

Case Nos. 10-56634 and 10-56813

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

LOG CABIN REPUBLICANS,
a non-profit corporation,

Plaintiff-Appellee/Cross Appellant,

vs.

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

Defendants-Appellants/Cross Appellees.

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

**APPELLEE/CROSS APPELLANT'S MOTION TO EXPEDITE BRIEFING
AND ORAL ARGUMENT SCHEDULE**

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Plaintiff-Appellee/Cross Appellant Log Cabin Republicans (“Log Cabin”) successfully challenged before the district court the federal statute that bars homosexuals from openly serving in the U.S. armed forces, codified at 10 U.S.C. § 654, commonly referred to as “Don’t Ask, Don’t Tell.” Defendants-Appellants/Cross Appellees the United States of America and Robert M. Gates, Secretary of Defense (collectively, the “government”) now appeal that ruling.

In light of this Court’s recent order staying the district court’s order enjoining enforcement of Don’t Ask, Don’t Tell, Log Cabin respectfully requests, pursuant to 28 U.S.C. § 1657 and Circuit Rules 27-12 and 34-3, an order expediting the briefing schedule and oral argument for the government’s appeal and Log Cabin’s cross-appeal,¹ filed yesterday, November 18, 2010.

The current briefing schedule, issued November 19, 2010, provides as follows:

- The government’s opening brief is due January 24, 2011.
- Log Cabin’s answering and opening brief is due February 23, 2011.
- The government’s reply and answering brief is due March 25, 2011.
- Log Cabin’s optional reply brief is due fourteen days after service of the third brief on cross-appeal.

¹ Log Cabin appeals the district court’s dismissal on a motion to dismiss of its Fifth Amendment equal protection claim.

As is the customary practice of this Court, oral argument has yet to be scheduled. Log Cabin understands that without an expedited oral argument date, it may be more than a year until the Court hears the cross-appeals and renders a decision.

Because there are good grounds for expediting this appeal, Log Cabin proposes the following briefing and oral argument schedule for the government's direct appeal and Log Cabin's cross-appeal:

- The government's principal brief due January 5, 2011.
- Log Cabin's principal and response brief due January 26, 2011.
- The government's response and reply brief due February 25, 2011.
- Log Cabin's optional reply brief due March 11, 2011.
- Oral argument to be scheduled for the week of April 11, 2011.

As demonstrated below, good cause exists to expedite the appeal of both matters. Further, both appeals qualify as "priority cases" as well as "cases of public importance." The Court, therefore, should expedite the briefing and oral argument schedule for both appeals.

I.

BACKGROUND

After a two-week trial on the merits, submission of thousands of pages of exhibits, and extensive expert and lay witness testimony, the district court found

that Don't Ask, Don't Tell violates the First Amendment and the Due Process clause of the Constitution.² On October 12, 2010, the district court permanently enjoined the enforcement of 10 U.S.C. § 654 as well as its implementing regulations.³ On October 20, 2010, a motions panel of this Court temporarily granted the government's emergency motion to stay the injunction, and on November 1, 2010, the panel ordered that the stay should remain in effect for the duration of the appeal. It left the previously established briefing schedule in place.⁴ No party has previously moved to expedite the briefing and oral argument schedule here.

Log Cabin's challenge to Don't Ask, Don't Tell addresses one of the most important civil rights issues of this generation. The district court found that Don't Ask, Don't Tell weakens the U.S. military and violates Constitutional rights. It concluded that "evidence at trial showed that the Don't Ask, Don't Tell Act harms

² See Exs. 14-15 to Log Cabin's Motion To File Oversize Brief and Response to Motion To Stay Lower Court Action ("Mot. to Stay Response"), Docket Entry No. 9.

³ See Ex. 16 to Mot. to Stay Response, Docket Entry No. 9.

⁴ On November 12, 2010, the Supreme Court denied Log Cabin's application to vacate the stay.

military readiness and unit cohesion, and irreparably injures servicemembers by violating their fundamental rights.”⁵

II.

THE APPEALS SHOULD BE EXPEDITED BECAUSE (1) GOOD CAUSE EXISTS, (2) THEY ARE ENTITLED TO PRIORITY STATUS, AND (3) THEY ARE OF PUBLIC IMPORTANCE

A. Good Cause

The appeals at issue should be expedited because Don't Ask Don't Tell violates the Constitutional rights of current and prospective servicemembers. Pursuant to 28 U.S.C. § 1657 and Circuit Rule 27-12(3), motions to expedite should be granted on a showing of good cause. “Good cause” exists where, as here, Constitutional rights are in issue. 28 U.S.C. § 1657(a).

Similarly, Circuit Rule 27-12(3) provides that good cause exists if irreparable harm will occur in the absence of an expedited appeal. The district court held that Don't Ask, Don't Tell violates both the First Amendment rights of free speech and petition and the Due Process Clause of the Fifth Amendment. “[C]onstitutional violations cannot be remedied through damages and therefore generally constitute irreparable harm.” Nelson v. Nat'l Aeronautics & Space

⁵ District Court's Amended Order Denying Defendants' *Ex Parte* Application for Entry of an Emergency Stay (Oct. 20, 2010) at 6, attached as Ex. 20 to Mot. to Stay Response, Docket Entry No. 9.

Admin., 530 F.3d 865, 882 (9th Cir. 2008). The deprivation of Constitutional rights is, therefore, *ipso facto* irreparable injury.

As a result of the current stay of the district court's injunction, the government will remain free to investigate and discharge servicemembers because of their homosexual status, without furthering any compelling government interest and indeed, as the district court found, actively undermining our national security. The government will remain free to violate the First Amendment both by punishing servicemembers for pure speech and by chilling their right to petition for redress of grievances by reporting harassment and even abuse for fear of investigation, retribution, and discharge. The government will remain free to deprive Americans, who fight to defend our freedoms, of the liberties that our Constitution grants them.

Because this case presents both significant Constitutional issues and irreparable injury, good cause exists under 28 U.S.C. §1657 and Circuit Rule 27-12.

B. Priority Status

The instant appeals further satisfy the definition of a "priority case." Circuit Rule 34-3(3) provides that, in addition to those matters that satisfy the good cause requirement of 28 U.S.C. § 1657, appeals involving applications for permanent injunctions are entitled to priority. Because the government appeals a permanent

injunction, which this Court has stayed pending appeal, these appeals are entitled to priority status.

C. Public Importance

Lastly, the Court controls its docket and can give preference to cases of public importance. 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2351 (3d ed. 2010); see also Perry v. Schwarzenegger, No. 10-16696, 2010 WL 3212786, at * 1 (9th Cir. Aug. 16, 2010) (order *sua sponte* expediting briefing and hearing of appeal in the Constitutional challenge to the state of California's Proposition 8).

Don't Ask, Don't Tell has impacted and continues to impact the lives of thousands of current and prospective American servicemembers. Servicemembers' family and friends – third-party members of the public – are affected also, as their own First Amendment rights are impaired when a servicemember cannot write them a private letter or express affection to them in public. Further and, equally importantly, Don't Ask Don't Tell impacts every person who lives under the protection of the United States Constitution: this constitutes a case of public importance.

III.

STATUS OF TRANSCRIPT

The transcripts are already complete and are ready to be filed with this Court. All of the official copies of the transcripts have been provided to the parties and most have been lodged with the district court. See Docket Entry Nos. 40, 130-33, 227, 240-46, 262-73, 286-87 in Log Cabin Republicans v. United States et al., Case No. 2:04-cv-8425 (lodging of official transcripts in district court proceedings). Expedited consideration of this appeal, therefore, need not await preparation of the transcripts.

IV.

OPPOSING COUNSEL'S POSITION

The government has acknowledged that expediting this appeal is appropriate. In its motion to stay the district court's injunction, the government stated that "to the extent any servicemember faces discharge proceedings (or any other alleged immediate harm), that can be addressed by expediting appeal."⁶

⁶ The government's Ex Parte Application for Emergency Stay filed in the District Court, dated Oct. 14, 2010, attached as Ex. 18 to Motion To Stay Response, Docket Entry No. 9.

V.

CONCLUSION

For the foregoing reasons, the Court should expedite both appeals, and set an expedited date for oral argument.

Dated: November 19, 2010

Respectfully submitted,

WHITE & CASE LLP

By: 

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 November 19, 2010.

I certify that all participants in the case, except for the participant listed below, are registered CM/ECF users and that service will be accomplished by the appellate system.

I certify that the foregoing document was served on the following participant by placing a true and correct copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

J. Pietrangelo II
P.O. Box 548
Avon, OH 44011

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 November 19, 2010, at Los Angeles, California.

/s/ Aaron A. Kahn
Aaron A. Kahn