Log Cabin Republicans v. United States of America et al Doc. 202

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOG CABIN REPUBLICANS, a non-profit corporation,

Plaintiff,

v.

UNITED STATES OF AMERICA and ROBERT M. GATES (substituted for Donald H. Rumsfeld pursuant to FRCP 25(d)), SECRETARY OF DEFENSE, in his official capacity,

Defendants.

Case No. CV 04-8425 VAP (Ex)

PLAINTIFF LOG CABIN REPUBLICANS' SUPPLEMENTAL BRIEF ON APPLICATION OF WITT STANDARD OF REVIEW

Trial Date: July 13, 2010
Time: 9:00 a.m.
Ctrm: 2
Judge: Hon. Virginia A. Phillips

Motion for Summary Judgment Hearing Date: April 26, 2010

Pre-Trial Conference: June 28, 2010

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I.

INTRODUCTION

On May 27, 2010, the Court asked the parties to file supplemental briefs "for the sole purpose of discussing application of the Witt standard to Plaintiff's substantive due process claim." Defendants' Supplemental Brief ignores the Court's directive; reiterates arguments and positions that have already been briefed and needed no further exposition; continues to cite bad law such as Beller v. Middendorf, Cook v. Gates, and Philips v. Perry, none of which control in this Circuit today; and fails to answer the central, sole question that the Court posed: does the DADT Policy survive constitutional scrutiny under the Witt standard?

The answer is no. Witt applies and DADT fails that standard. The Court should deny the motion for summary judgment. The parasitical procedural requests, for a stay and for bifurcation, that the government tacks on to its brief should also be denied.

II.

THE WITT STANDARD APPLIES TO LOG CABIN'S SUBSTANTIVE DUE PROCESS CLAIM

In its opposition to the motion for summary judgment, Log Cabin argued that some heightened level of scrutiny, greater than rational-basis review, is required to determine the constitutionality of DADT. (Doc. 140, pp. 9-12.) While Log Cabin did not specifically request application of the Witt standard, the Ninth Circuit announced that standard specifically in the context of a constitutional challenge to DADT and it is appropriate to apply it. The Court's inclination stated in its May 27, 2010 Order is therefore correct: the Witt standard of review applies in this case.

Witt requires that "when the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in Lawrence, the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must

be necessary to further that interest. In other words, for the third factor, a less intrusive means must be unlikely to achieve substantially the government's interest." Witt v. Air Force, 527 F.3d 806, 819 (9th Cir. 2008). Given that sexual intimacy is recognized as important in U.S. society and is a protected liberty interest under Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), and given that servicemembers are not expected to remain forever celibate, DADT intrudes upon the personal and private lives of homosexual servicemembers in a manner that implicates the rights identified in Lawrence. The Witt level of intermediate scrutiny is therefore appropriate here. That Log Cabin's challenge to DADT is facial rather than as-applied does not affect this conclusion. As shown below, the extensive evidence that Log Cabin submitted in its opposition to the summary judgment motion shows that DADT does not "significantly further" the asserted governmental interests, and mandates far greater intrusions than are necessary to further those interests. DADT therefore fails the Witt standard.

Instead of addressing the Court's query regarding application of the Witt standard, and whether DADT survives constitutional scrutiny when that standard is applied, defendants' Supplemental Brief continues to argue that traditional rational basis scrutiny, the most deferential standard of constitutional review, applies. They did so in their pretrial filings as well (Docs. 186, 188-1). But nowhere do they respond to the Court's direction as to what their brief should address.

Defendants also ignored the Court's invitation to submit further evidence in support of their position. Log Cabin, however, is submitting with this brief important additional evidence that further bolsters its challenge: five declarations from servicemembers discharged under or impacted by DADT. Those witnesses come from different branches of the military and were impacted by DADT in different ways. They represent examples – five among many that could be adduced – of how DADT actually undermines the goals of unit cohesion, morale, good order and discipline, and military readiness, and demonstrate how DADT therefore fails

to meet the due process standards of Witt.[1]

A. The Question of the Standard of Review Is Independent of Whether the Challenge Is Facial or As-Applied

At the outset, it is critical to note that defendants' Supplemental Brief confuses two independent issues: whether a constitutional challenge to a statute is facial or as-applied; and the level of scrutiny to be applied to that constitutional challenge. It is not the case, as defendants appear to claim (Supp. Bf. at 8-9), that a facial challenge demands rational-basis review.

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), on which Lawrence relied to affirm the substantive due process right at issue here, demonstrates that intermediate scrutiny is appropriate in connection with a facial challenge. The plaintiffs in Casey brought a facial substantive due process challenge to a Pennsylvania abortion statute and sought declaratory and injunctive relief – the same relief Log Cabin requests here. 505 U.S. at 845. The Court nevertheless analyzed the statute under an undue burden standard of scrutiny – a variety of intermediate scrutiny.[2] See id. at 877-78.

Indeed, Witt itself demonstrates the error in defendants' logic. Witt acknowledged that the intermediate scrutiny standard it derived from Sell v. United States is similar to the intermediate scrutiny test in equal protection cases such as Craig v. Boren, 429 U.S. 190, 197, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). See Witt, 527 F.3d at 818, n.7. Craig v. Boren was, like Casey and like this case, a facial challenge in which the plaintiffs sought declaratory and injunctive relief. Craig, 429 U.S. at 192. Casey, Craig, and Witt make clear that this Court may employ intermediate scrutiny to analyze a facial challenge.

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[1] See Declarations of Joseph Christopher Rocha, Jenny L. Kopfstein, Michael D. Almy, Anthony Loverde, and Stephen J. Vossler, filed concurrently herewith.

[2] While Justice O'Connor did not expressly identify the undue burden standard as intermediate scrutiny, she made clear that it required more than rational basis. After all, the dissent would have applied only the "rational relationship test." Id. at 845. Log Cabin similarly presents a facial challenge that requires something more than rational basis. See Opposition to Summary Judgment (Doc. 140) at 9-12.

Defendants rely on Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008), but that case does not support their position. Washington State Grange was a facial challenge to the state's blanket primary system. The Supreme Court rejected the facial challenge as premature and reiterated a preference for as-applied challenges, but it nonetheless recognized that strict scrutiny might apply, even in a facial challenge, if the statute severely burdened associational rights. 552 U.S. at 451.

B. DADT Fails Witt's Intermediate Scrutiny Standard

While purportedly addressed to the important governmental interests of military "morale, good order and discipline, and unit cohesion that are the essence of military capability" (10 U.S.C. § 654(a)(15)), DADT does not significantly further those interests, nor is it necessary to further those interests, nor is it the least intrusive means to achieve those interests. DADT, therefore, violates substantive due process. Log Cabin's opposition to the motion for summary judgment detailed the voluminous evidence as to how the enactment and implementation of DADT violates substantive due process. Every item of evidence that is before the Court on this motion illustrates how DADT fails to satisfy the Witt factors.[3] When measured

[3] All that evidence need not be repeated here, but to recap some of the most egregious ways in which DADT violates the required due process standard of scrutiny: (1) no objective studies, reports, or data, either pre- or post-enactment, support DADT's congruence to Congress's stated objectives, and in fact such studies are to the contrary; (2) the enactment of DADT was motivated by animus and prejudice; (3) the military itself recognizes that sexual orientation is not germane to military service, inasmuch as DADT is applied more frequently in time of peace than in time of war, and the military knowingly deploys openly homosexual servicemembers to foreign theaters of combat when they are needed; (4) DADT has a disproportionate impact on women, and several of its underlying rationales do not apply to female servicemembers; (5) the experience of comparable foreign militaries, and the experience of the thousands of U.S. troops who fight side-by-side with, and in some instances are commanded by, openly homosexual members of the armed forces of foreign militaries without any impact on unit cohesion, belie the rationale enunciated for DADT; (6) the discharge of servicemembers in non-combat but critical occupations actually undermines national security; (7) the actual undermining of military effectiveness, military readiness, unit cohesion, and troop morale, and the impairment of recruitment and retention; (8) the military's resort to "moral waivers" and enlistment of over 4000 felons to make up for the personnel shortfall caused in part by DADT; and (9) the violation of servicemembers' First Amendment rights of speech and association.

against the constitutional scrutiny required by Witt, DADT does not survive.

Additionally, for summary judgment purposes, DADT fails the Witt standard of due process scrutiny – and indeed all constitutional scrutiny – because Defendants have submitted no evidence demonstrating DADT's relationship to its stated purposes, while Log Cabin has shown that DADT actually impairs those interests. Witt recognized that the Supreme Court in Sell v. United States, 539 U.S. 166, 178, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003), and in Lawrence, 539 U.S. at 578, required the state to justify its intrusion into an individual's recognized liberty interest. Witt, 527 F.3d at 818. Thus, as with active rational basis, application of the Witt standard places the burden on the government to demonstrate that each element of the test is satisfied. It has not met that burden.

C. Beller Does Not Control This Case

The government continues to argue that if a heightened scrutiny standard applies, Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), governs this case despite Witt's statement that "Beller's heightened scrutiny analysis and holding … have been effectively overruled by intervening Supreme Court authority." Witt, 527 F.3d at 820. In fact, at least three aspects of Beller are no longer good law. Witt overruled Beller's refusal to apply an as-applied analysis to DADT's predecessor policy. Witt, 527 F.3d at 820. Witt recognized that Palmore v. Sidoti and City of Cleburne, cases that post-date Beller, would have changed at least a portion of Beller's heightened scrutiny analysis. Witt, 527 F.3d at 820 n.10 (Palmore and Cleburne would today preclude as a justification for DADT the need to avoid sexual tension between known homosexuals and others who despise homosexuals). And, as plainly as can be, Witt itself states, "our holding in Beller … that a predecessor policy to DADT survived heightened scrutiny under the Due Process Clause, is no longer good law." Witt, 527 F.3d at 819 (citations omitted).

Defendants ignore all this completely. Instead, they seize on the fact that Witt was an as-applied challenge and make the illogical leap to argue that Beller's

analysis still governs a facial challenge to DADT. Witt forecloses that argument.[4]

D. Evidence Is Not Restricted to the Legislative History

When applying the heightened scrutiny requirement of Witt, evidence must be brought to bear on the analysis. Defendants argue that, regardless of the level of scrutiny applicable, DADT's constitutionality should be analyzed "without reference to evidence adduced through discovery," and maintain that only the Congressional record is relevant. Defendants are incorrect. Neither the facial nature of Log Cabin's challenge, nor principles of deference to the military, limits the evidence Log Cabin may introduce at trial.

First, in its July 24, 2009 Order, this Court has already rejected the same arguments defendants present here, in ruling that Log Cabin "is entitled to conduct discovery in this case to develop the basis for its facial challenge," even if only rational basis review applied. (Doc. 91 at 3). That discovery has resulted in substantial evidence demonstrating the irrationality of DADT, and showing, as Witt requires, that DADT neither significantly furthers the governmental interests identified in the statute, nor is the least intrusive means necessary to do so. Consistent with its July 24, 2009 Order, the Court should now rule that the evidence Log Cabin has developed through discovery is admissible.

Defendants also recycle their argument that only evidence existing at the time of a statute's enactment may be considered in a rational basis review. This is incorrect even if rational basis review applied, as Log Cabin showed in its Opposition. In any case, where a higher level of scrutiny applies, such as that

[4] Beller could not govern how DADT is analyzed under a heightened scrutiny test even if it remained good law. DADT differs from its predecessor policy by recognizing that homosexuals may and do serve in the Armed Forces. Thus, justifications that may have supported the old policy are no longer applicable. To cite just one example, in support of the policy at issue in Beller the Navy claimed that there "would be an adverse impact on recruiting should parents become concerned with their children associating with individuals who are incapable of maintaining high moral standards." Beller, 632 F.2d at 811, n.22. This rationale is inapplicable now since homosexuals – purportedly incapable of high moral standards – serve in significant numbers.

required by Witt, it is defendants' burden to prove, through evidence, a tight fit between the statute and its stated goals.

Annex Books, Inc. v. City of Indianapolis, 581 F.3d 460 (7th Cir. 2009), is instructive. Annex Books held that when a legislative body (there a municipality) promulgates a regulation subject to intermediate scrutiny, it must marshal evidence supporting the need for the policy. Id. at 462, 464. It is not enough to simply "belittle plaintiffs' evidence." Id. at 464.

Annex Books arose out of a first amendment challenge to a municipal ordinance regulating adult book and video stores. Applying intermediate scrutiny, the court rejected the city's argument that "any empirical study of morals offenses near any kind of adult establishment in any city justifies every possible kind of legal restriction in every city." Under a heightened scrutiny analysis, "the public benefits of the restrictions must be established by evidence, and not just asserted." And it was the city's burden to adduce that evidence. Id. at 463 (citations omitted). The case was remanded for an *evidentiary* hearing. Id. at 467.

Furthermore, even if the standard is "active rational basis," City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), teaches that evidence outside the legislative record is relevant. In Cleburne, the Court examined evidence of the many other uses to which the subject property could be put without the special use permit required by the city council to house mentally retarded individuals, id. at 449-50, and confirmed that when some heightened scrutiny applies – as it did in Cleburne and as it does here – "judgment [must be] suspended until the facts are in and the evidence [is] considered." 473 U.S. at 471-72 (Stevens, J., concurring).

In addition, Lawrence itself demonstrates that evidence beyond the Congressional record is relevant even in a facial challenge. As in Cleburne, the Court in Lawrence analyzed the factual context behind Texas' enactment – far more than it did the legislative history. 539 U.S. at 572, 576-77. In the context of a

facial challenge, Lawrence examined, *inter alia*, foreign treatment of sodomy laws, evolution of sodomy laws throughout the United States, and the pattern of actual enforcement of such laws since the Bowers decision. Id. at 570-73.

But most importantly, Lawrence recognized that the judiciary's duty often is to subject a statute once viewed as constitutionally sound to deeper examination:

> Those who drew and ratified the Due Process Clauses … knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

539 U.S. at 578-79. Limiting evidence to the frozen-in-time Congressional record would forever shield enactments from exposure to such truths.[5]

Nor do defendants' authorities support their arguments here. FCC v. Beach Comm., Inc., 508 U.S. 307, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993), was a traditional rational basis case arising out of a challenge to economic legislation. Congress exempted certain private institutions from a regulatory scheme and simply defined the private facilities that would qualify for the exemption. The cable television statute at issue was not entitled to any form of heightened scrutiny. See 508 U.S. at 314-15. It is therefore inapplicable. Beach is simply a case about Congressional line-drawing and judicial resistance, when rational basis applies, to second-guessing where Congress draws such lines. Id. at 315-16. DADT, by contrast, is not an instance of Congressional line drawing. It is a statute that prevents all homosexual Americans from serving their country if they engage in constitutionally protected conduct and speech.

[5] Casey also exposes the error in defendants' evidentiary argument. In deciding whether various aspects of Pennsylvania's abortion statute passed the undue burden intermediate scrutiny standard, the Supreme Court had several occasions to consult evidence beyond legislative history – evidence developed *at trial*. See, e.g., 505 U.S. at 845, 884-86 (considering, for example, practical effect of 24-hour waiting period, including distances many women would have to travel, exposure of women to harassment, and the effect on low-income women).

Neither is Goldman v. Weinberger, 475 U.S. 503, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986), applicable here. Goldman involved a military regulation – a dress code – that, by its terms, applied to servicemembers only "while performing their military duties." 475 U.S. at 508. Expert testimony was offered to demonstrate that religious exceptions to the dress code are "desirable and will increase morale by making the Air Force a more humane place." Id. at 509. In other words, the experts in Goldman did not contend that the regulation undermined the military interest at issue – discipline. They sought to prove only that changing the regulation would be better. The expert evidence Log Cabin will present at trial, however, will not simply demonstrate that an end to DADT would better fit the military's stated objectives. Log Cabin's proffered experts – historians, social scientists, and psychologists – will demonstrate that DADT does nothing to further the military's goals and actually undermines those goals, revealing DADT as a policy born solely of animus. Goldman involved no allegation that the religious headwear ban arose from animus. Moreover, Goldman permitted expression in a private setting. It was far less invasive of constitutional rights than is DADT. DADT regulates servicemembers' private consensual intimate conduct – the very conduct protected by Lawrence.[6]

Hamdi v. Rumsfeld, 542 U.S. 507, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004), and Hamdan v. Rumsfeld, 548 U.S. 557, 126 S.Ct. 2749, 165 L.Ed.2d 723 (2006), affirmed the courts' traditional role to protect individual rights, even when military affairs are at issue. While "accord[ing] the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war," the Court held that "it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of

[6] Goldman's dress code regulation might be analogous to DADT if DADT only governed servicemembers' conduct while performing military duties – for example, if the military prohibited homosexual conduct while on duty. But DADT of course has no such limitation.

reviewing and resolving claims." Hamdi, 542 U.S. at 535. The Court rejected the Executive's attempt to subject enemy combatant incarcerations to a low "some evidence standard," mandating instead that detainees are entitled to a fact-finding process. Id. at 537-39. And Hamdan reaffirmed the duty of the courts, "in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty." 548 U.S. at 588.[7] If the military cannot deprive enemy combatants of constitutional rights, it certainly cannot do so to its own servicemembers.

Finally, the evidence in this case cannot be limited to DADT's 1993 legislative history because Log Cabin's challenge arises out of the due process rights that the Supreme Court first recognized in Lawrence. Until 2003, and indeed in 1993, Bowers v. Hardwick was the law. Congress would have had no occasion to deliberate the impact of DADT upon individual rights, because Bowers had affirmatively held that no such individual rights existed under the due process clause. Congress could not have fully considered the issues presented in this case.[8] For this Court to fully analyze the impact of DADT on the constitutional rights recognized in Lawrence, evidence outside of Congressional deliberations is critical.

E. A Facial Challenge to DADT Does Not Automatically Entitle Defendants to Summary Judgment

As they have done repeatedly before, defendants again fall back on United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), to argue that Log Cabin must prove that "no set of circumstances exists" under which DADT would be valid. But defendants make too much of Salerno and ignore the more applicable precedent, Planned Parenthood v. Casey.

[7] Notably, the Court in Hamdan looked to several sources of evidence beyond legislative history, including foreign laws and the total lack of evidence supporting the Executive's assertion that application of court-martial rules would be impracticable. Id. at 610, 623.

[8] Cf. Rostker, infra, 453 U.S. at 71 (upholding gender-based statute only because Congress fully considered the constitutional issues it raised).

Decided five years after Salerno, Casey involved a substantive due process facial challenge governed by the undue burden variety of intermediate scrutiny. The Supreme Court did not deem itself bound by Salerno to examine whether the abortion restrictions presented a substantial obstacle to all women to whom they applied. Rather, the Court held that the offending restrictions violated substantive due process because they would have amounted to an undue burden in "a large fraction of the cases in which [they were] relevant." Casey, 505 U.S. at 895. At trial, Log Cabin will present evidence demonstrating that DADT violates substantive due process in much more than just "a large fraction of the cases," through the testimony of its expert witnesses, its member Alex Nicholson, and the other servicemembers whose declarations are filed herewith.

Salerno is additionally distinguishable in that the statute at issue (the Bail Reform Act of 1984 which, for community safety purposes, allowed for federal detention without bail of arrestees pending trial), unlike DADT, built in many discretionary factors as constraints on its implementation. "[E]xtensive safeguards," such as the right to present evidence and cross-examine witnesses, the burden upon the government to present clear and convincing evidence, the requirement that the court issue written findings, the right of immediate appellate review, "suffice[d] to repel" a facial challenge. Salerno, 481 U.S. at 751-52. By contrast, DADT is essentially mandatory. A servicemember exercising the privacy right recognized in Lawrence will, if discovered, result in discharge: "A member of the armed forces **shall be separated** … if one or more of the following findings is made and approved …:" 10 U.S.C. § 654(b) (emphasis added).

Defendants also claim that Washington State Grange, supra, stands for the proposition that facial challenges are disfavored and contrary to principles of judicial restraint. Supp. Bf. at 8-9. But defendants again omit the context of that proposition. The Supreme Court's denial of the plaintiffs' facial challenge in Washington State Grange was based completely on the fact that the challenge was

premature, *and lacked an evidentiary record*: the challenge was brought immediately after enactment of the election statute at issue and before Washington held any elections under it. Id. at 448, 455, 458 ("Respondents ask this Court to invalidate a popularly enacted election process that has never been carried out"). The Court declined to grant the facial challenge because it would have to speculate regarding the actual implementation of the law, and would have to conjure "hypothetical" or "imaginary" scenarios. Id. at 450, 454-55.

The reasoning of Washington State Grange is inapplicable here. Constitutional scrutiny of DADT is hardly premature, or based on sheer speculation. DADT has an established history of implementation: the statute has been in place for 17 years. Log Cabin's voluminous evidence will demonstrate that the actual implementation of DADT exposes its unconstitutionality.[9]

III.

A STAY IS INAPPROPRIATE BECAUSE RECENT LEGISLATIVE EVENTS DO NOT PROMISE REPEAL

The government's supplemental brief again asks the Court to "defer ruling" – i.e., stay the trial – because the political branches have supposedly taken steps "to facilitate" repeal of DADT. This Court has already denied two prior requests for stay by the government, on November 24, 2009, and March 4, 2010, and should do so again, for several reasons.

First, the Court should deny the request because the government has not formally moved for a stay; its request for a stay is in the middle of a brief on the standard of review applicable to the trial of the merits. If the Court does consider this backhanded and procedurally improper procedure to seek a stay, it should deny the stay because the pending legislation may never pass, provides in any event only

[9] In this way, Log Cabin's suit again more resembles Lawrence. The Lawrence Court showed no resistance to the facial challenge presented because the sodomy statute at issue had been applied against the criminal defendants there and countless others. There was no need to speculate about or imagine the effect of its enforcement.

for conditional repeal, and repeal would be far from immediate.

Legislation to repeal DADT has been pending in Congress for many years. That the House of Representatives recently passed a bill calling for repeal is a positive step, but repeal is not certain. The government does not provide any information as to when the Senate may vote on possible repeal. No date is scheduled for a vote and various news reports speculate that the Senate may not take up the issue until the fall. When it does, there is no assurance that the Senate will pass the legislation; various Senators have already voiced their opposition to the bill and some have even threatened a filibuster.

Even if the proposed legislation, a copy of which is attached to the government's brief, passes the Senate, repeal would not be immediate. The Senate version of the legislation may differ from the bill passed by the House and the two versions of the bill would then require reconciliation. If the Senate and House bills are reconciled, and if the President signs the legislation, repeal of DADT is still conditional and is not immediate. Under the proposed legislation, repeal of DADT is conditional on (1) the Secretary of Defense receiving the report of the "Comprehensive Review" currently being undertaken by the Military Working Group; and (2) the President's transmission to Congress of a written certification, signed by the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff, confirming that they have considered the report's recommendations and its proposed plan of action, that the Defense Department 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. All that is no small task, and repeal would not take place until 60 days after the last of all those events occurs; and the pending legislation also specifically provides that DADT "shall remain in effect" until these requirements and certifications are met and, if they are not met, DADT "shall remain in effect."

The government offers no timetable as to whether or when any of these events may occur. The report of the study is not expected until December 2010 at the earliest; its recommendations will not be known until then and it is not certain that the study will recommend repeal. Following the delivery of the report, assuming it recommends outright repeal rather than some partial measure, it must be considered; the Department of Defense must prepare policies and procedures for implementing the repeal; and the various certifications must be obtained. There is no way to know whether or when all of these events may occur.

The cases cited by the government do not support the government's position that a stay is appropriate under these circumstances.[10] The government refers to separate "judicial, administrative, or arbitral" proceedings as prudential grounds for a stay of litigation, but cites no case where any court has stayed the imminent trial of the constitutionality of a statute because *legislation for repeal* of the statute was only *pending* in Congress. There is no such case. To the contrary, the Ninth Circuit has reversed trial court stay orders of infinite duration.[11] Because the government seeks a stay of indefinite duration, the controlling authorities compel the Court to deny the government's request.

Finally, in the Witt case, on remand, the district court on June 14, 2010

[10] Spector Motor Serv. Inc. v. McLaughlin, 323 U.S. 101, 65 S.Ct. 152, 89 L.Ed. 101, (1944), concerned the constitutionality of unresolved state law in a situation where state law provided an alternative remedy. United States v. Vilches-Navarrete, 523 F.3d 1 (1st Cir. 2008), involved a situation where the court did not need to decide the constitutionality of a criminal statute because the defendant did not violate the statute. Kremens v. Bartley, 431 U.S. 119, 97 S.Ct. 1709, 52 L.Ed. 2d 184 (1977), involved a constitutional challenge to a statute that had already been repealed, effective immediately. Leyva v. Certified Grocers of Cal., Ltd., 593 F.2d 857 (9th Cir. 1979), involved a stay pending the completion of related arbitration proceedings. Blue Cross v. Unity Outpatient Surgery Center, 490 F.3d 718 (9th Cir. 2007), involved a stay of civil proceedings pending the resolution of related criminal proceedings. And Rostker v. Goldberg, 453 U.S. 57, 101 S.Ct. 2646, 69 L.Ed. 2d 478 (1981), a due process challenge to the exclusion of women from the military draft, involved neither a stay nor judicial abstention; the Court reached and decided the constitutional challenge.

[11] E.g., Dependable Highway Express, Inc. v. Navigators Ins. Co., 498 F.3d 1059, 1066-67 (9th Cir. 2007). See also Young v. INS, 208 F.3d 1116, 1119 (9th Cir. 2000); Leyva, 593 F.2d at 864.

declined to reschedule the pending trial date. Minute Entry, Witt v. Dep't of Air Force, Case No. 3:06-cv-5195 (W.D. Wash.) (Dkt. No. 95) (copy attached as Exhibit 1) ("The shifting political climate surrounding "Don't Ask, Don't Tell" begs the question of whether trial should be rescheduled to a later date. (Currently the trial is scheduled for 9/13/2010); the Court declines to reset the trial date at this time").[12]

IV.

CONCLUSION

The Witt standard applies to this case. Evidence of the circumstances of the enactment and implementation of DADT is relevant to the Court's analysis under that standard, and that evidence shows that DADT fails the Witt standard and violates substantive due process. The Court should therefore deny the government's motion for summary judgment. Moreover, once the Court determines that Witt applies, the Court would actually be able to award summary judgment to Log Cabin, sua sponte, because the government has submitted no evidence in response to the Court's invitation and the evidence Log Cabin submitted shows that DADT violates the U.S. Constitution. At a minimum, the Court should let the case proceed to a trial, which DADT will not survive.

Dated: June 23, 2010

WHITE & CASE LLP

By: /s/ Dan Woods
Dan Woods
Attorneys for Plaintiff
LOG CABIN REPUBLICANS

[12] In footnote 6 at the end of its Supplemental Brief, the government requests that the trial be bifurcated, limited to the issue of Log Cabin's standing. Log Cabin objects to this procedurally improper request. Bifurcating or limiting the trial to the standing issue is unnecessary, since the evidence on that issue can readily be presented as part of the overall case, and would prejudicially interfere with Log Cabin's presentation of its case since its experts, who are academics and prominent public figures, cannot readily rearrange their schedules to accommodate the delay and uncertainty that such bifurcation would entail. In any event, the government has already raised that request in its pretrial Memorandum of Contentions of Fact and Law (Doc. 186), and the issue should be dealt with at the pretrial conference.