Case Nos. 10-56634, 10-56813

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LOG CABIN REPUBLICANS,
a non-profit corporation,

Appellee/Cross-Appellant,

vs.

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

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

RESPONSE TO MOTION TO HOLD APPEALS IN ABEYANCE

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TABLE OF CONTENTS

Log Cabin Republicans, Appellee/Cross-Appellant herein, opposes the motion of the government appellants, the United States of America and Robert M. Gates, Secretary of Defense, to hold these appeals "in abeyance" and suspend briefing and argument on the important Constitutional issues presented.

ARGUMENT

Although a bill to repeal the "Don't Ask, Don't Tell" statute, 10 U.S.C. § 654, has been passed and signed by the President, this legislative "repeal" is not yet effective. It is undisputed, and the government's motion acknowledges, that repeal will not take effect for 60 days following certification by three officials that several requirements have been met – a certification for which there is no deadline or expected timetable. The repeal also may not take effect at all if threatened Congressional action to "repeal the repeal" proceeds. In the meantime, Don't Ask, Don't Tell continues in full force. Homosexual Americans who wish to enlist in the armed forces may not do so openly; current homosexual servicemembers must continue to lie about their identity and serve under ongoing threat of investigation; and servicemembers identified as homosexual continue to be subject to discharge.

The district court found the Don't Ask, Don't Tell statute facially unconstitutional because it violates the due process and First Amendment rights of homosexuals who currently serve, or wish to serve, in our country's Armed Forces. The government elected to appeal that judgment, and stipulated to expedite the

briefing of that appeal. Its opening brief is due January 24. The government's motion is nothing more than a transparent attempt to avoid filing a brief in which it will have to argue that Don't Ask, Don't Tell is constitutional, when the government knows – and government officials have admitted – that it is not. The government cites no case for the proposition that a stay of this appeal (what it calls an "abeyance," perhaps because it cannot meet the established standards for a stay) is appropriate. The government has not met its burden of showing the need for a stay of proceedings.

This Court should not suspend its consideration of the district court's determination out of a misguided sense of deference to a political process that remains uncertain and indefinite, and should maintain the current stipulated, expedited briefing schedule for these appeals.

A. This Court should reject the government's constant attempts at delay and avoiding the issues.

The government knows that Don't Ask, Don't Tell is constitutionally indefensible. It called no witnesses at trial in the district court and put on no evidence other than the legislative history of the statute. President Obama, the Commander-in-Chief, has stated repeatedly that Don't Ask, Don't Tell "weakens" and in fact "endangers" our national security; in addition, the President has as much as acknowledged that the standard of review the district court applied at trial

and in its judgment and injunction was correct and that the court's role invalidating the statute was appropriate. *See* Interview with President Obama, available at http://www.advocate.com/News/News_Features/Exclusive_Interview_President_Barack_Obama_DADT/ (text reproduced in Exhibit A at 6).

It was no doubt in recognition of the unconstitutionality of the statute that while this case was pending in the district court, the government made at least *five* requests for stay. *See* district court Doc. 249 (Order Granting Permanent Injunction) at 13 ("Defendants have requested a stay in this action on three previous occasions"); Doc. 253 (Defendants' *Ex Parte* Application for the Entry of an Emergency Stay). Now, in this Court, with its opening brief on appeal due in two weeks, this motion is another effort by the government to avoid filing a brief attempting to defend the indefensible. But the government's evident discomfort at having to square that circle is not grounds to hold the appeal in "abeyance."

The balance of the hardships that would be imposed on the parties to this appeal makes a stay of the appeal inappropriate. If this appeal proceeds as scheduled, the government need only file its opening and reply briefs: by no means a hardship recognized in the law. By contrast, if the appeal is stayed as the government requests, current and prospective servicemembers will sustain an ongoing deprivation of their Constitutional rights as the district court found, which

is *ipso facto* irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Nelson v. Nat'l Aeronautics and Space Admin.*, 530 F.3d 865, 882 (9th Cir. 2008).

This Court should require from the government either forthright advocacy defending Don't Ask, Don't Tell against the district court's declaration of its unconstitutionality, or an acknowledgment that the district court was correct and a dismissal of its appeal. The motion is a procedural feint that does the government no credit; this Court should reject it.

B. The legislative "repeal" of Don't Ask, Don't Tell remains contingent and thus incomplete, and meanwhile the statute continues to work its pernicious, unconstitutional effect.

Although the "Don't Ask, Don't Tell Repeal Act of 2010," Pub. L. No. 111-321, 124 Stat. 3515, was signed into law on December 22, 2010, the Don't Ask, Don't Tell Act itself *has not been repealed*. Repeal is not effective, and the law remains on the books and being enforced, until 60 days after the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff have all certified to Congress, in writing, three things: that they have considered the recommendations contained in a military working group report that was issued on November 30, 2010; that the Department of Defense 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."

Pub. L. No. 111-321, § 2(b)(2)(A-C). The act specifically states that until that time, the Don't Ask, Don't Tell law remains in full force and effect. *Id.*, § 2(c). Because repeal has not occurred and will not be effective until some time in the indefinite future, this appeal is not moot and should proceed to judicial resolution. *Bouno v. Norton*, 371 F.3d 543 (9th Cir. 2004). *Cf. Ballen v. City of Redmond*, 466 F.3d 736, 739 (9th Cir. 2006) (possibility of re-enactment means case not moot); *Coral Constr. Co. v. King County*, 941 F.2d 910, 928 (9th Cir. 1991) (same).

1. **The repeal process is a lengthy one.**

Pub. L. No. 111-321 specifies no timetable for either the preparation of new policies and regulations, or the written certification to Congress by the civilian and military officials that all is in order for their implementation, or for the implementation itself. Nor have the civilian and military officials charged with certification offered any time frame for this process. Indeed, in a memorandum issued on December 22, 2010, the very day that the President signed Pub. L. No. 111-321 (Attachment 3 to the motion), the Secretary of Defense stated that the Defense Department would proceed "carefully and methodically, but purposefully … we will approach this process deliberately and will make [the] certification only after careful consultation with the military service chiefs and our combatant commanders, and when we each are satisfied that the conditions for certification set out in the statute have been met."

At a news briefing last week, on January 6, 2011, the Secretary of Defense and the Chairman of the Joint Chiefs of Staff continued to emphasize that the process leading up to certification is likely to be a lengthy one:

> SEC. GATES: … Our goal here is to – is to move as quickly but as responsibly as possible. I see this as a – as a three-step process. The first is to finalize changes in regulations, policies, get clearer definition on benefits. [¶] The second phase is to then prepare the training materials for use…. So there's the policy piece, the training – preparation piece, and then the actual training. [¶] We're trying to get the first two phases of that process done as quickly as possible. My hope is that it can be done within a matter of a very few weeks so that we can then move on to what is the real challenge, which is providing training to 2.2 million people. [¶] … But …there's just a certain element of physics associated with the number of people involved in this process. …

Transcript of DOD News Briefing, January 06, 2011, available at http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=4747 (Exhibit B at 11). The Chairman of the Joint Chiefs of Staff, for his part, added that "We'll get through this. We'll do it deliberately." *Id*. at 12.

Moreover, after this methodical and deliberate process, Pub. L. No. 111-321 imposes a further 60-day waiting period following certification before it is finally effective. Therefore even if the President, the Secretary of Defense, and the Chairman of the Joint Chiefs were to give Congress their written certifications *today* – an obvious impossibility – the briefing on this appeal, currently scheduled to conclude with the government's reply brief on March 8, 2011, would be

complete before the Don't Ask, Don't Tell Act was finally repealed and off the books. Given the lengthy amount of time the Defense Department's implementation and certification process is certain to take (assuming the process ends in certification),[1] it is likely that the hearing and this Court's determination of this appeal will take place before repeal is ultimately effective.

2. **Don't Ask, Don't Tell will continue to impose its unconstitutional effects throughout the entire time until repeal is fully effective.**

By the government's own admission, then, actual repeal of Don't Ask, Don't Tell – fully effective repeal, wherein the statute is stricken from the United States Code and the policy is no longer enforced against current and prospective servicemembers – is many months, or even years, away. In the meantime, by the terms of section 2(c) of Pub. L. No. 111-321 itself, there is "No Immediate Effect on Current Policy" and 10 U.S.C. § 654 "shall remain in effect." During that time, the military will continue to refuse to process enlistments of individuals who openly declare their homosexuality. It will continue to require that serving personnel who are homosexual conceal that core aspect of their identity, and lie, in violation of their oath and their honor, if the subject arises. This aspect of Don't

[1] The government's offer in its motion to advise the Court in 90 days of the status of the certification process is an implicit admission that certification will not be complete even by then. Meanwhile, as discussed below, the unconstitutional effects of Don't Ask, Don't Tell will continue, with no protection for American servicemembers.

Ask, Don't Tell has been particularly troublesome to both the military and the civilian commanders: Admiral Mullen, the Chairman of the Joint Chiefs of Staff, testified to the Senate Armed Services Committee in February 2010 that

> [n]o matter how I look at this issue, I cannot escape being troubled by the fact that we have in place a policy which forces young men and women to lie about who they are in order to defend their fellow citizens. For me personally, it comes down to integrity, theirs as individuals and ours as an institution.

Transcript of Hearing before the Senate Armed Services Committee, 111th Cong., 2nd Sess. (February 2, 2010) (Exhibit C at 59); and the Secretary of Defense, for his part, stated in November 2010 that

> one of the things that is most important to me is personal integrity. And a policy or law that in effect requires people to lie gives me – gives me a problem. And so I think it's – I mean, we spend a lot of time in the military talking about integrity and honor and values. [¶] Telling the truth is a pretty important value in that scale. It's a very important value. And so for me, and I thought the admiral was – that Admiral Mullen was eloquent on this last February – a policy that requires people to lie about themselves somehow seems to me fundamentally flawed.

Transcript of DOD News Briefing, November 30, 2010, available at http://www.defense.gov/transcripts/transcript.aspx?TranscriptID=4728 (Exhibit D at 7).

And, most significantly, the military will continue to investigate and discharge homosexual servicemembers, with the requisite approvals, just as if Pub. L. 111-321 had never been enacted. This is not hyperbole or scaremongering by

appellee herein, it is the express directive of the Secretary of Defense:

> In order to prevent any confusion, I want to be perfectly clear: at this time, there are no new changes to any existing Department or Service policies. … Service members who alter their personal conduct during this period [through 60 days after certification] may face adverse consequences.

December 22, 2010 Gates memorandum (Attachment 3 to motion) (emphasis in original). As Admiral Mullen drily put it at last week's news briefing, "the law has not changed, won't until it is certified; and there's 60 days after certification. And so now is not – from my perspective, you know, now is not the time to 'come out,' if you will." Exhibit B at 12.[2]

The district court found these consequences of Don't Ask, Don't Tell to be unconstitutional violations of servicemembers' due process and First Amendment rights. The unconstitutionality is not cured by the prospective application, months from now, of a contingent repeal act.[3] To hold this appeal in abeyance without

[2] The government has acknowledged, in conversations with appellee's counsel, that the military has in fact continued to discharge individuals under Don't Ask, Don't Tell since the stay of the district court's injunction.

[3] The lengthy time period before Pub. L. No. 111-321 finally becomes effective gives rise to another concern: it is possible that the Don't Ask, Don't Tell Act could be reinstated. According to news reports, at least one member of Congress is exploring the possibility, in the new 112th Congress, of reopening the Congressional debate and "repealing the repeal." See report, "Still unclear when military policy on gays could change," available at http://edition.cnn.com/2011/US/01/07/military.gays/ (Exhibit E). If such a "repeal of the repeal" were to pass Congress before the certification process is completed and 60 more days elapse, certification would be a moot point.

resolution of the live Constitutional issue it presents would perpetuate the deprivation of American servicemembers' Constitutional rights, a state of affairs this Court should not countenance.

3. The government rejected a feasible compromise that would protect servicemembers' Constitutional rights.

Though the government's motion states that appellee opposes the motion, that statement does not tell the full story. The motion omits to state that appellee did offer a compromise resolution. When asked by counsel for the government if it would agree to holding the appeal in abeyance, appellee offered to agree to stay this appeal, even though enlistees and current servicemembers would not be able to identify themselves as homosexual, if the government would only agree to a moratorium on actual discharges pending certification and full repeal of the Don't Ask, Don't Tell Act. Such a compromise, which follows the suggestion offered by Judge Fletcher in his dissent from this Court's stay order of November 1, 2010, would at least ameliorate the most harmful consequences of Don't Ask, Don't Tell: the discharge of competent, patriotic servicemembers for no reason but their homosexuality. The government rejected this resolution and does not mention the proposal in its motion.

C. **If the briefing schedule is suspended and the appeal held in abeyance, then the stay of the district court's permanent injunction should be lifted and the injunction reinstated.**

After a full two-week trial at which over 20 witnesses testified and over 100 exhibits were introduced, the district court on October 12, 2010 entered a lengthy, reasoned Memorandum Opinion, Findings of Fact and Conclusions of Law, and a Judgment and Permanent Injunction declaring 10 U.S.C. § 654 and its implementing regulations unconstitutional and enjoining its continued enforcement worldwide. The government hastened to file this appeal, two days after the district court entered judgment, and immediately moved to stay the district court's judgment, first in the district court and then in this Court. This Court entered a stay of the district court's judgment on November 1, 2010.

Now the government is attempting to eat its cake and have it too. Having obtained a stay of the district court's injunction, on the grounds that that injunction ordered a "precipitous change" in the military's policy and appellate consideration of the Constitutional issues was required, the government now requests that the appeal itself be stayed so as not to interfere with the change in policy that is – "methodically" and "deliberately" – underway. The government cannot have it both ways. If this Court is to determine the constitutionality of Don't Ask, Don't Tell under the appellate process the government instigated, it should proceed to do so without delay or "abeyance." On the other hand, If Don't Ask, Don't Tell is to

be ended because (as the civilian and military leadership acknowledge) it unconstitutionally undermines and endangers our national security, and (as the Congress has determined) it is bad policy, then an immediate halt on investigations and discharges as the district court ordered is appropriate, and its judgment and injunction requiring such a halt should be reinstated.

This Court should maintain these appeals on the expedited briefing schedule it ordered on December 1, 2010, and proceed to a speedy hearing and decision on the substantial Constitutional issues presented. But if the Court grants the government's motion to suspend the briefing and abey the appeal, it should lift the stay of the district court's October 12, 2010 orders and judgment that it entered on November 1, 2010, and reinstate the district court's injunction pending resolution of the appeal.

CONCLUSION

For all the reasons set forth above, the government's motion to suspend the briefing and hold the appeals in abeyance should be denied. These appeals should remain subject to the current briefing schedule, and set for argument as expeditiously as possible on the Court's calendar.

Dated: January 10, 2011

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 January 10, 2011.

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 January 10, 2011, at Los Angeles, California.

/s/ Hector M. Cordova
Hector M. Cordova