Case No. 08-73194

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LOG CABIN REPUBLICANS,

Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

UNITED STATES OF AMERICA AND ROBERT M. GATES, SECRETARY OF DEFENSE, IN HIS OFFICIAL CAPACITY

Real Parties in Interest.

WRIT OF MANDAMUS RELATED TO THE ORDER STAYING ACTION BY THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA IN CASE NO. CV-04-8425

Log Cabin Republicans' Reply in Support of Petition for Writ of Mandamus

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In its Petition for Writ of Mandamus, Log Cabin Republicans demonstrated the need for – and its entitlement to – a writ of mandamus vacating the District Court's *sua sponte* order staying all proceedings in the Log Cabin Republicans' challenge to the constitutionality of the United States' military's "Don't Ask Don't Tell" policy. As the petition established, the Log Cabin Republicans clearly satisfy the factors enunciated by this Court in *Bauman v. United States Dist. Court*, 557 F.2d 650 (9th Cir. 1977) governing when writ relief is appropriate. Specifically, as noted in the Petition at pages 10-15, at least three of the five *Bauman* factors are present here -- "lack of alternative adequate means of redress, prejudice uncorrectable on appeal, and a clearly erroneous district court order" – weighing heavily in favor of granting a petition for mandamus. *In re Ellis*, 356 F.3d 1198, 1210 (9th Cir. 2004).

Tellingly, the government's response ignores *Bauman*. Rather, to the extent the government addresses any of the *Bauman* factors at all, it does so through sleight of hand. For example, the first *Bauman* factor turns on whether the petitioner has other means to attain the desired relief, *i.e.*, could the Log Cabin Republicans file a direct appeal regarding the challenged order? The government explicitly argues "the Court lacks jurisdiction to consider an immediate appeal from the district court's stay order" (Response, p.3, n.1). Thus, by the government's own admission, the first *Bauman* factor is met

here.[1]

Nevertheless, the government contends – without citation to any authority – that Log Cabin Republicans have a "fully sufficient means" of vindication by virtue of a direct appeal of the "district court's [future, hypothetical] judgment on the merits." Response, p.3. In other words, this Court should simply ignore the Log Cabin Republicans' contentions regarding the impropriety of the stay order and focus on the "ultimate injury about which Log Cabin complains—that their members' constitutional rights are being violated by the United States military" (Response, p. 3) notwithstanding the fact that the district court has not addressed these issues in the four years the case has been pending before it. The issue before the court, however, is the stay order itself, which can and should be reviewed on mandamus. *Fitrol Corp. v. Kelleher*, 467 F.2d 242, 244 (9th Cir. 1972) (holding "propriety of a grant or denial of … a stay may be tested in the Court of Appeals by way of mandamus").

The government tries to sidestep the second *Bauman* factor – the prejudice suffered by the Log Cabin Republicans' and gay and lesbian servicemen as their challenge to the constitutionality of "Don't Ask Don't Tell" is rendered essentially frozen by the district court's past inaction and

[1] On November 6, 2008, this Court dismissed the Log Cabin Republicans' direct appeal of the stay order, *Log Cabin Republicans v. USA, et al.,* (No. 08-56185).

present stay order – by citing *CMAX, Inc. v. Hall*, 300 F.2d 265 (9th Cir. 1962), claiming it stands for the proposition that delay in the resolution of the Log Cabin Republicans' substantive constitutional challenge does not warrant a mandamus order vacating the stay. The government misreads *CMAX*. There, the relief sought by the plaintiff in the underlying case was limited to money damages (*i.e.*, there was no request for injunctive relief). *CMAX, Inc.*, 300 F.2d at 268-69. As a result, the court found no "showing of irreparable damage or injustice" and therefore was "not inclined to judge the stay order with a critical eye." *Id.* at 269. Significantly, the court noted that had there been a "fair possibility that a stay of the district court proceeding will result in irreparable injury and a miscarriage of justice, petitioner's prospect of showing an abuse of discretion would be considerably increased." *Id.* at 268.

CMAX, therefore, is consistent with *Landis v. North America Co.*, 299 U.S. 248 (1936) and its stricture that "[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Id.* at 255 (emphasis added).[2] "[I]f there is even a fair possibility that the stay … will work damage

[2] The government claims *Witt* is "virtually identical" (Response, p. 5) to Log Cabin Republicans' case. But however this Court or the Supreme Court ultimately decides *Witt*, that decision will not address the sufficiency of Log Cabin Republicans' First Amendment challenge to the "Don't Ask Don't Tell" policy. As noted in the Petition (and conceded by the government), the original *Witt* panel "did not address [a] First Amendment claim." Thus, neither *Witt* nor any other

to someone else," "the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward." *Id.* In other words, Log Cabin Republicans' having demonstrated that both it and gay and lesbian servicepersons will suffer prejudice due to the stay, the burden shifts to the government to demonstrate why this case should not go forward. And nowhere does the government contend in their response that it will suffer any prejudice if the stay order were to be lifted. (Nor did the government raise any such argument in the lower court as the district court instituted the stay order on its own initiative, after nearly four years of inattention and delay.)

Finally, Log Cabin Republicans established in its petition that the stay order clearly exceed the discretion of the district court under this Court's prior holding that a "stay should not be granted unless it appears likely the other proceedings will be concluded within a reasonable time in relation to the urgency of the claims presented to the court." *Levya v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 864 (9th Cir. 1979); *Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) ("stays should not be indefinite in nature.").

The government's response is twofold. First, it notes that *Leyva* and

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decision of this Court has addressed whether and to what degree this Court's prior First Amendment precedents regarding the policy are affected by *Lawrence v. Texas*, 539 U.S. 558 (2003).

Dependable Highway "were direct appeals, not mandamus petitions." However, this is a distinction without a difference: as noted above, the propriety of a stay order can be reviewed by mandamus. Second, the government attempts to avoid this rule by stating the stay has a "precise and concrete end point." Semantics aside, the government does not and cannot estimate *when* the stay order will end (*i.e.*, when final resolution in *Witt* will occur). Thus, the stay order is "indefinite" by definition. At most, the government claims it "is unlikely to be unreasonably long," citing the fact that the government's rehearing petition in *Witt* is "ripe for decision." By the government's own admission, the petition has been "ripe" for two months. Response, Exhibit B, p.6. But nothing has happened in *Witt* and nothing is scheduled to happen.

This case has been pending for more than four years. The government's motion to dismiss the complaint has been pending for almost two and half years. The District Court's order staying the case in favor of *Witt* has been in place for five months and there is no end to the stay in sight. Log Cabin Republicans respectfully submit it was wrong of the District Court to stay this case (as it was wrong of the District Court to endlessly defer ruling on the government's motion to

dismiss). It is time, now, to lift the stay and allow the Log Cabin Republicans and the men and women in the Armed Forces a substantive hearing on core constitutional rights issues, not an open-ended deep freeze.

Dated: November 10, 2008 WHITE & CASE LLP

By: /s/ Patrick O. Hunnius
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LOG CABIN REPUBLICANS

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2008, I electronically filed the foregoing document described as **LOG CABIN REPUBLICANS' REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants.

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