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

RESPONSE OF APPELLEE LOG CABIN REPUBLICANS TO GOVERNMENT'S EMERGENCY MOTION FOR STAY

ORAL ARGUMENT REQUESTED

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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 25, 2010

Respectfully submitted,

WHITE & CASE LLP

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I.

INTRODUCTION

The district court's prohibitory permanent injunction was entered following a full two-week trial on the merits and supported by an 85-page Memorandum Opinion, an 84-page set of Findings of Fact and Conclusions of Law, and a 15-page reasoned Order Granting Permanent Injunction. It does not require the appellants to take any affirmative steps, nor does it require them to refrain from taking any of the steps they argue that they must take if they are to avoid irreparable injury. The district court's injunction requires only one thing: that the government discontinue all investigations and discharge proceedings that have been commenced under the "Don't Ask, Don't Tell" statute, 10 U.S.C. § 654, and its implementing regulations ("DADT").

The government made no showing to the district court, and makes no showing here, either that it is likely to succeed on the merits on appeal, or that it would sustain irreparable injury if the district court's judgment remains in place pending determination of this appeal. By contrast, the district court conducted a careful, extensive analysis of the law, at every stage of the proceedings below. It concluded, after a full trial at which it heard testimony from over 20 witnesses and received over 100 exhibits in evidence, that DADT causes irreparable harm to servicemembers by its very existence and implementation, subjecting them to

investigation and discharge, and chilling their First Amendment rights of free speech and petition, while actually *impairing* unit cohesion, morale, and discipline – the very factors that supposedly justify DADT. The district court's decision was not a political one, nor an instance of "judicial activism": it was compelled by the evidence before it, presented at a full trial conducted under our adversarial litigation system.

Every day that the government remains free to implement the Don't Ask, Don't Tell policy, American citizens' Constitutional rights are violated. The emergency stay of injunction that the government requests would perpetuate this unconstitutional state of affairs with no countervailing benefit to the government that outweighs the deprivation of rights such a stay would entail. The motion does not meet any of the factors for a stay pending appeal, and it should be denied.

II.

BACKGROUND AND PROCEEDINGS BELOW

Log Cabin brought this challenge to DADT in the wake of the Supreme Court's decision in Lawrence v. Texas, 539 U.S. 558 (2003). Lawrence held that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct" and established a Constitutional right to engage in private, consensual homosexual conduct. Id. at 562, 578. Recognizing that "times can blind us to certain truths and later generations can see that laws

once thought necessary and proper in fact serve only to oppress," id. at 579, Lawrence overruled Bowers v. Hardwick, 478 U.S. 186 (1986).

While Log Cabin's case was pending below, this Court decided Witt v. Dep't of the Air Force, 527 F.3d 806 (9th Cir. 2008). Recognizing the change in the law announced by Lawrence, Witt held that Lawrence controls the scrutiny applied to DADT and concluded it could not "reconcile what the Supreme Court did in Lawrence with the minimal protections afforded by traditional rational basis review." Id. at 816. Witt concluded that Lawrence requires that DADT be subjected to a heightened level of constitutional scrutiny. Id. at 817.

The district court arrived at its injunction against this legal backdrop. The court issued the judgment and injunction after six years of litigation, extensive motion briefing, discovery, a two week bench trial, and hundreds of pages of considered rulings. Throughout, the district court carefully analyzed every issue underlying this constitutional challenge.

Appellants' motion largely ignores the extensive history of the case, but that history is critical to a determination of the motion. It demonstrates that the lower court could arrive at only one conclusion: a permanent injunction is the only avenue to safeguard the constitutional rights of gay and lesbian servicemembers in our armed forces.

A. The Extensive Proceedings in the District Court

Log Cabin filed this case on October 12, 2004 seeking declaratory and injunctive relief. In 2006, the district court granted the government's first motion to dismiss, with leave to amend, finding that Log Cabin lacked associational standing. It ordered Log Cabin to identify at least one member of the organization with standing to sue individually. Log Cabin's amended complaint specified two members: John Alexander Nicholson and John Doe, who remained anonymous because he is a current member of the military.[1]

After the reassignment of the case to a different district court judge and several more rounds of briefing and argument, the district court granted in part and denied in part the government's second motion to dismiss. The court found Log Cabin had established "standing to bring suit on behalf of current and former homosexual members of the armed forces."[2] It dismissed Log Cabin's equal protection claim but found that Log Cabin had stated a claim under the First Amendment and, in light of Lawrence and Witt, the Fifth Amendment guarantee of

[1] Mr. Nicholson was an Army soldier skilled in languages and counter-intelligence discharged under DADT after someone read a private letter he had written in Portuguese to another man about their relationship before he enlisted. John Doe is a Lieutenant Colonel in the U.S. Army Reserves who, because he is gay, serves his country under constant fear of discharge under DADT and who cannot communicate regarding the core of his identity in the same manner as heterosexual servicemembers.

[2] Order Denying in Part and Granting in Part Motion to Dismiss (June 9, 2009) (Ex. 1) at 11-14.

substantive due process.[3] The district court then set the case for trial, assigning an initial trial date of June 14, 2010, approximately 11 months later.[4]

The government then moved under 28 U.S.C. § 1292(b) for certification of the district court's dismissal order for interlocutory appeal. The court found the motion untimely and recognized it as merely an effort to avoid discovery, which the government claimed to be burdensome.[5] The government also moved for a stay because the political branches had indicated an intention to reconsider DADT, arguing that the discovery Log Cabin sought would interfere with the work of the political branches as they deliberated over changing the DADT policy. The district court denied the stay, concluding that Congress and the President cannot insulate a law from Constitutional challenge just by holding hearings.[6]

During pre-trial proceedings, the government resisted its obligation to participate in discovery. The district court examined and rejected almost every argument appellants presented, holding that a defendant is not exempt from discovery because the case involves a facial challenge,[7] that the government had

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[3] Id. at 14-24.

[4] Civil Trial Scheduling Order (July 24, 2009) (Ex. 2).

[5] Minute Order Denying Motion to Certify Order for Interlocutory Appeal and for Stay (Nov. 24, 2009) (Ex. 4) at 4-5.

[6] Id. at 5.

[7] Minute Order Denying Defendants' Request Regarding Discovery (July 24, 2009) (Ex. 3).

waived any deliberative process privilege and had failed to support any protections under the attorney-client privilege or attorney work product doctrine,[8] and that the government had to answer requests for admission regarding statements made by the Commander in Chief that DADT does not contribute to and weakens our national security.[9]

At the close of discovery, the government moved for summary judgment. Appellants challenged Log Cabin's standing, arguing, *inter alia*, that because Lt. Col. Doe had not been discharged, he had experienced insufficient harm to establish standing. The issues were fully briefed and standing was the subject of its own hearing and lengthy reasoned order.[10] The district court held that, for purposes of summary judgment, Log Cabin had associational standing through both Mr. Nicholson and Lt. Col. Doe.[11]

At the district court's request, the parties submitted additional briefing on the standard of review applicable to Log Cabin's facial challenge. The court addressed the parties' arguments at length during the pre-trial conference and

[8] Magistrate Judge Eick Civil Minutes (March 16, 2010) (Ex. 7).

[9] Minute Order Denying Defendants's Motion for Review of Magistrate Judge's Discovery Ruling (April 6, 2010) (Ex. 8).

[10] Transcript of Proceedings (April 26, 2010) (Ex. 9); Order Denying in Part Motion for Summary Judgment (May 27, 2010) (Ex. 10).

[11] Id. at 11-26.

issued another reasoned opinion.[12] Recognizing that Witt construed Lawrence to demand a heightened level of review, the court adopted the intermediate scrutiny standard announced in Witt: the government must advance an important governmental interest, any intrusion on the rights identified in Lawrence must significantly further that interest, and the intrusion must be necessary to that interest. The court adopted this standard, although Witt announced it in the context of an as-applied challenge, because the constitutional standard of review depends on the nature of the right implicated, not the nature of the plaintiff's challenge. Rather, the court explained, the consequence of a facial challenge is simply that the plaintiff must prove the unconstitutional operation of DADT across a broader set of circumstances. The district court then denied summary judgment on the merits.

In the months before trial, the government again requested a stay, claiming that the President had now promised repeal of DADT in his State of the Union address and that the Defense Department intended to study DADT and issue new regulations.[13] The district court echoed its same concerns about the uncertainty of political action[14] and again denied the stay.[15] Then, one month before trial, the

[12] See Reporter's Transcript of Proceedings (June 28, 2010) (Ex. 11); Order Denying Defendants' Motion for Summary Judgment (July 6, 2010) (Ex. 13).

[13] See Reporter's Transcript of Proceedings (February 18, 2010) (Ex. 5) at 7-8.

[14] See, e.g., id. at 31.

[15] Minute Order re: Stay of Proceedings (March 4, 2010) (Ex. 6).

government again argued for a stay "because the political branches [had] taken concrete steps to facilitate repeal of the DADT statute." In a lengthy decision, the court rejected this request as well, prophetically stating, "Given the many contingencies involved – including the threshold contingency of Congressional approval – and the lack of clear timelines, any ultimate repeal that may result from this legislation is at this point remote, if not wholly speculative."[16]

On the eve of trial, the government moved to exclude all of Log Cabin's exhibits, expert witnesses, and lay witnesses – essentially all of plaintiff's evidence. The parties fully briefed each of the government's three motions in limine and the court heard argument on them.[17] The government continued to contend that a plaintiff is precluded from introducing any evidence when it mounts a facial challenge. The court, taking guidance from the heightened scrutiny Lawrence requires, rejected the government's position and held that evidence should be received.[18] For the most part, the court denied the motions in limine.

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[16] Ex. 13 at 18-23.

[17] Reporter's Transcript of Proceedings (June 28, 2010) (Ex. 11).

[18] Ex. 13 at 10 n.7; Minute Order Granting in Part and Denying in Part Defendants' Motions in Limine (July 1, 2010) (Ex. 12) at 3. The court stated at page 23 of the June 28, 2010 transcript:

> [I]t seems that the government is trying to have it both ways. … [T]he government keeps focusing on, that it's a facial challenge. So the plaintiff has to prove that [DADT] doesn't further or advance any legitimate or important governmental objective. Yet, by this motion, … the defendants are

It is the trial that appellants gloss over most in their motion. Log Cabin presented over twenty witnesses during the two-week trial. They included four witnesses who established Log Cabin's organizational standing. They included seven leading experts who testified regarding the history and effect of DADT from a variety of disciplines, including history, political and social science, psychology, and sociology, an expert on the Canadian military, and a former Assistant Secretary of Defense.[19]

Log Cabin also presented six former servicemembers representing a cross section of our military, who demonstrated that service of openly gay and lesbian servicemembers has no effect on unit cohesion, morale, or readiness, that their discharge under DADT actually impaired those interests, and that the military does not act consistently with the claimed goals of DADT in any case.[20]

Log Cabin also introduced the testimony of several government witnesses (via Rule 30(b)(6) deposition) who admitted, *inter alia*, that no study exists showing that DADT furthers its stated objectives; that the military allows

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> attempting, really, to prevent the plaintiff from putting in any evidence that goes to this element of its case.

[19] For the district court's summary of the expert witnesses' testimony, see Amended & Final Memorandum Opinion (Ex. 14) at 56-72, and Findings of Fact & Conclusions of Law After Court Trial (Ex. 15) at 42-62.

[20] For the district court's summary of the lay witnesses' testimony and credibility, see Ex. 14 at 20-45, 67-71, 82-83, and Ex. 15 at 7-33, 53-57, 60-61.

convicted felons 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.[21] Log Cabin also introduced numerous government documents produced in discovery that supported Log Cabin's claims, well over 100 exhibits in all.[22]

Finally, Log Cabin presented several admissions from officials at the highest level of government demonstrating that DADT detracts from its stated objectives. For instance, Defense Secretary Gates admitted 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). Admiral Mike Mullen, the Chairman of the Joint Chiefs of Staff, admitted that 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, 69; trial ex. 330). And President Obama, the Commander in Chief, admitted DADT "doesn't

[21] For the district court's summary of the 30(b)(6) witnesses' testimony, see Ex. 14 at 63-64, and Ex. 15 at 50.

[22] Appellants misleadingly criticize the district court for ruling based on evidence submitted at trial rather than evidence before Congress. But the court admitted the entire legislative history of DADT and expressly considered it at pages 48 to 55 of its memorandum opinion.

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).

Against the weight of Log Cabin's presentation, the government offered no evidence. It relied exclusively on the 1993 legislative history of the statute. Appellants had ample opportunity to present at trial any evidence that DADT furthered any of its stated purposes but did not do so. That is because there is no such evidence. At the close of the trial, the district court took the matter under submission.[23]

On September 9, 2010, the court issued an 85-page memorandum opinion explaining in detail its reasons for concluding that Log Cabin had established standing and declaring 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.

Log Cabin submitted its proposed judgment and injunction, the government submitted 14 pages of objections, and Log Cabin submitted a lengthy response to

[23] The district court ordered post-trial briefing on the admissibility of Lt. Col. Doe's declaration, which Log Cabin offered to show that DADT deprives gay and lesbian members of the military from communicating the core of their identity and from even participating in the lawsuit. The court overruled the government's objection and admitted the declaration as probative of Doe's state of mind with respect to how DADT chills his speech and restricts his ability to petition the government for a redress of grievances. Ex. 14 at 2 n. 3, 83.

those objections. The district court rejected the government's objections. Because Log Cabin proved the statute is facially unconstitutional, the district court rejected the argument that the injunction must be limited to plaintiff and its members. The district court found it could not sever the unconstitutional aspects of DADT from provisions that are constitutional. And it overruled objections to the nationwide scope of the injunction, reasoning that the injunction binds the defendants wherever they act and that territorial application "would create an untenable result in which Defendants could, pursuant to the Act, discharge servicemembers in Maine, Massachusetts, and New Hampshire, but not elsewhere."[24]

As a result, the district court entered its injunction.[25] The injunction: (1) permanently enjoined the government from enforcing or applying DADT against any person under its jurisdiction or command; and (2) ordered the government to immediately suspend and discontinue any pending investigation, or discharge, separation, or other proceeding under DADT.

Included in the government's objections to the injunction was yet a fourth motion to stay, reciting the same argument that the political branches are "considering repeal." With repeal still speculative, the district court again rejected

[24] Order Granting Permanent Injunction (Oct. 12, 2010) (Ex. 16) at 4-12.
[25] Judgment & Permanent Injunction (Oct. 12, 2010) (Ex. 17).

a stay.[26] The district court also very slightly amended its Memorandum Opinion and issued 84 pages of findings of fact and conclusions of law.[27]

The government then applied *ex parte* for a stay in the district court.[28] The government supported its application with a declaration by Clifford L. Stanley, Under Secretary of Defense for Personnel and Readiness.[29] This evidence was presented for the first time in the stay application; the government did not offer Mr. Stanley's testimony at trial or when the district court asked for appellants' objections to the proposed injunction. Log Cabin opposed the application.[30]

The district court conducted a hearing on October 18, 2010, and then denied the stay request in a six-page opinion because the government satisfied none of the four factors in the stay analysis.[31] The court found as follows: by relying on pre-Lawrence and out-of-circuit authority with which Witt clearly conflicts, the government failed to demonstrate likelihood of success on the merits; the government did not show likelihood of irreparable injury because the injunction

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[26] Ex. 16 at 13-14.

[27] Ex. 15.

[28] Defendants' *Ex Parte* Application for Entry of an Emergency Stay (Oct. 14, 2010) (Ex. 18).

[29] Declaration of Clifford L. Stanley (Oct. 14, 2010) (Ex. E to motion).

[30] Opposition of Log Cabin Republicans to Defendants' *Ex Parte* Application for Emergency Stay of Injunction (Oct. 15, 2010) (Ex. 19). Inexplicably, and inexcusably, appellants did not attach this document to their motion here.

[31] Amended Order Denying Defendants *Ex Parte* Application for Entry of an Emergency Stay (Oct. 20, 2010) (Ex. 20).

does not prevent appellants from revising policies, regulations, or training regimens – the activities mentioned in the Stanley declaration; the government did not show that any of the claimed injuries will occur because, were any of those harms imminent, it would have presented evidence of them at trial; the government failed to address the injury to servicemembers from the violation of their Fifth and First Amendment rights; and, as proved at trial, continued enforcement of DADT would only harm the public's interest in military readiness, unit cohesion, and the preservation of constitutional rights.

In sum, the district court arrived at its permanent injunction after careful analysis at every stage of this years-long litigation. Throughout its six-year history, the government had multiple opportunities to introduce evidence that DADT actually furthered unit cohesion, morale, good order and discipline, and military readiness. It never did so. And for six years, the government had the opportunity to prepare for the eventuality that it may lose this trial. It never did. Based on the record presented at trial, the district court had no choice but to find in favor of Log Cabin.[32]

[32] The President agrees with the district court's decision. Indeed, *on the very day that the government filed both its appeal to this Court and its application in the district court for a stay,* President Obama, using his verified Twitter account, tweeted that "Anybody who wants to serve in our armed forces and make sacrifices on our behalf should be able to. DADT will end & it will end on my watch." And in the fuller remarks that his tweet encapsulated, the President made it clear that he agrees with the principles underlying the district court's judgment: "we recently

B. Congressional Efforts to Repeal DADT

The government supported its repeated requests to stay the trial below on the political branches' inevitable repeal of DADT. Its current emergency stay motion retains that premise, referring to the statute's eventual "repeal" over twenty times. After all, appellants' claimed need for an "orderly" transition requires that there be a transition in the first place; and that requires repeal.

But repeal remains uncertain, and any momentum toward repeal is now stalled. While the House of Representatives passed the 2011 National Defense Authorization Act which includes repeal language (H.R. 5136), and the Senate Armed Services Committee approved a version of the repeal language (S. 3454), the bill fell victim to a filibuster in the Senate in September and never reached a floor vote.[33] The motion does not provide any information as to when the Senate may vote on the bill again. No date is scheduled for a vote, there is no assurance that there will not be another filibuster, and there is no assurance that the Senate

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had a Supreme Court -- a district court case that said, 'don't ask, don't tell' is unconstitutional. I agree with the basic principle that anybody who wants to serve in our armed forces and make sacrifices on our behalf, on behalf of our national security, anybody should be able to serve. And they shouldn't have to lie about who they are in order to serve." See http://www.whitehouse.gov/the-press-office/2010/10/14/remarks-president-a-youth-town-hall.

[33] The bill also includes the "DREAM Act" legislation (allowing alien youths to achieve legal residency through college or military service) which may have also inspired the filibuster and could inspire a future filibuster. The bill also includes legislation regarding fighter jet aircraft which the President has threatened to veto.

will pass the legislation. The motion does not provide any evidence on this at all, or even attempt to explain why a lame-duck Senate would vote differently than it did in September, and ignores how next week's midterm elections could impact repeal efforts.

Even if the legislation passes the Senate, repeal is uncertain and subject to multiple cascading contingencies. Because the Senate version of the bill differs from the House version, the bills require reconciliation. If the Senate and House bills are reconciled, and if the President signs the legislation (which is not assured in light of other legislation included in the Defense Authorization Bill), repeal of DADT is still conditional and is not immediate. Under the proposed legislation, repeal of DADT is conditional on (1) the Secretary of Defense receiving the report of the "Comprehensive Review" currently being undertaken by the Military Working Group; and (2) the President's transmission to Congress of a written certification, signed by the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff, confirming that they have considered the report's recommendations and its proposed plan of action, that the Defense Department has prepared necessary policies and regulations, and that the implementation of those policies and regulations is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces. All that is no small task, and repeal would not take place until 60 days

after the last of all those events occurs; and the pending legislation also specifically provides that DADT "shall remain in effect" until these requirements and certifications are met and, if they are not met, DADT "shall remain in effect."

The government offers no timetable as to whether or when any of these events may occur. The report of the study is not expected until December 2010 at the earliest; its recommendations will not be known until then and it is not certain that the study will recommend repeal. (The motion seems to assume that it will, but provides no support for that assumption.) Following the delivery of the report, assuming it recommends outright repeal rather than some partial measure, it must be considered; the Department of Defense must prepare policies and procedures for implementing the repeal; and the various certifications must be obtained. There is no way to know whether or when all of these events may occur.

Thus, the "orderly transition" which the government seeks to achieve via a stay remains speculative at best.

III.

THE MOTION ADVANCES NEW GROUNDS NOT SUBMITTED TO THE DISTRICT COURT

Appellants' stay application to the district court argued that the district court should stay its injunction pending appeal based on two grounds: "serious [though unspecified] legal questions" presented by the district court's finding of facial

unconstitutionality; and the supposed irreparable harm to the military that would result from the entry into immediate effect of a worldwide injunction. See Ex. 18 at 4-12, grounds summarized at 3:13-17.

Appellants' motion in this Court, however, asserts several additional grounds for the requested stay. It challenges the district court's finding that Log Cabin has standing to bring this action (Motion at 6-9). It challenges the district court's finding that DADT violates the First Amendment rights of current and prospective servicemembers (Motion at 11-12). And it challenges the district court's injunction, which applies to the military as a whole, as being "in essence classwide relief" (Motion at 12-15).[34] None of these grounds was submitted to the district court as a basis for the request to that court for a stay pending appeal.

Circuit Rule 27-3(a)(4) provides that "[i]f the relief sought in the motion was available in the district court … the motion shall state whether all grounds advanced in support thereof in this court were submitted to the district court … and, if not, why the motion should not be remanded or denied." The motion contains such a statement, but it is inaccurate. Failure to submit to the district court, for its determination in the first instance, all grounds advanced in this Court for the relief sought is therefore an independent basis for remand or denial of the

[34] In their application in the district court, this point was merely an exacerbating factor (Ex. 18 at 11); in the motion here, it is an independent ground for the relief appellants seek.

motion. At a minimum, this Court should not consider the new grounds which appellants advance for the first time here.

IV.

A STAY PENDING APPEAL SHOULD BE DENIED

A. A Stay Is Not a Matter of Right

A stay of injunction is "extraordinary relief" for which the moving party bears a "heavy burden." Winston-Salem/Forsyth County Bd. of Educ. v. Scott, 404 U.S. 1221, 1231 (1971) (Burger, C.J., in chambers) (denying stay of desegregation order). "'A stay is not a matter of right, even if irreparable injury might otherwise result.' It is instead 'an exercise of judicial discretion,' and … the party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." Nken v. Holder, 129 S. Ct. 1749, 1760-61 (2009) (citations omitted).

The motion attempts to transform the "presumptive constitutional validity of an Act of Congress" into an ipso facto conclusive declaration of irreparable injury; the application goes so far as to claim (at pages 1-2) that the invalidation of a statute by itself "is routinely the basis for stays pending appeal." But it is simply not the case that a stay is required whenever a statute is held unconstitutional. In appropriate circumstances, as where the balance of equities weighs in favor of those who successfully challenge the constitutionality of a statute, a stay of an

injunction against enforcement of that statute will be denied. E.g., Ruckelshaus v. Monsanto Co., 463 U.S. 1315, 1316-17 (1983) (Blackmun, J., in chambers) (denying stay of injunction against enforcement of certain provisions of FIFRA which respondent claimed constituted an unconstitutional taking of its property, and noting that the granting of a stay "might well cause irreparable harm to [respondent]"); see also Blum v. Caldwell, 446 U.S. 1311, 1315-16 (1980) (Marshall, J., in chambers) (state statute) and additional cases cited in Nken, supra, 129 S.Ct. at 1763-64 (Kennedy, J., concurring).[35] Indeed, if the stay applicant fails to show irreparable injury from denial of a stay, its likelihood of success on the merits need not even be considered. Monsanto, supra, citing Whalen v. Roe, 423 U.S. 1313, 1316-17 (1975) (Marshall, J., in chambers).

The government relies on a group of decisions that all rest on the ipse dixit of a single Justice, beginning with New Motor Vehicle Board v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). In New Motor Vehicle Board, citing no law, Justice Rehnquist granted a stay of a three-judge district court's injunction against enforcement of a state statute because he disagreed that

[35] Cf. Edwards v. Hope Medical Group, 512 U.S. 1301 (1994) (Scalia, J., in chambers) ("The practice of the Justices has consistently been to grant a stay only when three conditions obtain. There must be a reasonable probability that certiorari will be granted, a significant possibility that the judgment below will be reversed, and a likelihood of irreparable harm (assuming the applicants' position is correct) if the judgment below is not stayed").

the plaintiff had a protected 14th Amendment liberty or property interest. By contrast, there is no question that servicemembers' protected liberty interest is implicated here; Witt v. Dep't of the Air Force, supra, which is the law of this Circuit, makes that clear. Coalition for Econ. Equity v. Wilson, 122 F.3d 718, 719 (9th Cir. 1997), relied on that same unsupported statement in New Motor Vehicle Board. In Walters v. Nat'l Ass'n of Radiation Survivors, 468 U.S. 1323 (1984) (Rehnquist, J., in chambers), Justice Rehnquist granted a stay of a district court injunction, but the constitutionality of the specific federal statute in question had previously been affirmed both by the Supreme Court and by the Circuit Court having jurisdiction.

Finally, appellants cite Bowen v. Kendrick, 483 U.S. 1304 (1987) (Rehnquist, C.J., in chambers) for the proposition that the Supreme Court often grants a stay upon the government's request where a district judge declares an Act of Congress unconstitutional. But that is far from a categorical rule, as shown above. As Chief Justice Rehnquist explained in Bowen, the presumption of constitutionality is an equity to be considered in balancing the hardships. Irreparable injury to the non-moving party is a heavy weight on the other side of the balance. And in none of the cases cited by appellants did that balancing analysis require consideration of a statute *that the executive branch admits does not further its stated goals*, as here.

B. Appellants Do Not Meet the Standard for a Stay

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 (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, 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 & 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 at page 6 of their Motion, but the *likelihood* of irreparable injury. Winter, 129 S.Ct. at 375 (rejecting this 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 government's showing

here fails all four factors.

1. Appellants Have Not Shown a Likelihood of Success on the Merits

Given the controlling law and the extensive factual record developed in the district court it is *Log Cabin* that is likely to succeed on the merits on appeal. The district court's finding of a constitutional violation is not to be taken lightly. Log Cabin's evidence at trial was overwhelming and showed conclusively, meeting the test set forth in Witt, supra, 527 F.3d 806, 819, that Don't Ask, Don't Tell does not significantly further an important governmental interest, is not necessary to that interest, and in fact impairs that interest. The government presented no evidence to the contrary at trial, and advanced no circumstance in which DADT has been or could be applied constitutionally. The government will be restricted on appeal to the record it made: the legislative history of the statute.

To meet their burden, appellants must show a likelihood of success on the merits on *both* the due process and the First Amendment claims on which the district court found in Log Cabin's favor. Appellants fail to do so on either, much less both. Their motion relies on three arguments in this regard: deference to the military; the Witt standard; and a mischaracterization of the district court's ruling on the First Amendment claim (Motion at 9-12). We address each of these points below. Appellants cannot show any likelihood of success on the merits, and they

know that.[36]

a. Standing

Appellants improperly assert as a basis for stay their challenge to Log Cabin's standing to bring this lawsuit. 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 (Ex. 14 at 2-13), finding that Log Cabin had proper associational standing to bring this facial challenge to DADT. Appellants' motion omits key facts heard and determined by the district court on this issue.[37] Similarly, as the trial record reflects in detail, appellants' pretense that the case below was brought solely on behalf of the two individuals through whom Log Cabin established standing, John Nicholson and Lt. Col. John Doe, is demonstrably false: this was a facial challenge to DADT, treated as such throughout the case. Members who confer standing on an association are not equivalent to plaintiffs.

[36] The Motion's apologetic footnote 1 acknowledges as much.

[37] To take just one example, the motion asserts (at page 7) that "Log Cabin's membership is limited to dues-paying members who are Republicans," referring to Log Cabin's Bylaws, and challenges Mr. Nicholson's qualifications under that provision. But the motion omits the immediately following section of the Bylaws which provides that the board of directors may establish other criteria for granting honorary membership. The district court heard all this evidence at trial and in pre-trial motions, and rejected the contention the government makes here. See Ex. 14 at 6-7. This Court has recognized the importance of a trial court's factual inquiry on reviewing an injunction proceeding and deferring to its factual conclusions, see Rendish v. City of Tacoma, 123 F.3d 1216, 1225 (9th Cir. 1997), and details of the record such as this illustrate the wisdom of doing so.

b. Scope of the injunction

Derivative of the standing argument but conceptually distinct, appellants challenge the worldwide scope of the district court's injunction, characterizing it as "in essence classwide relief" and arguing that only Log Cabin and its members should be entitled to an injunction. Besides misrepresenting the theory under which this case was presented and tried, appellants' argument misstates the law. Longstanding Ninth Circuit authority holds that "there is no bar against class-wide, and nationwide relief in federal district or circuit court when it is appropriate." Bresgal v. Brock, 843 F.2d 1163, 1170 (9th Cir. 1987). Nationwide relief – even an injunction protecting persons other than prevailing parties in the lawsuit – is appropriate *"if such breadth is necessary to give prevailing parties the relief to which they are entitled."* Id. at 1170-71 (emphasis in original). Numerous district courts have issued, and circuit courts have affirmed, nationwide injunctions against the government in both associational and individual actions. See, e.g., ACLU v. Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007), aff'd sub nom. ACLU v. Mukasey, 534 F.3d 181 (3d Cir. 2008) (invalidating on Constitutional grounds and permanently enjoining enforcement of the Child Online Protection Act).[38]

[38] In addition to many other cases that Log Cabin cited to the district court below, including inter alia Ali v. Ashcroft, 213 F.R.D. 390 (W.D. Wash.), aff'd, 346 F.3d 873 (9th Cir. 2003) (permanently enjoining the Immigration and Naturalization Service from removing Somali natives or nationals in the United States to Somalia) and Gorbach v. Reno, 219 F.3d 1087 (9th Cir. 2000) (en banc) (affirming

c. Appellants completely ignore Lawrence v. Texas and therefore have not shown a "serious legal question"

A moving party that cannot make a showing of likely success on the merits may substitute a showing that the appeal presents a serious legal question. See Golden Gate Rest. Ass'n, 512 F.3d at 1115-16. This is what appellants tried to do in their motion to the district court for a stay. It is not clear if they still advance this argument in this Court, but to the extent they do, the motion fails as well because appellants have not shown the existence of a serious legal question.

For their claim that such a serious question exists, appellants again rely solely, as they have throughout this case, on several cases that did not invalidate DADT but which preceded Lawrence and Witt and are therefore irrelevant.[39] Tellingly, *appellants' motion does not even mention Lawrence at all*. Appellants also cite Cook v. Gates, 528 F.3d 42 (1st Cir. 2008), but Cook does not control in this Circuit, where the rule of Witt – a decision the government elected not to

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injunction enjoining Attorney General and INS, nationwide, from implementing regulations allowing administrative denaturalization), the district court independently researched and cited several more such cases in its Order Granting Permanent Injunction (Ex. 16), at 5-6.

[39] Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126 (9th Cir. 1997); Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997); Able v. United States, 155 F.3d 628 (2d Cir. 1998); Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996); and Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996) (en banc). The motion also cites Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (en banc), which dealt with the military regulations that preceded the enactment of DADT.

appeal – governs.[40] The injunction here was specifically based on Witt, and conforms to the controlling law of this Circuit.

Furthermore, the appellants' motion ignores the requirement that a movant relying on the "serious legal question" alternative must show that the balance of hardships tips "sharply" in its favor. Golden Gate Rest. Ass'n, 512 F.3d at 1115-16; Nelson v. Nat'l Aeronautics & Space Admin. (Nelson II), 530 F.3d 865, 872-73 (9th Cir. 2008), cert. granted on other grounds, 130 S. Ct. 1755 (March 8, 2010) (No. 09-530). The determination of the balance of hardships, on review of an injunction order, necessarily involves a factual inquiry of the sort that the district court here carefully conducted and adjudicated in detail in its comprehensive

[40] The Cook court stated explicitly that it disagreed with this Court's opinion in Witt; and Cook, moreover, was decided on an appeal from a motion to dismiss, without the benefit of the extensive evidence that the district court heard and considered at a full trial.

The government also continues to falsely assert that Witt "rejected as inappropriate a facial challenge to the statute." Witt did not assert that a facial challenge to DADT would be impermissible, it merely decided the case that was before it, which was an as-applied challenge. 527 F.3d at 819. The district court properly applied the standard announced in Witt to this facial challenge by requiring Log Cabin to present proof under the Witt factors that DADT does not have a plainly legitimate sweep. Nothing in Witt foreclosed the district court from doing so.

Finally, it is significant to note that on remand, the district court hearing Witt's as-applied challenge to DADT also found DADT unconstitutional and ordered the plaintiff reinstated to the Air Force. To our knowledge, the government has not moved to stay that order. These facts show further that no serious legal question is presented here, and that the military suffers no harm from the open service of homosexual servicemembers.

opinion and findings of fact. As shown below, the balance of hardships in this case in fact tips sharply toward the *appellee*, so appellants cannot rely on the "serious legal question" avenue.

d. Military deference

Appellants' motion also heavily invokes the notion of judicial deference to Congress and the military when it comes to regulating military affairs. But as the district court recognized throughout the proceedings below, the military is not immune to the demands of the Constitution. "Deference does not mean abdication" and Congress cannot subvert the guarantees of the Due Process Clause merely because it is legislating in the area of military affairs. Witt, 527 F.3d at 821. "Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs...." Weiss v. United States, 510 U.S. 163, 176 (1994).[41]

Moreover, as noted above, Log Cabin presented unrebutted admissions at trial by our nation's top civilian and military commanders that DADT "doesn't contribute to our national security," "weakens our national security," and reversing

[41] Appellants' complaint that the injunction "is a court-ordered precipitous change in the military's longstanding policy" which "constitutes an extraordinary and unwarranted intrusion into military affairs" (Motion at 16-17) carries no weight in the constitutional context. Moreover, evidence at trial showed that the end of the similar bans on open service by homosexuals in Canada and the United Kingdom came in response to court rulings in those jurisdictions (Trial Tr. 1114-15 [U.K.]; 1280-83 [Canada]), and was implemented with no ill effect whatsoever.

DADT is "essential for our national security" (trial exs. 85, 305, 306, and 321); that no studies or evidence suggest that repeal of DADT would undermine unit cohesion (trial ex. 312 at 69); and that the assertions purportedly justifying DADT's intrusion on the personal and private lives of homosexuals "have no basis in fact" (id.).

e. The First Amendment claim

The district court found that DADT infringes on the First Amendment rights of current and prospective servicemembers in at least two distinct ways: it imposes content-based restrictions on their speech; and it chills their ability to complain of harassment and to openly join organizations that seek to change the military's policy, thereby preventing them from petitioning the government for redress of grievances (Ex. 14 at 75-84). Contrary to another of appellants' misstatements of the record (Motion at 12), the district court did in fact "invoke the overbreadth doctrine"; it held that "the sweeping reach of the restrictions on speech in the Don't Ask, Don't Tell Act is far broader than is reasonably necessary to protect the substantial government interest at stake here" (Ex. 14 at 81, 82-84).

The district court therefore found, based on specific testimony at trial, that DADT requires discharge for pure speech, not merely for conduct as appellants claim it was analyzed in the (pre-Lawrence) cases of Holmes v. Cal. Army Nat'l

Guard and Philips v. Perry, supra.[42] In addition, the evidence at trial showed, through the testimony of at least four witnesses, that DADT stifles the right of petition, a separate and independent First Amendment right that has not been invoked in prior challenges to DADT.

2. Appellants Have Not Shown Irreparable Injury if a Stay is Denied

Much of the appellants' motion is devoted to their claim that the military will be harmed if the district court's injunction remains in place while the government appeals. The supposed harms identified in the motion, and enumerated in the Stanley Declaration, are all to the military's institutional interests and its bureaucratic needs. But the injunction does not require the military to take *any* affirmative measures: it does not order the military to redesign its barracks, to retool its pay scales or benefits, to re-ordain its chaplains, to rewrite its already extensive anti-harassment or "dignity and respect" rules, or anything else. Nor does it prevent the military from undertaking the acts appellants now claim it must do if DADT is enjoined – revising policies, preparing educational

[42] Philips did not reach the First Amendment issue, because the servicemember was discharged under 10 U.S.C. § 654(b)(1), which prohibits homosexual conduct, not subsection 654(b)(2), which prohibits speech. Philips, 106 F.3d at 1429-30. The court in Holmes summarily disposed of the plaintiffs' First Amendment claims by stating that they were discharged for conduct, not for speech, 124 F.3d at 1136, without considering whether DADT affected protected speech other than an admission of homosexuality used in a discharge proceeding as evidence of conduct. Neither case therefore controls the outcome here.

and training materials, and the like.[43] The district court's injunction requires only one thing: to cease investigating and discharging honorable, patriotic, brave fighting men and women for reasons unrelated to their performance and military ability.

With the injunction in place, *nothing will change* with regard to the composition of the military, the training, promotion, demotion, and deployment of servicemembers, the mission and operations of the armed forces, or anything else that pertains to the important governmental interest that the military serves. The evidence at trial showed that homosexual men and women already serve today; they are deployed to theaters of combat when needed – indeed, retained overall in greater numbers during times of combat – even if they are openly homosexual; it is their *discharge*, not their presence, that if anything impacts morale and good order. As the district court held (Ex. 14 at 59), "[f]ar from furthering the military's readiness, the discharge of these service men and women had a direct and deleterious effect on this governmental interest." The evidence at trial "directly undermine[d] any contention that the Act furthers the Government's purpose of military readiness," id. at 64; and appellants admitted – in public statements of the

[43] The injunction does not even prevent the military from warning current and prospective homosexual servicemembers that the current legal environment is uncertain, as it has done (Ex. 22), and letting them reach their own decisions whether to enlist or disclose their sexual orientation.

President and the Chairman of the Joint Chiefs of Staff – that "far from being necessary to further significantly the Government's interest in military readiness, the Don't Ask, Don't Tell Act actually undermines that interest." Id. at 65. Enjoining the enforcement of DADT, far from injuring appellants, will actually improve morale, readiness, cohesion, and overall military effectiveness.

The supposed "injury" to the military that the government claims would result from the district court's injunction is, by the government's own account, entirely a matter of rewriting handbooks and personnel manuals, developing training and "education" materials, reassuring serving personnel that their "views, concerns, and perspectives" are valued, and the like. These activities are not "irreparable injury" of the type that the test for a stay contemplates. Moreover, the government has known since June 2009, when the district court set this case for trial, that it might lose and have to adjust its policies accordingly. By contrast, the injury to Log Cabin's members and to all American servicemembers from granting a stay is both immediate and truly irreparable, in a Constitutional sense, as the following section shows.

3. A Stay Would Cause Substantial Injury to Appellee and to All Homosexual Servicemembers

If this Court grants the government's application for a stay, homosexual

servicemembers will continue to be investigated and discharged under DADT.[44] Those investigations and discharges violate the due process and First Amendment rights of the servicemembers, and it is firmly established that *deprivation of Constitutional rights is ipso facto irreparable injury*. "[C]onstitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm." Nelson II, 530 F.3d at 882; Elrod v. Burns, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). Remarkably, the government's motion does not even address *at all* the issue of Constitutional injury to Log Cabin and to homosexual servicemembers.

On the other hand, maintaining the injunction in place pending appeal preserves servicemembers' Constitutional rights. They will continue to be held to the military standards applicable to all servicemembers, and subject to the same discipline and regulations that apply to all. If the district court's judgment is ultimately reversed and the Don't Ask, Don't Tell Act is reinstated, the government may resume investigations and discharges with no ill effects beyond the hiatus it will have experienced. But the ill effects to homosexual servicemembers of the

[44] DADT is that rara avis, a statute that goes beyond merely not protecting individuals against discrimination on some basis, but actually *mandates* discrimination on that basis. The government does not even suggest that the hardships could be brought closer into balance by, at a minimum, a moratorium on investigations and discharges while its appeal proceeds.

inverse scenario – disruption and termination of their military careers, with merely the hollow satisfaction of abstract vindication when the district court's judgment is ultimately upheld – are irreparable. These individuals may not be reinstated, even if reinstatement could make them whole for the deprivation of Constitutional rights they would have suffered. The concrete injury to them from an ill-advised stay of the injunction far outweighs the theoretical harm to the government that might result from maintaining the injunction in place during the appeal process, and tips the balance of hardships "sharply" in favor of appellee.

Witnesses at trial – men and women, officers and enlisted personnel, from multiple branches of the service – presented powerful, unforgettable testimony of the effects of DADT on their personal lives, the lives of their unit comrades, and, most importantly, on the performance of their units. They are American heroes. Compelled by DADT to lie and dissemble about their human nature, subjected to unredressable humiliations, forced out of careers in which they were commended and decorated: these witnesses proved that DADT causes, *every day that it remains in force,* irreparable injury to American servicemembers. "Faced with … a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in favor of

the latter." Golden Gate Rest. Ass'n, 512 F.3d at 1126 (quotation omitted).[45]

4. The Public Interest Weighs Against a Stay

The analysis of where the public interest lies is a separate and additional consideration from that of irreparable injury. Golden Gate Rest. Ass'n, 512 F.3d at 1116. The public interest is not identical to the government's interest; if it were, this factor would always count in favor of sustaining a statute or granting a stay of an injunction invalidating a statute, and there would be no need to include it as one of several factors to be considered.

Appellants' motion does not discuss the public interest at all, beyond reciting that an Act of Congress is "deemed" to be a declaration of public interest (Motion at 16). But the public interest is not so limited: it lies equally if not more so in safeguarding the Constitutional rights that define us as a nation. The public interest is not served by blind deference to military judgment or even to legislative findings. Rather, the clear public interest is in ensuring that the military, like every other institution of our society, conforms to Constitutional requirements.

Finally, it must not be overlooked that it is not only servicemembers who are affected by DADT. Servicemembers' family and friends – third party members of the public – are affected also, as their own First Amendment rights are impaired

[45] Amicus curiae briefs being filed concurrently with this Response address the harms to servicemembers in more detail.

when a servicemember cannot write them a private letter or express affection to them in public. This, too, was proven at trial (see Ex. 14 at 84). Their interests militate against the granting of a stay of injunction as well.

C. A Stay Would Be More Disruptive of the Status Quo Than Maintaining the Injunction

It is too simplistic to argue, as the government does at page 20 of its motion, that a stay of the injunction is necessary to preserve the status quo. The status quo is not simply the presence of DADT on the statute books since 1993, as the government contends. It is equally the status quo, as the district court heard and found, that homosexuals are serving, *today*, in all branches of the military, honorably and valiantly. Though they serve in constant peril of investigation and discharge, they serve; they are commended, decorated, and promoted; they are deployed to combat when the needs of the military so require.[46] If the district court's injunction remains in place pending the government's appeal, as it should, this status quo will be maintained; the only change to it will be the lifting of the peril of investigation and discharge that is currently unconstitutionally overlaid on the mortal peril these men and women face simply by virtue of their profession.

"Maintaining the status quo is not a talisman." Golden Gate Rest. Ass'n, 512 F.3d at 1116. Rather, the focus must be on *prevention of injury*: "[i]t often

[46] See Ex. 14 at 64, 72-73.

happens that this purpose is furthered by preservation of the status quo, but not always. If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury. … The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo." Id.

The government has already acted nimbly in response to the district court's injunction. Two days after it was issued, on October 14, the Defense Department announced that it was halting all discharges under DADT. Press Release (Ex. 21). The next day, October 15, the military instructed its field recruiting offices to process applications for enlistment from openly gay and lesbian applicants. Press Release (Ex. 23). News reports indicated that applications from such individuals were received (and presumably processed) without incident. On that same day, Undersecretary of Defense Stanley issued a memorandum to the secretaries of the military departments (Ex. 22) directing that "the Department of Defense will abide by the terms of the injunction." Then, last Thursday, October 21, following this Court's issuance of a temporary stay, the Secretary of Defense issued a memorandum (Ex. 24) directing that "until further notice, no military member shall be separated pursuant to 10 U.S.C. § 654 without the personal approval of the Secretary of the Military Department concerned, in coordination with the Under Secretary of Defense for Personnel and Readiness and the General Counsel of the

Department of Defense. These functions may not be delegated."

That the government could and did issue the October 15 instructions and comply with the injunction immediately shows that the military will not sustain irreparable harm from compliance and belies the need for a stay pending appeal. And while the October 21 directive has no effect on the initiation and progress of investigation or discharge proceedings – and thus does not cure the constitutional harm that the district court found – it will necessarily slow the rate of actual discharges, given that all DADT discharges must be personally approved by three high-ranking civilian officials. That strikingly undermines the government's claim that it must keep its current policies and regulations in place, and will sustain irreparable harm if it is not free to fully enforce DADT pending appeal.

V.

CONCLUSION

For all the reasons set forth above, appellants' emergency motion for stay should be denied. If a stay is granted, however, this appeal should be expedited.

Dated: October 25, 2010

Respectfully submitted,

WHITE & CASE LLP

By: */s/ Dan Woods*

Dan Woods

Attorneys for Plaintiff/Appellee Log Cabin Republicans

REQUEST FOR ORAL ARGUMENT

Appellee requests that this motion be set for oral argument.

Dated: October 25, 2010

Respectfully submitted,

WHITE & CASE LLP

By: */s/ Dan Woods*
Dan Woods
Attorneys for Plaintiff/Appellee
Log Cabin Republicans

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 25, 2010.

I certify that all participants in the case 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 25, 2010, at Los Angeles, California.

/s/ Earle Miller
Earle Miller