Case Nos. 10-56634, 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

REPLY BRIEF OF LOG CABIN REPUBLICANS IN SUPPORT OF MOTION TO VACATE STAY OF INJUNCTION

Dan Woods (CA SBN 78638)
dwoods@whitecase.com
Earle Miller (CA SBN 116864)
emiller@whitecase.com
Aaron A. Kahn (CA SBN 238505)
aakahn@whitecase.com

WHITE & CASE LLP
633 West Fifth Street, Suite 1900
Los Angeles, California 90071
Telephone: (213) 620-7700
Facsimile: (213) 452-2329
Attorneys for Plaintiff-Appellee/Cross-Appellant Log Cabin Republicans

The government's response to Log Cabin Republicans' motion to vacate this Court's stay order completely ignores the central point that Log Cabin argued in that motion. As Log Cabin showed in its motion, the stay of injunction that this Court entered on November 1, 2010 was necessarily premised on the conclusion that the government had shown a likelihood of success on the *merits* of the case, namely, that the Don't Ask, Don't Tell statute ("DADT") is constitutional. Since the government no longer argues that the statute is constitutional, the stay order lacks a continuing legal foundation and must be vacated. The government's opposition offers no rebuttal to this essential deficiency.

The opposition also fails to show that the government is likely to succeed on its other arguments on appeal either. Log Cabin's motion showed that those arguments, relating to Log Cabin's standing and to the scope of the district court's injunction, fail in view of the trial court record and the applicable standard of review. The opposition ignores that showing too.

A. The Government Does Not Refute That the Legal Underpinning of the Stay Is Gone

As the motion showed, when the government sought a stay of the district court's injunction, it represented to this Court – for several pages – that it was likely to succeed on the merits of its arguments that DADT did not violate either the due process clause or the First Amendment. The motion also showed that the

government's merits brief makes no such arguments. The opposition does not dispute this.

Instead, the government insists that the merits of this appeal to be evaluated are those presented by the law "as it now exists" since enactment of the Repeal Act (Opp., at 5). But the Court should see through this attempt to evade the issue before it. The Repeal Act continues DADT in full force and effect indefinitely and, as a result of the stay, the government continues to investigate and discharge servicemembers. The government's argument about the constitutionality of the Repeal Act, however, does not include any claim that section 2(c), the portion of the Repeal Act maintaining DADT in effect, passes constitutional muster under the First or Fifth Amendments.

Rather than make any argument under the First or Fifth Amendments, the government cites (Opp., at 3) the three reasons this Court listed in granting that stay: (1) "Acts of Congress are presumptively constitutional" (ER 300); (2) judicial deference is due to Congressional legislation in military affairs (ER 301); and (3) the asserted "conflict between the district court's constitutional ruling and the rulings of other circuits" (ER 301-02). But the government itself argues that the Don't Ask, Don't Tell Repeal Act worked "a massive, historic change in the legal landscape" (Govt. Merits Reply, Dkt. 104, at 1); given the government's new

position declining to defend the constitutionality of DADT itself, those reasons for a stay no longer pertain to this case.

First, the presumption of constitutionality logically plays no part when, as here, the constitutionality of the statute is no longer in issue. Since the government takes the position that any necessary constitutional examination is to be directed to the Repeal Act, not to DADT itself, this Court need not presume the constitutionality of DADT. With the government no longer defending the constitutionality of that statute, there is simply no reason to invoke this canon of decision and it vanishes from the analysis.

Second, judicial deference to Congress's judgment in military affairs no longer counsels in favor of a stay of the district court's injunction. If anything, with the government no longer arguing that DADT is constitutional, the reverse is true: since Congress has now judged that DADT should be repealed, this Court should support Congress's judgment by vacating the stay and reinstating the district court's injunction barring enforcement of it.

The government's true argument on deference is unstated but implied. Even if DADT is unconstitutional, the government is truly arguing, the military needs an indefinite amount of time to implement the repeal of DADT. In other words, the government argues, the military should be allowed to continue to violate Americans' constitutional rights until it determines how not to do so and this Court

should sit idly by. As this Court has already held with respect to this same issue, in *Witt v. Dep't of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008), "deference does not mean abdication" and Congress is still "subject to the requirements of the Due Process Clause when legislating in the area of military affairs."

Third, the supposed conflict between the district court's ruling and those of other circuits is similarly nugatory now. As Log Cabin's motion showed, all but one of the cases from other circuits with which the district court's decision was "arguably at odds," as this Court put it in the stay order, predate the Supreme Court's landmark decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). The sole post-*Lawrence* case, *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008), expressly disagreed with this Circuit's decision in *Witt*, does not control in this Circuit, and represents a position on the standard of review of classifications based on sexual orientation that the government has now repudiated. The opposition ignores Log Cabin's arguments as to the irrelevance of these cases and their insufficiency to sustain a finding of likelihood of success on the merits that would justify a stay.

B. The Government Ignores the Fact That Investigations and Discharges Under DADT Are Continuing While The Stay Is in Effect

The most glaring omission in the government's opposition is its refusal even to acknowledge the fact that by leaving DADT in effect indefinitely, the Repeal Act countenances and indeed mandates ongoing discrimination against current and

prospective homosexual American servicemembers by permitting continued investigations and discharges of those individuals under DADT.

The government assures this Court that the military's training is under way, and certification should follow in due course, and DADT will finally pass away 60 days after that. But as Log Cabin pointed out in its answering merits brief, an unconstitutional statute does not become constitutional because a process for its eventual repeal – even an "orderly" one – has commenced. It does not cure the unconstitutionality of a statute to note that it is moribund, if it is still in effect and is being enforced as DADT is.

The point cannot be stated enough: *every day that DADT remains in effect, it visits pernicious, discriminatory consequences on American servicemembers and prospective servicemembers, and undermines our national security. Investigations and discharges under DADT are continuing even as this appeal, and this motion, are pending.* Patriotic Americans who wish to join the military are also aging daily and approaching the unforgiving barrier of the services' upper age limits for enlistment or commissioning. And currently serving members of the military are having their First Amendment rights of freedom of speech and freedom to petition curtailed at every moment of the day so long as DADT remains in place.

Amicus curiae briefs submitted in support of Log Cabin on appeal described the harms that specific identified individuals are sustaining even today by virtue of

DADT being still in effect.[1] Log Cabin cited these specific ongoing harms in its motion, and the government did not contest it: the opposition says not a single word about the impact of DADT on these real people. It is no answer to argue that DADT will be repealed at some time in the future. Repeal will not remedy these ongoing harms, much less reverse time's arrow for those individuals who have passed the maximum enlistment age limit and are forever precluded from service.

C. The Government Rejected the Opportunity to Show That Its Arguments on Standing and the Scope of the Injunction Are Likely to Succeed

On appeal the government also challenges Log Cabin's standing, and argues that the district court's injunction was overbroad. Log Cabin's motion showed that neither of those arguments had a likelihood of success on the merits and could not sustain the stay. The district court record and the evidence introduced at trial amply supported the district court's factual findings on which it based both its affirmation of Log Cabin's standing to sue and the scope of its injunction, and under the applicable standard of review those factual findings are reviewed, respectively, under a clearly erroneous standard and an abuse of discretion standard. Log Cabin also pointed out, both in its answering brief (Dkt. 79) and in

[1] *See*, *e.g.*, *amicus curiae* brief of Servicemembers Legal Defense Network (Dkt. 82, at 14-17); *amicus curiae* brief of Lambda Legal *et al.* (Dkt. 83, at 13-14); *amicus curiae* brief of Servicemembers United (Dkt. 88, at 8-11).

its motion, that the government had violated Ninth Circuit Rule 28-2.5 by failing to discuss the applicable standards of review in its opening merits brief.

The opposition again altogether omits any discussion of the standard of review and the impact of that standard on its claim that it is likely to succeed on these arguments. Instead, the opposition sidesteps the necessary analysis by asserting (Opp., at 8) that "if the district court lacked authority to issue the injunction in the first place, the government would prevail on the merits…." This assertion begs the question: the impropriety of the district court's acts is the very issue on which the government must show a likelihood of success in order to obtain a stay of the injunction.

Furthermore, the cases the government cites do not support a showing that it is likely to succeed on its claim that the district court's injunction was clearly erroneous or an abuse of discretion. The stays entered in *Brady v. National Football League*, 2011 WL 1843832 (8th Cir. 2011), *United States v. Evans*, 62 F.3d 1233 (9th Cir. 1995), and *Ayuda, Inc. v. Thornburgh*, 919 F.2d 153 (D.C. Cir. 1990), were not entered because the orders of the respective district courts exceeded their *authority* (as the government argues the district court did here), but because the district courts lacked *jurisdiction*. That is not the case here: the government's only challenge to the district court's jurisdiction was its argument

about standing, and the factual record amply supports the district court's conclusion that Log Cabin had and has standing. See Dkt. 79, at 20-43.

The other two cases the government cites on this point are also inapposite. In *Dep't of Defense v. Meinhold*, 510 U.S. 939 (1993), the Supreme Court stayed a district court's injunction insofar as it granted relief to persons other than the one individual who had brought a challenge to a federal statute. But *Meinhold* was an as-applied challenge, not a facial challenge as this case is. *See Meinhold v. Dep't of Defense*, 34 F.3d 1469, 1479-80 (9th Cir. 1994). Broad relief binding the government as a whole is appropriate in the case of facial challenges. *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987). The other case the government cites, *Heckler v. Lopez*, 463 U.S. 1328 (1983), granted a stay of a district court's mandatory injunction directing the payment of Social Security disability benefits. The district court's injunction here required no mandatory, irreversible action by the government; it simply enjoined further enforcement of an unconstitutional statute, based on a full evidentiary record, not challenged by the government on the merits. Therefore, neither *Meinhold* nor *Heckler* controls the outcome here.

To maintain a stay of the district court's injunction, the government must show a strong likelihood of success on the merits of its claims. It has not done so on the standing and scope issues. The legal underpinning for a stay based on a likelihood of success on the constitutional merits disappeared when the

government elected to abandon its defense of the constitutionality of DADT, but the underpinning for a stay based on these other arguments was and is lacking altogether. The government failed to show or even argue, either in its merits briefs or its opposition to this motion, that the district court's considered factual findings on both issues were clearly erroneous or an abuse of discretion.

Log Cabin's answering brief on appeal showed how the district court's findings were specific and fully supported by the record. It recapitulated that showing in its motion. The opposition, by contrast, makes no showing that the government is likely to succeed in overturning these findings under the applicable standard of review. Without such a showing, the stay must be vacated.

The opposition also argues that the stay order "indicated" that repeal of DADT renders this case moot. That "indication" was a statement in passing in the order, reached without analysis and unnecessary to the ruling; it does not settle the issue, which is in any case not yet ripe for decision. As Log Cabin's motion showed, even if DADT is repealed, this case will not become moot because there is no bar to the government's "repealing the repeal" and re-enacting it. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982); *Ballen v. City of Redmond*, 466 F.3d 736 (9th Cir. 2006). Moreover, for the thousands of servicemembers who have sustained deprivation of their constitutional rights since 1993, repeal hardly makes their injuries moot; they deserve the finality of a

determination, by a court fulfilling its essential role of interpreting and determining our Constitution, that DADT offends our nation's fundamental principles.

D. Conclusion

For all the foregoing reasons, the government has not shown and cannot show that it has a likelihood of success on the merits on this appeal. Since such a showing was and is an essential basis for a stay of the district court's injunction, this Court should vacate its order staying that injunction.

At a minimum, this Court should modify its November 1, 2010 order to leave in place that portion of the district court's injunction which enjoined future discharges of servicemembers under DADT. As Judge Fletcher's dissent to that order observed, the actual discharge of servicemembers under DADT works a genuine hardship on them.

The Court should also expedite the hearing of this appeal, as the government had previously stipulated. The issue presented in this case is one of the preëminent civil rights issues of our time, and it should be decided swiftly.

Dated: May 27, 2011

Respectfully submitted,

WHITE & CASE LLP

By: */s/ Dan Woods*

Dan Woods

Attorneys for Appellee/Cross-Appellant 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 REPLY BRIEF OF LOG CABIN REPUBLICANS IN SUPPORT OF MOTION TO VACATE STAY OF INJUNCTION 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 May 27, 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 May 27, 2011, at Los Angeles, California.

/s/ Earle Miller
Earle Miller