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 EMERGENCY MOTION FOR RECONSIDERATION

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTION

STATUTES

RULES

MISCELLANEOUS

I.

INTRODUCTION

This Court granted Log Cabin's motion to vacate the stay of the district court's injunction after careful deliberation. Before Log Cabin filed its motion, the Court had already ruled on two motions to stay or hold the case in abeyance and the merits briefing was completed. After Log Cabin's May 2011 motion was filed and fully briefed, the Court deliberated for about six weeks before issuing its July 6 order vacating the stay.

The July 6 order was not hasty or rash and the government's emergency motion for reconsideration should not persuade the Court to alter it. The motion fails to meet the requirements of Circuit Rule 27-10 because the law has not changed, no new facts have emerged since the Court issued its order, and the government has failed to show any significant change in the facts since it filed its opposition to the motion, even after the Court invited it to explain why its May 20 opposition did not include the material found in its emergency motion. The motion also fails to show that the Court misunderstood the government's position on the constitutionality of DADT or any of the other issues that led to its July 6 order. In short, the government's disagreement with the order does not entitle it to reconsideration.

Even if the Court does reconsider its July 6 order, it should nevertheless again vacate the stay because, under the circumstances now existing, the government has not met its burden of showing the four essential requirements for a stay of the district court's injunction pending appeal.

II.

BACKGROUND

The background and history of the Don't Ask, Don't Tell statute, the lengthy district court proceedings, and the prior history of the appellate proceedings in this case are set forth in the parties' merits briefs and other briefs that have been filed in the appellate proceedings and need not be repeated here. The history and background is, however, important to this Court's ruling on the pending emergency motion for reconsideration, which must be decided on the facts of and the law governing this case and this motion. Contrary to what the government may be suggesting, the Court's decision on this motion is not a matter of political or policy choice. Like any other case, it must be decided on its merits.

III.

THE COURT SHOULD DENY THE EMERGENCY MOTION FOR RECONSIDERATION

A. Required Showing for Motions for Reconsideration

As a party moving for reconsideration, the government is required to "state with particularity the points of law or fact which, in the opinion of the movant, the

court has overlooked or misunderstood. Changes in legal or factual circumstances which may entitle the movant to relief also shall be stated with particularity." Circuit Rule 27-10.

The Circuit Advisory Committee Note to Rule 27-10 expands, stating that motions for reconsideration are "not favored" and "should be utilized only where counsel believes that the Court has overlooked or misunderstood a point of law or fact, or where there is a change in legal or factual circumstances after the order which would entitle the movant to relief" (emphasis added). Similarly, the Advisory Notes also provide: "Motions for … reconsideration … of a motion are disfavored by the Court and are rarely granted. The filing of such motions is discouraged." Circuit Advisory Committee Note to Rule 27-1, Note 4.

B. This Court Did Not Misunderstand the Government's Position on the Constitutionality of DADT

The government claims that this Court "misunderstood" its position on the constitutionality of DADT. This is not so. Log Cabin's motion to vacate the stay showed how the government had claimed in its motion for a stay that it was likely to succeed in its argument that the district court erred in finding DADT unconstitutional on its face. Log Cabin set out the three arguments found in the government's motion, and showed that the government's brief on the merits did not advance any of these three arguments. This is undisputed. The Court's July 6 order correctly recognized

that the appellants "do not contend that 10 U.S.C. § 654 is constitutional."

The Court's July 6 order saw through the government's double-speak and correctly recognized that the government had shifted its position to attempt to convert its appeal from a defense of the constitutionality of DADT to a defense of a statute which was not at issue below and which had not been enacted at the time of the judgment. The government's position on this motion remains the same: regardless of what it may say it is arguing, it is *not* defending the constitutionality of DADT. If it were, the government's merits briefs would have addressed *Lawrence v. Texas*, 539 U.S. 558 (2003); *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008); the standard of review applicable to Log Cabin's due process claims; and Log Cabin's First Amendment claims. But neither the government's merits briefs nor its motion address any of these issues.

To evade the consequences of abandoning its argument that led to the stay, the government claims that it is defending the constitutionality of § 654 "as it appears today" after the Repeal Act and that it is now a "transitional" provision or an "interim measure." This is not a new argument by the government either; it was the basis of the government's opposition to Log Cabin's motion to vacate the stay.[1] Because the Repeal Act expressly provides that DADT remains in effect until repeal becomes

[1] Dkt. 108 at 4-5.

effective, however, this argument is mere obfuscation and the Court should continue to reject it.[2]

In this section of its motion, the government also urges deference to Congress in military affairs. This is the same meritless argument the government has made repeatedly, including in its opposition to Log Cabin's motion to vacate the stay.[3] The military is not immune to the demands of the Constitution. "Deference does not mean abdication," *Witt*, 527 F.3d at 821, and "Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs…." *Weiss v. United States*, 510 U.S. 163, 176 (1994). The judiciary retains its authority as the final arbiter of constitutional rights even in the military context, and even in a time of ongoing war. *E.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 588 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 527, 533-34 (2004).

C. This Court Did Not Misunderstand the Status of Implementation of Repeal

---

[2] The political obfuscation may be necessary because the President has admitted that he agrees with the constitutional principles underlying the district court's judgment. "We recently had a Supreme Court – a district court case that said, 'don't ask, don't tell' is unconstitutional. I agree with the basic principle that anybody who wants to serve in our armed forces and make sacrifices on our behalf, on behalf of our national security, anybody should be able to serve. And they shouldn't have to lie about who they are in order to serve." See http://www.whitehouse.gov/the-press-office/2010/10/14/remarks-president-a-youth-town-hall.

[3] Dkt. 3 at 9; Dkt. 58 at 38-39; Dkt. 108 at 3.

The government next claims that this Court "may not have been aware of the full extent of the implementation" of the repeal of DADT when it issued its July 6 order. This is also not so. The July 14 Hummer Declaration provides more detail as to the current status of the implementation of repeal, but the government's argument that a stay of the district court's injunction is necessary to allow for the "orderly process" of repeal has been briefed and argued repeatedly, in connection with the government's motion for a stay, the government's motion to hold the case in abeyance, the merits briefs, and on Log Cabin's motion to vacate the stay.[4]

The Court completely grasped the issue in its July 6 order by stating: "Appellants/cross-appellees state that the process of repealing Section 654 is well underway, and the preponderance of the armed forces are expected to have been trained by mid-summer." The July 14 Hummer declaration adds some more detail about the process of repeal but little new information and nothing of significance. Paragraphs 1-10 and 13 are background information, all of which has been available for some time. Paragraph 11 speculates that the issue of certification will be presented to the Chairman of the Joint Chiefs of Staff and the Secretary of Defense by late July or early August but says nothing about whether or when those officials might agree to certification. Paragraphs 14-15 address a "new" rigorous process for reviewing

[4] Dkt. 3 at 17-19; Dkt. 37 at 4-7; Dkt. 58 at 41-43; Dkt. 76 at 16, 48-52; Dkt. 104 at 8-10.

discharges but that process has been, according to the declaration, in place since October 21, 2010. The remaining paragraphs are informative but the claimed harm to the military they describe is just an updated version of the same claims presented earlier in the declaration of Clifford L. Stanley filed by the government in late 2010 and in the government's motion to hold the appeal in abeyance.[5]

This section of the motion also cites *Bowen v. Kendrick*, 483 U.S. 1304, 1304 (1987) (Rehnquist, J., in chambers) and similar cases for the proposition that the Supreme Court's "consistent practice" when a district court declares an Act of Congress unconstitutional is to grant a stay upon the government's request. These are the same cases the government has repeatedly cited during this appeal.[6]

D. The Attorney General's Letter and the *Golinski* Brief

Log Cabin's motion to vacate the stay argued that the government had abandoned its claim that the *Witt* intermediate scrutiny standard did not apply to this case and cited the letter from Attorney General Holder to the Speaker of the House announcing the Administration's determination not to continue to defend the

---

[5] Dkt. 3-6 at 6-10; Dkt. 37 at 4-5, 8.

[6] Dkt. 3-1 at 16. Justice Rehnquist (deciding the matter as a single Justice in chambers) explained in *Bowen* that there is no categorical rule mandating such a stay in all cases. Rather, the presumption of an act's constitutionality is but a factor to be considered in balancing the equities. *Id*. And far from the case here, the *Bowen* balancing analysis did not require consideration of a statute that the executive branch admitted did not further its stated goals.

constitutionality of section 3 of the Defense of Marriage Act, 1 U.S.C. § 7.[7] The government's opposition did not respond to this point. In its July 6 order, this Court cited this letter as well as a recent brief filed by the government in *Golinski v. U.S. Office of Personnel Mgmt.* also stating that classifications based on sexual orientation should be subjected to heightened scrutiny.

The government's motion for reconsideration argues that this Court "misapprehended" the significance of the government's position on the constitutionality of DOMA in this case. While conceding that heightened scrutiny applies under equal protection principles, the government argues that this case presents a question of military policy and that its *Golinski* brief had a footnote noting that military classifications present different questions from classifications in the civilian context. The government's argument, however, misstates the *Golinski* brief and misrepresents the significance of the government's admissions that heightened scrutiny applies to classifications based on sexual orientation, for several reasons.

First, throughout this case, including its October 20, 2010 motion to stay, the government argued that rational basis review applied to DADT. But Attorney General Holder's letter now admits that heightened scrutiny is the appropriate

[7] Dkt. 107-1 at 10 and n.3. The letter stated the position of the Executive Branch that "classifications based on sexual orientation should be subject to a heightened standard of scrutiny."

standard of review and the government's merits briefs in this case accordingly did *not* argue for rational basis review. This was a major shift from the position taken by the government consistently over the prior six years in this case.

Second, Log Cabin's cross-appeal seeks to reverse the district court's dismissal of its equal protection claim. It urges this Court to reevaluate its equal protection analysis in *Witt*. The admissions by Attorney General Holder and in the *Golinski* brief are important concessions supporting Log Cabin's position. For example, both the Attorney General's letter and the *Golinski* brief cite the same authorities on which Log Cabin's argument relies, including *Lawrence* and *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

Third, while the *Golinski* footnote claims that military classifications differ from civilian classifications, Attorney General Holder's letter says no such thing. Indeed, the government's motion does not address the content of that letter. Furthermore, the *Golinski* brief concedes that this Court's decision in *High Tech Gays v. Defense Industry Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990), which *did* involve military classifications, was incorrectly decided. *Golinski* Brief at 4-5.

Finally, while the government's motion argues that the *Golinski* brief is about DOMA, and not DADT, the *Golinski* brief contains the following passage, which the government omits from its motion:

> Just as a person's gender, race, or religion does not bear an inherent relation to a person's ability or capacity to contribute to society, a person's sexual orientation bears no inherent relation to ability to perform or contribute. President Obama elaborated on this principle in the context of the military when he signed the Don't Ask, Don't Tell Repeal Act of 2010:
>
> > [S]acrifice, valor and integrity are not more defined by sexual orientation that they are by race or gender, religion or creed…. There will never be a full accounting of the heroism demonstrated by gay Americans in service to this country; their service has been obscured in history. It's been lost to prejudices that have waned in our own lifetimes. But at every turn, every crossroads in our past, we know gay Americans fought just as hard, gave just as much to protect this nation and the ideals for which it stands.

Golinski Brief at 17 (citation omitted).

E. Standing and Scope of Injunction

The motion also argues that Log Cabin lacks standing and that the injunction is too broad. These arguments, however, merely repeat the same points that have been briefed repeatedly before. The standing issues were fully briefed on the merits[8] and in the moving, opposition, and reply papers on Log Cabin's motion to vacate the stay.[9] The government's motion does not identify any changes in the law or facts on this issue or any aspect of the issue that the Court has overlooked or misunderstood.[10]

---

[8] Dkt. 58 at 20-21, 26-37; Dkt. 76-2 at 20-42; Dkt. 104 at 10-19.

[9] Dkt. 107-1 at 12-13; Dkt. 108 at 7-9; Dkt. 109 at 6-7.

[10] Neither the Hummer declarations nor the government's July 14 letter to the Court address standing.

Similarly, the government's argument as to the scope of the injunction merely repeats the same points that have been fully and repeatedly briefed before in the merits briefs[11] and in the moving, opposition, and reply papers on Log Cabin's motion to vacate the stay.[12] The government's motion does not identify any changes in the law or facts on this issue or any aspect of this issue that this Court has overlooked or misunderstood either.[13]

For all of the foregoing reasons, none of the government's arguments meet the showing required by Circuit Rule 27-10 and the Court should deny the motion.

IV.

THE GOVERNMENT IS NOT ENTITLED TO A STAY PENDING APPEAL

Even if the Court does reconsider its July 6 order, and considers the issue anew, it should nevertheless again vacate the stay of the district court's injunction because the government has not met the requirements for a stay.

---

[11] Dkt. 58 at 23-24, 43-47; Dkt. 76-2 at 52-62; Dkt. 104 at 19-23.

[12] Dkt. 107-1 at 12-13; Dkt. 108 at 7-9; Dkt. 109 at 6-7.

[13] Neither the Hummer Declarations nor the government's July 14 letter address this issue. The only cases cited in the government's motion on this argument, *Dep't. of Defense v. Meinhold*, 510 U.S. 939 (1993), and *Meinhold v. Dep't of Defense*, 34 F.3d 1469 (9th Cir. 1994), were also cited in both of its merits briefs and in its opposition to Log Cabin's motion to vacate. Dkt. 58 at 45-46; Dkt. 104 at 22-23; Dkt. 108 at 8.

A stay of injunction is "extraordinary relief" for which the moving party bears a "heavy burden." *Winston-Salem/Forsyth Cnty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971). Four factors regulate the issuance of a stay of a district court injunction, pending appeal: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The government must show the existence of all four factors and must show not merely the possibility of irreparable injury absent a stay but the *likelihood* of irreparable injury. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). The government's showing here fails all four factors.

A. Likelihood of Success on the Merits

Given the controlling law and the extensive factual record developed in the district court, *Log Cabin* is likely to succeed on the merits on appeal. The district court's finding of a constitutional violation is not to be taken lightly. Log Cabin's evidence at trial was overwhelming and showed conclusively that DADT does not significantly further an important governmental interest, is not necessary to that interest, and in fact impairs that interest. *See Witt*, 527 F.3d at, 819. The government presented no evidence to the contrary, and advanced no circumstance in which DADT

has been or could be applied constitutionally. The government is restricted on appeal to the record it made: the legislative history of the statute. To meet its burden, the government must make a strong showing of likelihood of success on the merits on *both* the due process and the First Amendment claims on which the district court found in Log Cabin's favor. It does not even try to do so.

The government's motion claims that it is defending the constitutionality of DADT "as in effect … following enactment of §2(c) of the Repeal Act" and suggests that the Repeal Act "changed" DADT. But this is double-speak: the Repeal Act did not change a single word in DADT; it merely set out conditions for its eventual repeal. In essence, the government is saying that it has been violating Americans' constitutional rights since 1993 but it will stop doing so soon, if it can continue doing so for a little while longer, until its military officials, politicians, and bureaucrats decide when they want to stop. The Constitution does not tolerate such an indulgence.[14]

This does not show a likelihood of success. An unconstitutional statute does

[14] Suppose California's capital punishment statute calls for execution by hanging, and a district court invalidates that statute as violative of the Eighth Amendment. The state legislature responds by passing an act providing that the statute will be repealed effective after the Bureau of Prisons certifies that it has developed a replacement protocol, but that the existing statute will remain in place, and executions will continue to be carried out, until the state's supply of rope runs out. Should this court accept the proposition that the repeal rescues the statute from unconstitutionality?

not become constitutional merely because Congress affixes a sunset clause to it, particularly when, as here, the sunset has no fixed time and is contingent on events that may never occur. As the Supreme Court has just held, it is rarely if ever appropriate to stay a lower court judgment based on hypothetical future change in the law; a court's "task is to rule on what the law is, not what it might eventually be." *Leal Garcia v. Texas*, 131 S.Ct. 2866, 2867 (2011).

In addition, the government is not likely to succeed on the merits of its standing argument. Log Cabin's merits brief showed that ample evidence was presented at trial to sustain the district court's factual findings that Log Cabin had proper associational standing to sue. These factual findings are reviewed under a clearly erroneous standard. *San Diego Cnty. Gun Rights Comm'n v. Reno*, 98 F.3d 1121, 1124 (9th Cir. 1996). The government's briefs failed to discuss the standard of review, in violation of Ninth Circuit Rule 28-2.5, even ignoring the issue in its reply brief after Log Cabin called the omission to the government's attention in its answering brief. This omission signals that the government cannot show a likelihood of success on appeal on its standing argument.

The motion also argues that the district court erred in issuing what it terms a "sweeping" worldwide injunction. The government is not likely to succeed on the merits of this issue either. Again, the government's merits briefing omits any mention

of the applicable standard of review, but the scope of an injunction is reviewed under an abuse of discretion standard. *United States v. Laerdal Mfg. Corp.*, 73 F.3d 852, 854 (9th Cir. 1995). The district court found that a military-wide injunction was necessary to accomplish the purpose of the injunction and afford Log Cabin appropriate relief. ER 4-18. *See Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987). The government has not shown that it is likely to succeed in showing any abuse of discretion.

B. Irreparable Injury

The government claims that the military will be harmed if the injunction remains in place pending appeal. The supposed harms identified in the motion and in the Hummer Declarations are all to the military's institutional interests and its bureaucratic needs, however. The injunction does not prevent the military from undertaking the acts now underway – revising policies and regulations, preparing educational and training materials, and the like.

The Hummer Declarations articulate clearly the military's strong preference to end DADT on its own timetable but omit any specific reasons how a stay will irreparably harm the military in the short time before oral argument on September 1 and a decision thereafter. With the injunction in place, *nothing will change* with regard to the composition of the military, the training, promotion, demotion, and deployment of servicemembers, the mission and operations of the armed forces, or

anything else that pertains to the important governmental interest that the military serves. The evidence at trial showed that homosexual men and women already serve today; they are deployed to theaters of combat when needed – indeed, retained overall in greater numbers during times of combat – even if they are openly homosexual. The district court found that their *discharge*, not their presence, impacts morale and good order and that enjoining the enforcement of DADT, far from injuring the military, will improve troop morale, military readiness, and unit cohesion. ER 91-93.

The injunction would have three immediate consequences but the government has not shown that it will suffer any irreparable harm from any of them.

First, the government will continue to be precluded from discharging any servicemember under DADT. The Hummer Declarations declare that the number of discharges has fallen and that the discharges now occur only after a "careful and detailed process." This is all well and good but it fails to show how the government will be irreparably harmed if the existing ban on discharges continues. The assertion that only one discharge has occurred this year reinforces that point. At the same time, however, the Hummer Declaration says nothing about the total number of discharges in progress or their status.[15] The injunction is needed to protect *all* individuals in the

[15] For example, exhibit A to this brief is an Air Force memorandum to Airman First Class Dailey, dated July 8, 2011. The Air Force initiated discharge proceedings against him on June 9, 2011 for "homosexual conduct," he is

discharge pipeline.

Second, the government will continue to be precluded from investigating anyone for alleged violations of DADT. The Hummer Declaration is conspicuously silent as to any irreparable harm the government will suffer if it cannot do so. No doubt that is because there would be no harm.

Third, the government would have to allow openly homosexual individuals to enlist. It did so after the Court's July 6 order – although it may have stopped after the Court's July 15 order – and the Hummer Declarations fail to specify any irreparable harm from again allowing homosexuals to enlist in our armed forces.

Moreover, the government has had ample time to revamp its policies and regulations and cannot use its own delay in obtaining and implementing legislative repeal of DADT to delay the implementation of constitutional rights. The government has known since June 2009, when the district court set this case for trial, that it might lose and have to adjust its policies accordingly. By contrast, the injury to Log Cabin's members and to all American servicemembers from granting a stay is

---

contesting his discharge, and this Court's July 6th order stayed his discharge proceedings. Paragraph 6 of the July 18 Hummer Declaration asserts that no one has been "approved for discharge" other than individuals who have pressed for their own separation. Gen. Hummer's assertion does not cover Airman Dailey – and others in his position – only because he has not yet been "approved for discharge."

both immediate and irreparable, as the following section shows.

C. Injury to Other Parties

If the injunction is stayed, homosexual servicemembers will continue to be investigated and discharged under DADT. Those investigations and discharges violate the due process and First Amendment rights of the servicemembers, and deprivation of Constitutional rights is *ipso facto* irreparable injury. *Nelson v. Nat'l Aeronautics & Space Admin. (Nelson II)*, 530 F.3d 865, 882 (9th Cir. 2008), *cert. granted on other grounds*, 130 S.Ct. 1755 (March 8, 2010); *see Elrod v. Burns*, 427 U.S. 347, 373 (1976). Remarkably, the Hummer Declarations and the government's motion do not even address *at all* the issue of Constitutional injury to homosexual servicemembers even after Log Cabin's motion argued the point at length.[16]

On the other hand, maintaining the injunction in place pending appeal preserves servicemembers' Constitutional rights. They will continue to be held to the military standards applicable to all servicemembers, and subject to the same discipline and regulations that apply to all. But, without an injunction in place, the ill effects to homosexual servicemembers – disruption and termination of their military careers, with merely the hollow satisfaction of abstract vindication when the district court's judgment is ultimately upheld – are irreparable. These individuals may not be

[16] Dkt. 107-1 at 14-16.

reinstated, even if reinstatement could make them whole for the deprivation of Constitutional rights they would have suffered. The concrete injury to them from a stay of the injunction far outweighs the theoretical harm to the government that might result from maintaining the injunction in place during the short time remaining before the appeal is argued on September 1 and thereafter promptly decided, and tips the balance of hardships "sharply" in their favor.

D. The Public Interest

The public interest is a separate and additional consideration. *Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008). The public interest is not identical to the government's interest; if it were, this factor would always count in favor of granting a stay of an injunction invalidating a statute, and there would be no need to include it as a separate factor to be considered.

The government's motion does not discuss the public interest, beyond a footnote reciting that Congress has "determined" the public interest. But the public interest is not so limited: it lies equally if not more so in safeguarding the Constitutional rights that define us as a nation. The public interest is not served by blind deference to military judgment or even to legislative findings. Rather, the clear public interest is in ensuring that the military, like every other institution of our society, conforms to Constitutional requirements.

Finally, not only servicemembers are affected by DADT. Their family and friends – 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. This, too, was proven at trial. Their interests also militate against a stay.

V.

CONCLUSION

The government's motion fails to meet the requirements of Circuit Rule 27-10 and, even if it does, the government has not met its burden of obtaining a stay of the district court's injunction pending appeal. The government has been violating the constitutional rights of homosexual Americans who wish to or do serve in our country's military since 1993. It should not be allowed to do so for a single day more.

Dated: July 21, 2011

WHITE & CASE LLP

By: */s/ Dan Woods*
Dan Woods (CA SBN 078638)
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 July 21, 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 21, 2011, at Los Angeles, California.

/s/ Earle Miller
Earle Miller

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR ARMAMENT CENTER (AFMC)
EGLIN AIR FORCE BASE FLORIDA

JUL 08 2011

MEMORANDUM FOR A1C JUSTIN DAILEY, 46 OSS

FROM: AAC/CC

SUBJECT: Suspension of Administrative Discharge Action

1. On 9 June 2011, I notified you of the initiation of administrative discharge proceedings in accordance with Air Force Instruction 36-3208, *Administrative Separation of Airmen*, paragraph 5.36.2.1. The basis for your discharge action was homosexual conduct. On 20 June 2011, you elected to have your case heard by an administrative discharge board.

2. On 6 July 2011, the Ninth Circuit Court of Appeals ordered the stay of the injunction in the case of Log Cabin Republicans v. Secretary of Defense be lifted. The Court's order enjoins the Air Force from processing service members for separation based on homosexual conduct. In compliance with this judicial order and recent Headquarters Air Force guidance, I have directed all activity on your discharge board be suspended. The suspension of the board proceedings in your case does not terminate the discharge action. Rather, this action will suspend processing of your case until further notice.

3. Questions regarding your rights and the effect of this action should be referred to your detailed Defense Counsel.

CHARLES R. DAVIS, Major General, USAF
Program Executive Officer for Weapons and
Commander

EXHIBIT A