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STATUTES

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INTRODUCTION

Defendants request that the Court issue an order to stay pending appeal of its Order, dated October 12, 2010 (Doc. 252), permanently enjoining enforcement of the "Don't Ask, Don't Tell" (DADT) statute, 10 U.S.C. § 654, and implementing regulations.[1] Defendants also request that the Court issue an immediate administrative stay of its October 12, 2010 Order to allow time for the orderly litigation of that request for a stay pending appeal both before this Court and, if this Court were to deny the stay request, before the Court of Appeals. At a minimum, if this Court declines to enter a stay pending appeal or any administrative stay to allow its own consideration of the request, defendants request that the Court enter an immediate administrative stay to afford time for filing a request for a stay pending appeal in the Court of Appeals and an opportunity for that Court to consider that request in a meaningful and orderly manner. Given the urgency and gravity of the issues, defendants respectfully request that the Court rule on this *ex parte* application no later than noon PDT on Monday, October 18, 2010. If an administrative stay is not entered by that time, defendants intend to seek a stay pending appeal from the Court of Appeals and will request an immediate administrative stay from that Court to allow the orderly litigation of the stay request before that Court.

This Court's granting of a worldwide injunction against the military presents serious legal issues and the balance of hardships warrants a stay. The President strongly supports repeal of the DADT statute that the Court has found unconstitutional, a position shared by the Secretary of Defense and the Chairman of

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[1] As the President has stated previously, the Administration does not support the DADT statute as a matter of policy and strongly supports its repeal. However, the Department of Justice has long followed the practice of defending federal statutes as long as reasonable arguments can be made in support of their constitutionality, even if the Administration disagrees with a particular statute as a policy matter, as it does here.

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the Joint Chiefs of Staff. In support of the President's decision to seek a congressional repeal of the law, and as directed by the Secretary of Defense, the Department of Defense has established a high-level Working Group that is currently conducting a comprehensive review of the statute and how best to implement a change in policy in a prudent manner. The Working Group is nearing completion of its report to the Secretary, which is due on December 1. The immediate implementation of the injunction would disrupt this review and frustrate the Secretary's ability to recommend and implement policies that would ensure that any repeal of DADT does not irreparably harm the government's critical interests in military readiness, combat effectiveness, unit cohesion, morale, good order, discipline, and recruiting and retention of the Armed Forces. Accordingly, a stay should be entered while defendants appeal the Court's entry of a worldwide injunction.

ARGUMENT

I. The Court Should Stay Its Judgment Pending Appeal

In the Ninth Circuit, courts consider four factors in determining whether to grant a stay 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.

Golden Gate Restaurant Ass'n v. City and County of San Francisco, 512 F.3d 1112, 1115 (9th Cir. 2008) (quoting Hilton v. Braunskill, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987)). The Ninth Circuit has further explained the relationship between these factors by grouping them into "'two interrelated legal tests' that 'represent the outer reaches of a single continuum.'" Id. (quoting Lopez

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v. Heckler, 713 F.2d 1432, 1435 (9th Cir.1983)). "'At one end of the continuum, the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury. . . . At the other end of the continuum, the moving party must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor.'" Id. (quoting Lopez, 713 F.2d at 1435). A stay is required under either formulation.

At the very least, this Court's rulings raise serious constitutional questions justifying a stay pending appeal. Not only does this case present serious questions in its own right, but as noted below, DADT has been upheld by the federal courts on several occasions since it was enacted in 1993. With due respect to the Court's judgment, defendants submit that they have made the required showing of likelihood of success on the merits. The balance of hardships also tips sharply in favor of a stay pending appeal. Given that the DADT statute was duly enacted by Congress, and, as discussed below, the Department of Defense's considered judgment that a precipitous change in policy will immediately and significantly impair the Department's current efforts to devise an orderly end to DADT, immediate implementation of the Court's injunction would cause irreparable harms. Enforcement of the statute should not be halted by court order until and unless there is a final, non-appealable decision holding the statute to be unconstitutional. Indeed, given the unsettled state of the law that would exist pending appeal of this case, an injunction whose longevity is uncertain threatens to disrupt ongoing military operations at a time when a comprehensive policy review, and plan for implementing repeal, are nearing completion. A stay will prevent any such disruption.

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A. The Government Is Timely Requesting A Stay Now That An Injunction Has Issued And The Scope of the Court's Injunction is Known

In its ruling, the Court notes that the Government did not seek a stay of the plaintiff's proposed injunction. Doc. 249 at 13-14. The Government did not make such a request before the Court issued a ruling on plaintiff's proposed injunction, as it was not known whether an injunction would issue or what the terms of the injunction would be. Now that the Court has ruled and entered a worldwide injunction, defendants respectfully request a stay of that injunction.

B. At A Minimum, This Case Raises Serious Legal Questions

DADT has been challenged myriad times since it was enacted in 1993, and several appellate courts have upheld the constitutionality of this statute.[2] Indeed, the Ninth Circuit in Witt rejected as inappropriate a facial challenge to the statute. Witt v. Dep't of the Air Force, 527 F.3d 806, 819 (9th Cir. 2008). Therefore, at a minimum, this Court's opinion holding DADT facially unconstitutional presents serious legal questions that favor entering a stay pending the resolution of this case by appellate courts.

C. Absent a Stay, An Immediate Worldwide Injunction Will Irreparably Harm the Public Interest In A Strong And Effective Military

As the Court's opinion recognizes, the President has made clear his view that DADT should be repealed. He is committed to an orderly repeal of DADT, and the

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[2] See, e.g., Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997); Cook v. Gates, 528 F.3d 42 (1st Cir. 2008) (rejecting equal protection, due process and First Amendment challenges); Able v. United States, 155 F.3d 628 (2d Cir. 1998) (rejecting an equal protection clause challenge); Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996) (rejecting First Amendment and equal protection challenges); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996) (en banc) (rejecting equal protection and First Amendment challenges).

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Department's Working Group is nearing completion of its study and recommendations on implementing repeal in an orderly manner. In contrast, the precipitous changes to military policy required by the Court's injunction would result in a host of significant and immediate harms to the recognized public interest in ensuring that the Nation has strong and effective military operations. The injunction forces the Executive to immediately cease enforcing a statute enacted by Congress regarding military affairs, which alone creates harm justifying a stay. The injunction also requires an immediate and dramatic change in policy without allowing time to do so in an orderly and comprehensive way. For these reasons, a stay is necessary.

1. The Injunction Compels the Military to Contravene A Duly Enacted Statute Without the Opportunity for Appellate Review

The immediate implementation of the Court's injunction would compel the military to cease enforcing a duly enacted statute. Given the presumptive constitutional validity of an act of Congress, the interim invalidation of a statute irreparably injures the Government and itself constitutes sufficient grounds to enter a stay. See New Motor Vehicle Bd. v. Orrin W. Fox Co., 434 U.S. 1345, 1351, 98 S. Ct. 359, 54 L. Ed. 2d 349 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."); Coalition for Econ. Equity v. Wilson, 122 F.3d 718, 719 (9th Cir. 1997) ("[I]t is clear that a state suffers irreparable injury whenever an enactment of its people … is enjoined."). Given the nature of that irreparable injury, it is the practice of the Supreme Court to stay injunctive relief pending appeal in cases in which a single district court has declared an act of Congress unconstitutional. Bowen v. Kendrick, 483 U.S. 1304, 1304, 108 S. Ct. 1, 97 L. Ed. 2d 787 (1987) (Rehnquist, J., in chambers) ("It has been the unvarying practice of this Court . . . [to] decide on the merits all cases in which a

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single district judge declares an Act of Congress unconstitutional. In virtually all of these cases the Court has [accordingly] granted a stay if requested to do so by the Government."). A stay of the injunction would allow the Government to carry out the statutory policy of Congress, which "is in itself a declaration of the public interest which should be persuasive." Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 552, 57 S. Ct. 592, 81 L. Ed. 789 (1937).

2. The Injunction Requires A Precipitous Change In Policy That Threatens the Public Interest in A Strong Military

A stay is particularly appropriate here, where a precipitous change in policy could harm compelling public interests in military readiness, combat effectiveness, unit cohesion, morale, good order, discipline, and recruiting and retention. The Court's September 9, 2010 opinion, as amended, correctly observes that the President, Secretary of Defense, and other key officials support the repeal of DADT. But those officials also have expressed the considered view that such a change in policy should not occur without a thorough study and plan of how best to accomplish a successful transition. That process is well under way, with the Department's Working Group nearing completion of a report due on December 1. An immediate injunction would not only disrupt the process being undertaken by the political branches, but would also have both short-term and long-term adverse effects on the recognized interests of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces.

The President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff have all announced their support for a repeal of the DADT statute. These officials also have expressed their firm and considered belief that, to be successful, the discontinuation of DADT must be done in a comprehensive and orderly manner. The President, who has repeatedly called for repeal of DADT, including during his 2010 State of the Union address, has said as recently as last month that implementation of repeal must be done in "an orderly way." Declaration of

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Clifford L. Stanley ("Stanley Decl."), Ex. A. The Chairman of the Joint Chiefs of Staff also testified before the Senate Armed Services Committee on February 2, 2010, that "any implementation plan for a policy permitting gays and lesbians to serve openly in the armed forces must be carefully derived, sufficiently thorough, and thoughtfully executed." Id. Ex. B. Thus, the Commander-in-Chief and the nation's highest-ranking military officer have concluded that there must be an orderly process of ending DADT in order for such a policy change to be successful.

In support of statutory repeal, but also recognizing that a repeal could not be successfully implemented in a precipitous manner, the Secretary of Defense on March 2, 2010, established the Department of Defense Comprehensive Review Working Group and designated Jeh C. Johnson, the Department's General Counsel, and General Carter F. Ham, Commanding General, U.S. Army Europe, as Co-Chairs of the Working Group. Stanley Decl. Ex. C. The Secretary of Defense's memorandum establishing the Working Group emphasized that "[t]o be successful [in implementing repeal], we must understand all issues and potential impacts associated with repeal of the law and how to manage implementation [of repeal] in a way that minimizes disruption to a force engaged in combat operations and other demanding military activities around the globe." Id.

Congressional proposals to repeal the statute have also recognized the need for careful planning. Although the House of Representatives has passed, and the Senate Armed Services Committee has approved, a bill that would allow the repeal of the DADT statute, that proposed legislation does not provide for the immediate repeal of the statute. Under the proposed legislation, repeal would only take effect after a certification by the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff that they have considered the recommendations contained in the Working Group's report; that the Department of Defense has prepared the necessary policies and regulations to implement repeal; and that the implementation of those policies and regulations is consistent with the standards of military

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readiness, military effectiveness, unit cohesion, and recruitment and retention of the Armed Forces.

Dr. Clifford L. Stanley, Undersecretary of Defense for Personnel Readiness, is the official charged with overseeing the implementation of the Court's injunction. Stanley Decl. ¶¶ 2-3. And in his professional judgment, the injunction would risk significant and immediate impairment of the public interest in military readiness. Id. ¶ 8.

The precipitous changes required by the injunction would prevent the military from developing the necessary policies and regulations, and from conducting the necessary training and education of the force, to successfully adapt to the end of DADT. The Secretary of Defense has, among other things, directed the Working Group to provide "an assessment of the implications" of repeal and "an implementation plan for any new statutory mandate." Id. ¶ 14. The Working Group is undertaking a comprehensive legal and policy review of the issues implicated by any potential repeal of DADT. Id. ¶ 17.[3] The result of the Working Group's Assessment will be to recommend changes to DoD regulations, policies, and guidance that would be necessary to address the issues associated with ending DADT and to mitigate any negative consequences of repeal. Id. The Working Group is also developing tools for leadership to educate and train the force in the

[3] To that end, the Working Group has made extensive efforts to solicit the views of servicemembers and their families regarding potential issues associated with repeal. Stanley Decl. ¶ 15. The Secretary of Defense has emphasized that he believes that members of the military must be afforded the opportunity to inform us of their concerns, insights, and suggestions if we are to carry out such a change successfully. Id. Among other things, the Working Group has conducted visits to numerous military installations across the country and overseas, where they have interacted with tens of thousands of servicemembers on this issue. Id. The Working Group has also conducted an extensive, professionally developed survey that was distributed to a representative sample of approximately 400,000 servicemembers. Id.

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event of repeal. Id. ¶ 18. The Secretary of Defense has emphasized that "strong, engaged, and informed leadership will be required at every level to properly and effectively implement" such a change. Id.

The DADT statute implicates dozens of DoD and Service policies and regulations that cover such disparate issues as benefits, re-accession, military equal opportunity, anti-harassment, and others. Id. ¶ 26. Amending these regulations would typically take several months, because of the need to notify and seek input from all affected to ensure that changes do not inadvertently result in unanticipated negative effects on the force. Id. Properly implementing any change in policy would thus be a massive undertaking by the Department and the military and cannot be done overnight. Id. And if the Court's judgment is reversed on appeal, the Department and the military will have to implement another major policy change – creating further disruption and confusion.

Thousands of military personnel have enforced the DADT statutory policy for many years. Thus, the end of DADT will require that these personnel receive training and instruction in a number of areas, including: (i) how the policy has changed; (ii) why the policy has changed; (iii) how the change in this policy affects other existing policies; (iv) appropriate treatment of gay and lesbian servicemembers who reveal their sexual orientation; (v) appropriate treatment of servicemembers who object to serving with servicemembers they know to be gay or lesbian; and (vi) principles to consider when handling other issues that may arise after the elimination of the DADT statute. Id. ¶ 30. The immediate injunction ordered by the Court does not permit adequate time for this necessary training and instruction to occur.

Developing proper training tools regarding the end of DADT and communicating any new policy effectively to the millions of personnel at issue will take time and effort and cannot happen immediately, especially for commanders and servicemembers serving in theaters of active combat. Id. ¶ 31. The failure to

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provide proper training and effective communication regarding any change in the enforcement of DADT would be disruptive to military commanders and to servicemembers as they attempt to carry out their mission and military responsibilities, especially in active theaters of combat. Id. The Department is actively engaged in developing educational and training tools and a plan for effective communication so as to allow the orderly discontinuation of DADT, and the injunction should be stayed so that process can be completed. Id. An immediate court-ordered end to the statutory policy would place the military in a position of devising solutions on-the-fly, rather than responsibly implementing the careful planning that is currently being conducted by the Working Group. Id. ¶ 34.

A court-ordered injunction, operating precipitously and directly on all military and civilian Defense Department personnel throughout the world, would undermine the credibility and validity of the entire process that the political branches have undertaken for the orderly repeal of DADT, and may make the transition to repeal not only far more difficult, but also potentially disruptive to military readiness. Id. ¶ 16. The immediate implementation of the Court's injunction would also force the military to devise *ad hoc* procedures that may be inadequate, particularly when compared to the comprehensive and well-considered policies being developed by the Working Group. The Court, accordingly, should not require the military to restructure its policies and regulations during the pendency of the Government's appeal.

The Court should give deference to the considered judgment of the most senior leaders of the military – the President, Secretary of Defense, and the Chairman of the Joint Chiefs of Staff – that a repeal of the DADT statute and its implementing regulations should follow an orderly process. Orloff v. Willoughby, 345 U.S. 83, 93, 73 S. Ct. 534, 97 L. Ed. 842 (1953) ("[J]udges are not given the task of running the Army."); Gilligan v. Morgan, 413 U.S. 1, 10, 93 S. Ct. 2440, 37 L. Ed. 2d 407 (1973) ("[I]t is difficult to conceive of an area of governmental

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activity in which the courts have less competence," given that "[t]he complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments."). Indeed, if the Court's judgment is overturned on appeal without the statute being repealed by Congress, the temporary implementation of the Court's injunction would cause significant and unnecessary confusion and inconsistency in the management of the military. See generally, Stanley Decl. ¶¶ 16, 19, 26, 30, 31. Repeated and sudden changes in policy regarding DADT will be enormously disruptive and time-consuming, particularly at a time when this Nation is involved in combat operations overseas. Stanley Decl. ¶ 32.

3. The Breadth of the Injunction Exacerbates the Harm

The world-wide and military-wide injunction entered by the Court further exacerbates the harm that would result without a stay. As noted in the Government's objections to such an injunction (Doc. 235), the breadth of the injunction interferes with litigation of new constitutional challenges in other circuits notwithstanding a single adverse district court decision. The Supreme Court has observed that "the Government is not in a position identical to that of a private litigant, both because of the geographical breadth of government litigation and also, most importantly, because of the nature of the issues the Government litigates." United States v. Mendoza, 464 U.S. 154, 159, 104 S. Ct. 568, 78 L. Ed. 2d 379 (1984). If the Court's injunction is not stayed, it effectively overrules the decisions of other circuits that have upheld the DADT statute, and precludes consideration of similar issues by courts in circuits that have not addressed the issue. The district court is "in effect . . . imposing [its] view of the law on all the other circuits." Virginia Society for Human Life, Inc. v. FEC, 263 F.3d 379, 394 (4th Cir. 2001).

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D. The Harms to Defendants of Immediate Implementation of the Court's Injunction Outweigh Any Harm to Servicemembers that Might Result From A Stay

As DADT was enacted in 1993, and this action was filed in 2004, any harms suffered by plaintiff's members or servicemembers generally during the appeal period are outweighed by the harms that would be caused by immediate implementation of the judgment. A stay would "simply suspend[] judicial alteration of the *status quo*," while this case is resolved. Nken v. Holder, 129 S. Ct. 1749, 1758, 173 L. Ed. 2d 550 (2009) (quotation marks omitted). Any benefit to servicemembers from ending DADT would not inure unless that policy change were permanent. And to the extent any servicemember faces discharge proceedings (or any other alleged immediate harm), that can be addressed by expediting appeal.

Finally, a stay pending appeal would help to avoid the confusion and uncertainty that would be caused by an order temporarily enjoining enforcement of DADT, with the looming possibility that the statutory policy could be reinstated on appeal. Enjoining the operation of the statute before any appeal is concluded would create tremendous uncertainty about the status of servicemembers who may reveal their sexual orientation in reliance on this Court's decision and injunction. Therefore, the injunction should be stayed pending appellate review. Cf. Edgar v. MITE Corp., 457 U.S. 624, 630, 102 S. Ct. 2629, 73 L.Ed. 2d 269 (1982) ("reversal of the judgment [could] . . . expose MITE to . . . liability" for acting in violation of state law pursuant to a preliminary injunction).

CONCLUSION

For all of these reasons, the Court should stay the injunction pending resolution of the defendants' appeal of the Court's September 9, 2010 decision, as amended on October 12, 2010, and October 12, 2010 judgment and permanent injunction. Defendants also request that the Court issue an immediate administrative stay of its October 12, 2010 Order to allow time for the orderly

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litigation of that request for a stay pending appeal both before this Court and, if this Court were to deny the stay request, before the Court of Appeals. At a minimum, if this Court declines to enter a stay pending appeal or any administrative stay to allow its own consideration of the request, defendants request that the Court enter an immediate administrative stay to afford time for filing a request for a stay pending appeal in the Court of Appeals and an opportunity for that Court to consider that request in a meaningfully and orderly manner. Given the seriousness of the issues, defendants respectfully request that the Court rule on this *ex parte* application no later than noon PDT on Monday, October 18, 2010; should the Court decline to do so, defendants intend to seek a stay pending appeal from the Court of Appeals and will request an immediate administrative stay from that Court to allow the orderly litigation of the stay request before that Court.

Dated: October 14, 2010

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