injunction requires is that appellants cease enforcing and applying the Don't Ask, Don't Tell policy ("DADT"), and discontinue any pending investigations commenced under that policy. The appellants have apparently already done so, since the injunction was issued on October 12; there is no reason to alter the current status quo and excuse the appellants from complying with the injunction for the next few days while their motion for stay pending appeal is properly briefed and decided in this Court.

The government has already acted nimbly in response to the district court's injunction: it has instructed its field recruiting offices to process applications for enlistment from openly gay and lesbian applicants.[1] That guidance was issued last Friday, October 15, and news reports indicate that applications from such individuals are being received (and presumably processed) without incident. The fact that the government can and did issue such instructions and comply with the injunction immediately shows that the military will not sustain irreparable harm from compliance and belies the need for any temporary stay. Should the Court grant the administrative stay but deny the stay pending appeal, the military will have gone from enforcing DADT (pre-injunction), to not enforcing DADT (post-

[1] Press Release (October 15, 2010) (Ex A).

injunction), to enforcing DADT (granting administrative stay), to not enforcing DADT again (denying stay pending appeal), all in a matter of weeks. The simpler and more orderly solution is simply to decide the stay motion and deny the temporary stay.

Indeed, the evidence at trial demonstrated that no harm would occur by ceasing enforcement of DADT. And a week after the Department of Defense ceased enforcing DADT, that is exactly what occurred - nothing.

A stay of injunction under Fed. R. App. P. 8 is considered "extraordinary relief" for which the moving party bears a "heavy burden." See Winston-Salem/Forsyth County Bd. of Educ. v. Scott, 404 U.S. 1221, 1231, 31 L. Ed. 2d 441, 92 S. Ct. 1236 (1971). Four factors regulate the issuance of a stay of a district court judgment, including stay of injunction, pending appeal: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. Hilton v. Braunskill, 481 U.S. 770, 776, 95 L. Ed. 2d 724, 107 S. Ct. 2113 (1987). These are the same four factors that must be shown by a party moving for an injunction in the first place, see Winter v. Natural Resources Defense Council, ___ U.S. ___, 172 L. Ed. 2d

249, 129 S. Ct. 365, 374 (2008), and analysis of the factors in the one situation informs the analysis in the other. See Golden Gate Rest. Ass'n v. City and County of San Francisco, 512 F.3d 1112, 1115-16 (9th Cir. 2008).

The moving party must show the existence of all four factors; and the moving party must show not merely the "possibility" of irreparable injury absent a stay, as appellants contend, but the *likelihood* of irreparable injury. Winter, 129 S.Ct. at 375 (rejecting the Ninth Circuit's earlier "possibility" standard as articulated in, e.g., Golden Gate Rest. Ass'n, 512 F.3d at 1115, and Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983), cited by appellants); Alliance for the Wild Rockies v. Cottrell, ___ F.3d ___, No. 09-35756, 2010 WL 3665149, at *5, 8 (9th Cir. Sept. 22, 2010). The party requesting a stay bears the burden of demonstrating that the circumstances justify an exercise of that discretion. Nken v. Holder, ___ U.S. ___, 129 S. Ct. 1749, 1761, 173 L. Ed. 2d 550 (2009). The government's showing here fails all four factors.

The District Court arrived at the appealed from injunction against enforcement of Don't Ask Don't Tell ("DADT") after six years of litigation, extensive motion briefing, discovery, a two week bench trial, and hundreds of pages of considered rulings. The government is trying to undo these considered rulings in one day.

Because the government grossly understates the attention which the District Court gave the issues underlying this constitutional challenge, a brief history is in order. That history demonstrates that the injunction is the only avenue to vindicating the constitutional rights of gay and lesbian servicemembers in our armed forces.

Log Cabin filed this case on October 12, 2004 and the government moved to dismiss. On March 21, 2006, the District Court found that Log Cabin lacked associational standing and permitted the filing of an amended complaint. Log Cabin did so. The District Court ordered Log Cabin to identify at least one member of the organization who would have standing to sue individually. Log Cabin complied. It provided the Court with two members: Alexander Nicholson and a member who served on active duty in the military and so filed an anonymous declaration under the pseudonym John Doe.

The government again moved to dismiss. After several more rounds of briefing, and after this Court decided Witt v. Department of the Air Force, 527 F.3d 806 (9th Cir. 2008), the District Court, on June 9, 2009, granted in part and denied in part the motion to dismiss. The Court dismissed Log Cabin's equal protection claim but found that Log Cabin had stated claims under substantive due

process and the First Amendment.[2] The Court also found Log Cabin had established "standing to bring suit on behalf of current and former homosexual members of the armed forces."[3]

Following the District Court's order, on July 24, 2009, that the government is not exempt from its obligation to participate in discovery,[4] extensive discovery ensued. Log Cabin received from the government significant evidence that, contrary to the government's arguments, demonstrated that DADT impeded the government's stated interests of unit cohesion, morale, and readiness.

For instance, Log Cabin deposed Lt. Colonel Jamie Brady as one of the government's Federal Rule of Civil Procedure 30(b)(6) witnesses. Col. Brady confirmed that the military knowingly deploys servicemembers under investigation for homosexual conduct, which greatly undermines the government argument that DADT is needed for military readiness.

Following discovery, the government moved for summary judgment. The District Court, over the course of two hearings and two opinions denied that

[2] Order Denying in Part and Granting in Part Motion to Dismiss (June 9, 2009) (Ex. B).

[3] *Id.* at 14.

[4] Minute Order Denying Defendant's Request Regarding Discovery (July 24, 2009) (Ex. C).

motion. The Court's orders include extensive reasoning demonstrating that Log Cabin had carried its burden as to standing and on the merits to permit a trial.[5]

It is the trial that the government glosses over the most in its Emergency Motion. Log Cabin presented over twenty witnesses. They included four witnesses who established Log Cabin's organizational standing. They included seven leading experts, from a variety of disciplines, who testified regarding the history and effect of DADT. They included six lay witness former servicemembers who demonstrated, *inter alia*, that their discharge under DADT actually impaired unit cohesion and readiness in their units. And they included several government witnesses (via Rule 30(b)(6) deposition) who explained, *inter alia*, that the military allows individuals with criminal convictions to enlist while it categorically excludes openly gay or lesbian individuals, and that the largest category of servicemembers discharged under DADT are individuals who were never deployed to a combat zone. Log Cabin also introduced numerous government documents produced in discovery, well over 100 exhibits in all.

Log Cabin also presented several admissions from officials at the highest level of government demonstrating that DADT actually detracts from its stated

[5] *See* Order Denying in Part Motion for Summary Judgment (May 27, 2010) (Ex. D); Order Denying Defendants' Motion for Summary Judgment (July 6, 2010) (Ex. E); Transcript of Proceedings (April 24, 2010) (Ex. F); Transcript of Proceedings (June 28, 2010) (Ex. G).

objectives. For instance, the Commander in Chief believes that DADT "doesn't contribute to our national security," "weakens our national security," and reversing DADT is "essential for our national security." (trial exs. 85, 305, 306, and 321)

Log Cabin presented evidence from Admiral Mike Mullen, the Chairman of the Joint Chiefs of Staff, that DADT "forces young men and women to lie about who they are in order to defend their fellow citizens," that he is unaware of any studies or evidence suggesting that repeal of DADT would undermine unit cohesion, and that "allowing homosexuals to serve openly is the right thing to do" and is a matter of "integrity." (trial ex. 312 at 59, 62; trial ex. 330). Log Cabin also introduced Defense Secretary Gates' admission that the assertions purportedly justifying DADT's intrusion on the personal and private lives of homosexuals "have no basis in fact." (trial Ex. 312 at 69).

The government, by contrast, presented no evidence. **Zero**. The government chose to rely exclusively on the 1993 legislative history of the statute. The government had ample opportunity to present at trial any evidence that DADT actually furthered any of its stated purposes and it chose not to do so. That is because there is no such evidence. Based on the record presented at trial, the District Court had no choice but to find in favor of Log Cabin.

Following trial, on September 9, 2010, the District Court issued an 85 page memorandum opinion explaining that Log Cabin had established its standing and that Log Cabin had proved that DADT violates the Fifth Amendment guarantee of substantive due process and the First Amendment. The Court set a briefing schedule for Log Cabin to submit a proposed judgment and injunction and for the government to file any objections thereto.

The district court considered the government's objections and issued the appealed-from injunction. In addition, it very slightly amended its Memorandum Opinion and issued 84 pages of findings of fact and conclusions of law.[6]

The government then applied *ex parte* for a stay in the district court. The government supported its application with doomsday scenarios of bureaucratic difficulties. The government failed totally to explain why it is likely to prevail on the merits and ignored the import of Lawrence v. Texas, 539 U.S. 558, 156 L. Ed. 2d 508, 123 S. Ct. 2472 (2003), and this Court's decision in Witt v. Air Force. It also ignored that DADT deprives American servicemembers of their constitutional rights, which is alone sufficient irreparable injury to deny a stay. Log Cabin opposed the application. On October 18, 2010, the district court denied the stay request in a six-page opinion. The district court correctly concluded that the

[6] Findings of Fact and Conclusions of Law After Court Trial (October 12, 2010) (Ex. H).

government had not shown any of the injury it claims will occur because, were any of those harms imminent in a post-DADT military, it would have presented evidence of them earlier.

The motion for stay pending appeal not only presents the same arguments that the district court already considered and rejected with regard to the scope of the injunction, but also attempts to relitigate matters that were extensively briefed below, and subjects of a thorough presentation of evidence at trial. Appellee's response to the motion for stay will discuss all these matters in greater detail but in summary, for consideration on this preliminary application:

- *Standing* – the district court heard evidence of Log Cabin's standing from four witnesses at trial and devoted extensive analysis to the issue in its Memorandum Opinion, at 2-13, finding that Log Cabin had proper associational standing to bring this facial challenge to the Don't Ask, Don't Tell Act. Appellants' motion omits key facts heard and determined by the district court on this issue, including pertinent sections of Log Cabin's Bylaws. Appellants pretend that the case below was brought solely on behalf of the two individual Log Cabin members John Nicholson and Lt. Col. John Doe, which blatantly misrepresents the theory under which the case was presented and tried;

- *The Witt Standard* – the district court determined that controlling Ninth Circuit precedent, Witt v. Department of the Air Force, supra, called for heightened scrutiny of the government's justification for the statute, and applied that standard to its receipt and evaluation of evidence at the two-week bench trial it conducted;

- *Scope of the Injunction* – the district court repeatedly, and properly, rejected the government's contention, which it repeats here, that an injunction should run in favor only of the two Log Cabin members through whom it established standing, and held (Injunction Order at 4-6) that under Bresgal v. Brock, 843 F.2d 1163 (9th Cir. 1987) and numerous other cases an associational plaintiff bringing a facial constitutional challenge is entitled to nationwide relief binding the governmental defendant wherever it operates;

- *Military Deference* – the government now argues that courts should defer to the judgment of military commanders on military matters, but it presented no evidence at trial that Don't Ask, Don't Tell, as implemented, enhances military readiness or other military objectives, and understandably so since the evidence at trial was not only that the nation's top civilian and military leaders, including the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff unanimously oppose the Don't Ask, Don't Tell

policy, but that Don't Ask, Don't Tell, in the President's words, "doesn't contribute to our national security," "weakens our national security," and its reversal is "essential for our national security" (Trial Ex. 85; Memo. Op. at 65);

- *Precipitous Change by Court Order* – the government's repeated invocation of the supposed need for deference to an "orderly" process of "repeal" of the Don't Ask, Don't Tell statute, rather than immediate invalidation of the statute by an Article III court finding it unconstitutional, is misleading in three respects. First, it pretends that repeal of the statute by the political branches is a certainty with a defined timeline; the application refers to the statute's eventual "repeal" over twenty times. In fact, as the district court recognized on multiple occasions in denying the government's five previous requests for a stay, political repeal is subject to numerous cascading contingencies that may never be met, including a favorable report from the military working group investigating the matter; acceptance of those conclusions by both the Executive and the military; a favorable vote in the Senate (where at least one Senator has already stated he will filibuster any repeal bill); and a successful reconciliation of the House and Senate versions of any repeal bill. Second, it misleadingly suggests that the district court's decision came as a complete surprise, requiring the government to respond

"overnight" to the requirements of the injunction, whereas in fact the trial of this case was set over a year ago, in July 2009; the trial took place in July 2010; and the district court's initial memorandum opinion was issued on September 9, 2010, and the government has had ample time to prepare for the possibility that the Don't Ask, Don't Tell policy would be invalidated. And third, it argues that judicial invalidation of a military policy, as opposed to legislative repeal, will lead to confusion and uncertainty; but extensive evidence presented at trial established that the analogous policies in Canada (Trial Tr. 1280-87), which were ended in response to court orders, were readily accepted and led to no disruption of the sort the government conjures in its motion.

- *Purported Circuit Conflicts* – the government's motion in this Court continues to rely (see footnote 2 on page 11) on outdated cases from other Circuits which predate the Supreme Court's decision in Lawrence v. Texas, and which the district court repeatedly held irrelevant on that basis. Indeed, and tellingly, the government's motion does not cite Lawrence – the case that opened the path for this lawsuit in the first place – *at all*.

Given the emergency nature of the temporary stay application, the Court may also be aided by reviewing Log Cabin's opposition to the government's stay motion filed in the District Court. It is also attached.[7]

CONCLUSION

For all the reasons set forth in this Brief, it is respectfully requested that Appellants' motion for a temporary administrative stay be denied.

Dated: October 20, 2010

Respectfully submitted,

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[7] Opposition of Log Cabin Republicans to Defendants' Ex Parte Application for Emergency Stay of Injunction (October 15, 2010) (Ex. I).

STATEMENT OF RELATED CASES

Log Cabin Republicans is unaware of any pending related cases before this Court.

Dated: October 20, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 633 West Fifth Street, Suite 1900, Los Angeles, California 90071.

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 20, 2010.

I certify that all participants in the case who are registered CM/ECF users and that service will be accomplished by the appellate system.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on October 20, 2010, at Los Angeles, California.

/s/ Earle Miller
Earle Miller