UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOG CABIN REPUBLICANS, a non-profit corporation, Plaintiff - Appellee, v. UNITED STATES OF AMERICA; ROBERT M. GATES, Secretary of Defense, in his official capacity, Defendants - Appellants.	No. 10-56634 D.C. No. 2:04-cv-08425-VAP Central District of California, Los Angeles ORDER

Before: O'SCANNLAIN, TROTT and W. FLETCHER, Circuit Judges.

Appellee's motion for leave to file an oversize response to appellant's motion for stay pending appeal is GRANTED.

Appellant's motion to stay the district court's October 12, 2010, order pending appeal is GRANTED.[1] The briefing schedule established previously shall remain in effect.

[1] As to oral argument, both sides have provided us with satisfactory information and argument to make this decision, and, in accord with our General Orders, we have decided that oral argument is not necessary.

I

On October 12, 2010, the district court entered a permanent injunction enjoining the enforcement or application of an Act of Congress known as the "Don't Ask, Don't Tell Act," codified at 10 U.S.C. § 654. Although the government, including the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff, tells us that "[t]he Administration does not support § 654 as a matter of policy and strongly believes Congress should repeal it," the government nevertheless asks us to "stay enforcement of the district court's order pending resolution on the merits by our Court of the constitutional issues involved." The government argues that the district court's plenary order–mandating that its injunction be given immediate worldwide effect–will seriously disrupt ongoing and determined efforts by the Administration to devise an orderly change of policy. The government asserts that successfully achieving this goal will require as a preliminary matter the preparation of orderly policies and regulations to make the transition. We are advised by the government that, in legal terms, a precipitous implementation of the district court's ruling will result in "immediate harm" and "irreparable injury" to the military. To make this point, the government avers that a successful and orderly change in policy of this sort will not only require new policies, but proper training and the guidance of those

affected by the change. The government persuasively adds that "[t]he district court's injunction does not permit sufficient time for such appropriate training to occur, especially for commanders and servicemen serving in active combat." We also note that the government takes issue with the district court's constitutional conclusions.

II

In addition to the fact that this case raises "serious legal questions," Golden Gate Restaurant Association v. City and County of San Francisco, 512 F.3d 1112, 1115 (9th Cir. 2008), there are three reasons that persuade us to grant a stay pending appeal.

First, Acts of Congress are presumptively constitutional, creating an equity in favor of the government when balancing the hardships in a request for a stay pending appeal. Bowen v. Kendrick, 483 U.S. 1304 (1987) (Rehnquist, C.J., in chambers). In fact, "[w]henever called upon to judge the constitutionality of an Act of Congress–'the gravest and most delicate duty that this Court is called upon to perform'–the Court accords 'great weight to the decisions of Congress.'" Rostker v. Goldberg, 453 U.S. 57, 64 (1981) (quoting Blodgett v. Holder, 275 U.S. 142, 148 (1927), and Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 102 (1973)).

Second, "'judicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies." Rumsfeld v. Forum for Academic & Institutional Rights, 547 U.S. 47, 58 (2006) (quoting Rostker v. Goldberg, 453 at 70). Rostker advises us in turn that courts must be "careful not to substitute [their] judgment of what is desirable for that of Congress" where the military is concerned. 453 U.S. at 68. "Courts are ill-suited to second-guess military judgments that bear upon military capability and readiness." Able v. United States, 155 F.3d 628, 634 (2d Cir. 1998). Moreover, "the Constitution contemplates that Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.'" Weiss v. United States, 510 U.S. 163, 177 (1994) (quoting Chappell v. Wallace, 462 U.S. 296, 301 (1983)). These principles do not mean, of course, that the individual rights guaranteed by our Constitution have no place in this calculus, but they do counsel careful consideration before final judgment. Rostker, 453 U.S. at 67 ("None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs.").

Third, the district court's analysis and conclusions are arguably at odds with the decisions of at least four other Circuit Courts of Appeal: the First, Second,

Fourth, and Eighth. See Cook v Gates, 528 F.3d 42 (1st Cir. 2008) (holding that § 654 does not violate constitutional substantive due process, the principle of equal protection, or the Free Speech Clause of the First Amendment); Able v. United States, 155 F.3d at 631-36 (§ 654(b) does not violate the Constitution's Equal Protection Clause of the Fifth Amendment); Richenberg v. Perry, 97 F.3d 256, 260-62 (8th Cir. 1996) (§ 654 does not violate the First Amendment or the Equal Protection component of the Fifth Amendment); Thomasson v. Perry, 80 F.3d 915, 927-31, 934 (4th Cir. 1996) (en banc) (holding that § 654 does not violate any provision in the Constitution). As we said in United States v. AMC Entertainment, Inc., 549 F.3d 760 (9th Cir. 2008),

> Principles of comity require that, once a sister circuit has spoken to an issue, that pronouncement is the law of that geographical area. Courts in the Ninth Circuit should not grant relief that would cause substantial interference with the established judicial pronouncements of such sister circuits. To hold otherwise would create tension between circuits and would encourage forum shopping.

Id. at 773. The Appellees' answer to our sister circuits' decisions is that they are now "irrelevant," but only a final merits decision by an appellate court can render this judgment.

Accordingly, we conclude that the government's colorable allegations that the lack of an orderly transition in policy will produce immediate harm and

precipitous injury are convincing. We also conclude that the public interest in ensuring orderly change of this magnitude in the military–if that is what is to happen–strongly militates in favor of a stay. Golden Gate Restaurant Ass'n, 512 F.3d 1115. Furthermore, if the administration is successful in persuading Congress to eliminate § 654, this case and controversy will become moot.

Although our respected colleague in dissent agrees generally with the gist of our decision to grant this stay, he would allow the district court's permanent injunction to remain in effect with respect only to the military's authority to discharge any member who violates the "Don't Ask, Don't Tell" policy while the issues remain on appeal. In our view, this "carve out" is inconsistent with the stay itself and would be subject to the vagaries of the rule of unintended consequences. It could have the unfortunate effect of encouraging violations of § 654 in the interim, which, if the statute were ultimately to be found valid (an issue on which we express no opinion), would leave the persons involved in a precarious position, because even Appellees admit that the government could resume discharges if the district court judgment is reversed.

In light of these concerns, we believe that prudence mandates restraint until the final judgment is rendered.

W. FLETCHER, Circuit Judge, dissenting:

I respectfully dissent.

I would have preferred to hear argument to assist our panel in deciding whether, or in what degree, to grant the Defendants' motion to stay the district court's order. However, our General Orders provide that one judge requesting oral argument on a motion is not enough. G. O. 6.3.g.(4) ("If two judges determine that oral argument on a motion is necessary, the panel shall direct the motions attorney to make the necessary arrangements.").

I would stay the district court's order in all respects except one: I would allow the district court's order to continue in effect insofar as it enjoins the Defendants from actually discharging anyone from the military, pursuant to the Don't Ask Don't Tell policy, during the pendency of the appeal. Defendants would not be required during the pendency of the appeal to change their recruiting practices, to change their personnel manuals, or, subject only to the requirement that they not actually discharge anyone, otherwise to change their practices. If the hardship that would be imposed on plaintiffs by actual discharge is removed, the balance of hardships would tip sharply in favor of the Defendants. A partial stay of the district court's order, such as I have just described, would then be appropriate. See Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco, 512

F.3d 1112, 1115-16 (9th Cir. 2008) (a stay is appropriate when there are "serious legal questions" and the balance of hardships tips sharply in favor of the party seeking the stay).