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; LEON E. PANETTA, 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

RESPONSE OF APPELLEE LOG CABIN REPUBLICANS TO REQUEST FOR ENTRY OF TEMPORARY ADMINISTRATIVE STAY

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Plaintiff-Appellee Log Cabin Republicans opposes the request of appellants the United States of America and Leon E. Panetta, Secretary of Defense ("Appellants" or "the government") for a temporary administrative stay of this Court's order of July 6, 2011 which lifted the stay of judgment previously entered on November 1, 2010. This statement is submitted at the Court's request. The request for administrative stay should be denied because no reason is given for this extraordinary request; the underlying motion for reconsideration will likely be denied; and an on-again, off-again status of the District Court's injunction benefits no-one and plays havoc with the constitutional rights of American servicemembers.

Since the District Court entered its judgment and permanent injunction on October 12, 2010, the injunction has gone in and out of effect and back again. The injunction was entered on October 12, 2010; stayed by this Court temporarily on October 20, 2010 and on November 1, 2010 pending appeal; and then reinstated when this Court lifted the stay on July 6, 2011. For nine days now, since the Court's order lifting the stay of judgment, the District Court's injunction against enforcement of Don't Ask, Don't Tell has been back in place. Individuals identifying themselves as homosexual, including one who was a witness at the trial of this case, have applied for enlistment in the military, and the military has accepted their applications. The government has identified no adverse

consequences to have befallen the military. The five-page declaration of Major General Steven Hummer, signed yesterday, is conspicuously silent as to any actual harm to the military that has occurred since July 6, as opposed to speculative harm in the future.

Now, however, the government requests that this Court temporarily reinstate the stay while it considers the government's motion for reconsideration of the July 6, 2011 order. This would only engender the very uncertainty and confusion the government claims to wish to avoid.

The motion for reconsideration lacks merit. It merely restates the same arguments that appellants have made four times already: most recently in their opposition to appellee's motion to vacate the stay; before that in their merits briefs, and still earlier in their original emergency motion for a stay pending appeal, filed October 20, 2010, and in their later motion to hold the appeal in abeyance which this Court denied on January 28, 2011.

There is nothing in the motion for reconsideration to satisfy the stringent requirements of Circuit Rule 27-10. If this Court ultimately denies, as it should, the government's motion for reconsideration, without entering the requested temporary administrative stay, the current status quo will be maintained with the injunction in place pending resolution of the appeal. But if in the meantime the

Court grants an administrative stay of the July 6 order, the injunction would be again stayed, only to be reinstated when the motion for reconsideration is denied. The parties, and thousands of gay and lesbian servicemembers now serving honorably but in silence, would be left whipsawed, wondering from day to day what the current state of their constitutional rights might be.

Furthermore, the request for a temporary administrative stay is misconceived. The normal purpose of such a request, when brought as an adjunct to another motion, is to freeze the status quo for a short period of time to allow the Court to look at the merits of the underlying motion. But this Court has already considered the merits of a stay of the district court's judgment – and done so not once, but several times, as noted above. The underlying motion here is not one for new relief, it is a motion for reconsideration of an order entered after extensive briefing and thorough analysis. There is no need for a temporary stay while the Court reviews the motion as if it presented a wholly new issue.

The government repeatedly assures this Court that certification under the Repeal Act is imminent and that 10 U.S.C. § 654 will soon cease to be enforced. If this assurance is true, there is no harm in suspending enforcement of the statute now rather than the 75-90 days from now that the government claims the statute will be suspended anyway. Certainly any harm that the government claims is

significantly outweighed by the constitutional harm to servicemembers that they would sustain by the threat of enforcement of a moribund statute, as this Court recognized in its July 6 order. But the government nonetheless asks the Court to change its mind, reverse the status quo, and reimpose the stay of injunction, even though that reimposed stay is likely to be of only a few days' duration until the motion for reconsideration – a motion not favored by the Court – is denied.

Finally, the government states in its application (p. 3) that "[s]ince passage of the Repeal Act, only one Service member has been discharged under § 654…." The government does not disclose, however, that at least three other servicemembers have been "approved for discharge" by the Secretary of the Air Force under that statute since the Repeal Act, but the processing of those discharges has been "stopped in their tracks." If the administrative stay that the government requests is granted, the government would be free to complete those discharges, and would also be free to put the recent applications from homosexual enlistees – applications it has accepted – in limbo. This Court should not enter a stay that would enable the government to do so.

American servicemembers' constitutional rights are not a ping-pong ball to be paddled back and forth while this appeal is pending. This Court correctly held in its July 6, 2011 order that since the stay of injunction was originally imposed,

"the circumstances and balance of hardships have changed, and appellants/cross-appellees can no longer satisfy the demanding standard for issuance of a stay." The motion for reconsideration is likely to be denied, so a temporary administrative stay would be itself dissolved in short order, and should therefore not be granted in the first place.

For the foregoing reasons, Appellants' motion for a temporary administrative stay of this Court's July 6, 2011 order should be denied.

Dated: July 15, 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 July 15, 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 July 15, 2011, at Los Angeles, California.

/s/ Earle Miller
Earle Miller