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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, SECRETARY
OF DEFENSE, in his official capacity,

Defendants.

Case No. CV 04-8425-VAP (Ex)

**OPPOSITION OF LOG CABIN
REPUBLICANS TO DEFENDANTS'
EX PARTE APPLICATION FOR
EMERGENCY STAY OF
INJUNCTION**

Judge: Hon. Virginia A. Phillips

Hearing: October 18, 2010

Time: 2:30 p.m.

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I.

INTRODUCTION

This is at least the government's *fifth* request for a stay in this case, following the stay it requested in its Objections to plaintiff's proposed judgment (Doc. 235) and the three prior requests identified in plaintiff's Response to those Objections (Doc. 236). See Minute Order of October 12, 2010 (Doc. 249), at 13-14. The government does not even discuss, let alone call into question, any of the reasons for the injunction that were set forth in that Minute Order or in the Court's 85-page Memorandum Opinion (Doc. 250) or its 84-page Findings of Fact and Conclusions of Law (Doc. 251). Instead, it supports the request first with a belated declaration from an Undersecretary of Defense ominously recounting the bureaucratic nightmare that the injunction will supposedly create for his Department, and second, unbelievably, with an Internet printout of an interview of President Obama in Rolling Stone magazine – the rankest of hearsay and unsworn, self-serving statements which the Court should disregard. Defendants make nowhere near the showing required to sustain an application for a stay of injunction pending appeal.

The government rushes to appeal the Court's judgment that DADT is unconstitutional, even as the President states repeatedly in public pronouncements that the policy weakens and undermines our national security and will "end on [his] watch".¹ The government is evidently uncomfortable with the fact that it is arguing that this case should not proceed to the inevitable invalidation of Don't Ask, Don't

¹ It is not only Admiral Mullen who tweets (Trial Ex. 330). President Obama, using his verified Twitter account, tweeted yesterday, *on the very day that the Government filed both its appeal to the Ninth Circuit and this emergency motion for stay*, that "Anybody who wants to serve in our armed forces and make sacrifices on our behalf should be able to. DADT will end & it will end on my watch." See Attachment 1. And in the fuller remarks that his tweet encapsulated, the President made it clear that he agrees with the principles underlying the 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>.

1 Tell at the same time as the senior civilian and military command professes to wish
2 for the end of that policy. That discomfort is well justified. But the fact that the
3 government's continued defense of the case bespeaks hypocrisy at its highest levels
4 should reinforce, not deter, the Court from maintaining the injunction it correctly
5 entered based on the evidence presented at trial, and thereby safeguarding the
6 Constitutional rights of our servicemembers.

7 Every day that the government remains free to implement the Don't Ask,
8 Don't Tell policy, American citizens' Constitutional rights are violated. The
9 emergency stay of injunction that the government requests would perpetuate this
10 unconstitutional state of affairs with no countervailing benefit to the government
11 that outweighs the deprivation of rights such a stay would entail. The request for
12 stay must be denied.

13 II.

14 **DEFENDANTS DO NOT MEET**

15 **THE STANDARDS FOR A STAY UNDER RULE 62(C)**

16 A stay of injunction under Fed. R. Civ. P. 62(c) is considered "extraordinary
17 relief" for which the moving party bears a "heavy burden." Winston-Salem/Forsyth
18 County Bd. of Educ. v. Scott, 404 U.S. 1221, 1231, 31 L. Ed. 2d 441, 92 S. Ct.
19 1236 (1971). Four factors regulate the issuance of a stay of a district court order,
20 including stay of injunction, pending appeal: (1) whether the stay applicant has
21 made a strong showing that he is likely to succeed on the merits; (2) whether the
22 applicant will be irreparably injured absent a stay; (3) whether issuance of the stay
23 will substantially injure the other parties interested in the proceeding; and (4) where
24 the public interest lies. Hilton v. Braunskill, 481 U.S. 770, 776, 95 L. Ed. 2d 724,
25 107 S. Ct. 2113 (1987). These are the same four factors that must be shown by a
26 party moving for an injunction in the first place, see Winter v. Natural Resources
27 Defense Council, ___ U.S. ___, 172 L. Ed. 2d 249, 129 S. Ct. 365, 374 (2008), and
28 analysis of the factors in the one situation informs the analysis in the other. See

1 Golden Gate Rest. Ass'n v. City and County of San Francisco, 512 F.3d 1112,
2 1115-16 (9th Cir. 2008).

3 The moving party must show the existence of all four factors; and the moving
4 party must show not merely the “possibility” of irreparable injury absent a stay, as
5 defendants contend, but the *likelihood* of irreparable injury. Winter, 129 S.Ct. at
6 375 (rejecting the Ninth Circuit’s earlier “possibility” standard as articulated in,
7 e.g., Golden Gate Rest. Ass'n, 512 F.3d at 1115, and Lopez v. Heckler, 713 F.2d
8 1432, 1435 (9th Cir. 1983), cited by defendants); Alliance for the Wild Rockies v.
9 Cottrell, ___ F.3d ___, No. 09-35756, 2010 WL 3665149, at *5, 8 (9th Cir. Sept.
10 22, 2010). The government’s showing here fails all four factors.

11 **A. Defendants Are Not Likely to Succeed on the Merits.**

12 Defendants’ application *completely fails to argue that defendants are likely*
13 *to succeed on the merits of their appeal*, the first necessary prong of the test for a
14 stay. There is an excellent reason for that omission: defendants are not at all likely
15 to succeed on the merits, and they know it.² Log Cabin’s evidence at trial was
16 overwhelming and showed conclusively that Don't Ask, Don't Tell does not
17 significantly further an important governmental interest, is not necessary to that
18 interest, and in fact impairs that interest. The government presented no evidence to
19 the contrary and will be restricted on appeal to the record it made – the legislative
20 history of the statute. Under the circumstances, it cannot show any likelihood of
21 success on the merits. See Gay Lesbian Bisexual Alliance v. Sessions, 917 F.
22 Supp. 1558, 1563 (M.D. Ala. 1996) (denying stay of declaration of facial
23 unconstitutionality of state statute because the state could identify no single
24 prospective application of the statute that would be constitutional).

25 A moving party that cannot make a showing of likely success on the merits
26 may substitute a showing that the appeal presents a serious legal question. See
27 Golden Gate Rest. Ass'n, 512 F.3d at 1115-16. That fallback argument is

28 ² The application’s apologetic footnote 1 acknowledges as much.

1 apparently what the government relies on here, in the very cursory Part B of its
2 Argument at page 4 of its application. But defendants cannot show the existence of
3 a serious legal question here.

4 First of all, they do not even identify what the supposed “serious question” is.
5 Is it Log Cabin’s standing? Is it the fact that this case presented a facial challenge?
6 Is it the admission of some particular evidence? Is it the Court’s application of the
7 Witt standard? The Court and Log Cabin are left to guess.

8 For their claim that such a serious question exists, defendants again rely
9 solely, as they have throughout this case, on five previous Circuit Court cases that
10 did not invalidate DADT: Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997); Cook v.
11 Gates, 528 F.3d 42 (1st Cir. 2008); Able v. United States, 155 F.3d 628 (2d Cir.
12 1998); Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996); and Thomasson v. Perry,
13 80 F.3d 915 (4th Cir. 1996) (en banc). As we have pointed out more than once
14 before, all of these cases except Cook predate the Supreme Court’s decision in
15 Lawrence v. Texas, 539 U.S. 558, 156 L. Ed. 2d 508, 123 S. Ct. 2472 (2003), and
16 therefore, as the Court has recognized (See Minute Order of October 12, 2010
17 (Doc. 249), at 9-10), are not relevant here. As for Cook, it does not control in this
18 Circuit, where the rule of Witt v. Department of the Air Force, 527 F.3d 806 (9th
19 Cir. 2008) – a decision the government elected not to appeal – governs.³ The
20 injunction here was specifically based on Witt, and there can be no serious legal
21 question of its validity under the controlling law.

22 Moreover, following remand from the Ninth Circuit, Witt is also the only
23 other case to have gone to a full trial on the merits of DADT. That trial resulted in
24 the same finding this Court reached, that DADT was unconstitutional, in its as-

25 _____
26 ³ The government continues to falsely assert that Witt “rejected as inappropriate a
27 facial challenge to the statute.” Witt did not assert that a facial challenge to DADT
28 would be impermissible, it merely decided the case that was before it, which was an
as-applied challenge. 527 F.3d at 819. The standard announced in Witt is properly
applied in this facial challenge, and nothing in the Witt decision forecloses that.

1 applied setting. To our knowledge, the government has not moved to stay the trial
2 court's decision of reinstatement. These facts show further that no "serious legal
3 question," as defined in stay jurisprudence, is presented here.

4 Finally, though the defendants' application ignores this requirement, a
5 movant relying on the "serious legal question" alternative must show that the
6 second and third factors, collectively the balance of hardships, tips "sharply" in its
7 favor. Golden Gate Rest. Ass'n, 512 F.3d at 1115-16; Nelson v. Nat'l Aeronautics
8 & Space Admin. (Nelson II), 530 F.3d 865, 872-73 (9th Cir. 2008), cert. granted on
9 other grounds, ___ U.S. ___, 176 L. Ed. 2d 211, 130 S. Ct. 1755 (March 8, 2010)
10 (No. 09-530). As shown below, the balance of hardships in this case in fact tips
11 sharply toward the *plaintiff*, so defendants cannot rely on the "serious legal
12 question" avenue.

13 **B. Defendants Will Not Be Irreparably Injured Absent a Stay.**

14 The great bulk of the defendants' application for stay is devoted to their
15 claim that the military will be harmed if the Court's injunction remains in place
16 while the government pursues an appeal.⁴ But the injunction does not require the
17 military to do anything affirmatively: it does not order the military to redesign its
18 barracks, to retool its pay scales, to re-ordain its chaplains, or any of the other
19 specters raised in the application. The Court's injunction requires only one thing:
20 to cease investigating and discharging honorable, patriotic, brave fighting men and
21 women for reasons unrelated to their performance and military ability.

22 With the injunction in place, *nothing will change* with regard to the
23 composition of the military, the recruitment, training, promotion, demotion, and
24 deployment of servicemembers, the mission and operations of the armed forces, or

25 ⁴ The application dresses the claim up in the garb of the "public interest," a separate
26 and distinct prong of the required four-factor analysis, but the supposed harms
27 identified in the moving papers are all to the military's institutional interests and its
28 bureaucratic needs. Though the military ultimately serves the public, its interests
are not the "public interest" and conflating the two, as the government's application
attempts to do, is misleading. As discussed in Part D below, the true public interest
is served by ensuring that the military is held to Constitutional standards.

1 anything else that pertains to the important governmental interest that the military
2 serves. The evidence at trial showed that homosexual men and women already
3 serve today; they are deployed to theaters of combat when needed – indeed,
4 retained overall in greater numbers when needed – even if they are openly
5 homosexual; it is their discharge, not their presence, that if anything impacts morale
6 and good order. As the Court held (Am. Memo. Opinion (Doc. 250), at 59), “[f]ar
7 from furthering the military's readiness, the discharge of these service men and
8 women had a direct and deleterious effect on this governmental interest.” The
9 evidence at trial “directly undermine[d] any contention that the Act furthers the
10 Government’s purpose of military readiness,” *id.* at 64; and defendants admitted –
11 in public statements of the President and the Chairman of the Joint Chiefs of Staff –
12 that “far from being necessary to further significantly the Government’s interest in
13 military readiness, the Don't Ask, Don't Tell Act actually undermines that interest.”
14 *Id.* at 65. Enjoining the enforcement of DADT, far from injuring defendants, will
15 actually improve morale, readiness, cohesion, and overall military effectiveness.

16 Neither should the government be heard to argue, as it does in Part D of its
17 Argument at page 12, that a stay of the injunction is necessary to preserve the status
18 quo. “Maintaining the status quo is not a talisman.” Golden Gate Rest. Ass’n, 512
19 F.3d at 1116. The focus is on prevention of injury: “[i]t often happens that this
20 purpose is furthered by preservation of the status quo, but not always. If the
21 currently existing status quo itself is causing one of the parties irreparable injury, it
22 is necessary to alter the situation so as to prevent the injury. ... The focus always
23 must be on prevention of injury by a proper order, not merely on preservation of the
24 status quo.” *Id.*, quoting Canal Auth. of Florida v. Callaway, 489 F.2d 567, 576
25 (5th Cir. 1974).

26 The supposed “injury” to the military that the government claims would
27 result from the Court’s order invalidating DADT is, by the government’s own
28 account, entirely a matter of rewriting handbooks and personnel manuals,

1 developing training and “educational” materials, reassuring serving personnel that
2 their “views, concerns, and perspectives” are valued, and the like. These activities
3 may or may not be burdensome – and if they are, it is a burden the Constitution
4 demands – but they are not “irreparable injury” of the type that the test for a stay
5 contemplates. By contrast, the injury to Log Cabin’s members and to all American
6 servicemembers from granting a stay is truly irreparable, in a Constitutional sense,
7 as the following section shows.

8 **C. Issuance of a Stay Will Substantially Injure Log Cabin’s Members,**
9 **and All Homosexual Servicemembers, by Perpetuating the Denial**
10 **of Their Constitutional Rights.**

11 If the Court grants the government’s application for a stay of the injunction,
12 homosexual servicemembers will continue to be investigated and discharged. The
13 government admits as much, at page 12 of its brief (“to the extent any
14 servicemember faces discharge proceedings (or any other alleged immediate harm),
15 that can be addressed....”).⁵ Those investigations and discharges, as required by
16 and carried out under DADT, violate the due process and First Amendment rights
17 of the servicemembers, and *deprivation of Constitutional rights is ipso facto*
18 *irreparable injury*. “[C]onstitutional violations cannot be adequately remedied
19 through damages and therefore generally constitute irreparable harm.” Nelson II,
20 530 F.3d at 882; see also Elrod v. Burns, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S.
21 Ct. 2673 (1976) (“The loss of First Amendment freedoms, for even minimal periods
22 of time, unquestionably constitutes irreparable injury”); Tucker v. City of Fairfield,
23 398 F.3d 457, 464 (6th Cir. 2005) (same). Remarkably, the government’s
24 application does not even address *at all* the issue of Constitutional injury to Log
25 Cabin and to homosexual servicemembers.

26 On the other hand, maintaining the injunction in place while the government

27 ⁵ The government does not even offer that there could be a moratorium on
28 investigations and discharges, at a minimum, while its appeal proceeds.

1 pursues its appeal preserves servicemembers' Constitutional rights and allows them
2 to continue serving in the military just as they do today. They will continue to be
3 held to the military standards applicable to all servicemembers, and subject to the
4 same discipline and regulations that apply to all. In the unlikely event that the
5 Court's judgment is ultimately reversed and the Don't Ask, Don't Tell Act is
6 reinstated, the government may resume investigations and discharges with no ill
7 effects beyond the hiatus it will have experienced. But the ill effects to homosexual
8 servicemembers of the inverse scenario – disruption and termination of their
9 military careers, with merely the hollow satisfaction of abstract vindication when
10 the Court's judgment is ultimately upheld – are irreparable. These individuals will
11 not be reinstated, even if reinstatement could make them whole for the deprivation
12 of Constitutional rights they would have suffered. The concrete injury to them
13 from an ill-advised stay of the injunction far outweighs the theoretical harm to the
14 government that might result from maintaining the injunction in place during the
15 appeal process, and tips the balance of hardships “sharply” in favor of plaintiff.

16 Witnesses at trial – men and women, officers and enlisted personnel, from
17 multiple branches of the service – presented powerful, unforgettable testimony of
18 the effects of DADT on their personal lives and on the lives of their unit comrades.
19 Compelled by DADT to lie and dissemble about their human nature, subjected to
20 unredressable humiliations, forced out of careers in which they were commended
21 and decorated: these individuals proved that DADT causes, *every day that it*
22 *remains in force*, irreparable injury to American servicemembers. “‘Faced with ...
23 a conflict between financial concerns and preventable human suffering, we have
24 little difficulty concluding that the balance of hardships tips decidedly’ in favor of
25 the latter.” Golden Gate Rest. Ass’n, 512 F.3d at 1126, quoting Lopez, 713 F.2d at
26 1437.

27 **D. The Public Interest Favors Denial of a Stay of the Injunction.**

28 The analysis of where the public interest lies is a separate and additional

1 consideration from that of irreparable injury. Golden Gate Rest. Ass'n, 512 F.3d at
2 1116. The public interest is not identical to the government's interest; if it were,
3 this factor would always count in favor of sustaining a statute or granting a stay of
4 an injunction invalidating a statute, and there would be no need to include it as one
5 of several factors to be considered. Here, the public interest is in safeguarding the
6 Constitutional rights that define us as a nation. The public interest is not served by
7 merely giving blind deference to military judgment. Rather, the clear public
8 interest is in ensuring that the military, like every other institution of our society,
9 conforms to Constitutional requirements. "Congress, of course, is subject to the
10 requirements of the Due Process Clause when legislating in the area of military
11 affairs...." Weiss v. United States, 510 U.S. 163, 176, 127 L. Ed. 2d 1, 114 S. Ct.
12 752 (1994).

13 It must not be overlooked that it is not only servicemembers who are affected
14 by DADT. Servicemembers' family and friends – third party members of the
15 public – are affected also, as their own First Amendment rights are impaired when a
16 servicemember cannot write them a private letter or express affection to them in
17 public. Their interests militate against the granting of a stay of injunction as well.

18 The moving papers attempt to transform the "presumptive constitutional
19 validity of an act of Congress" into an ipso facto conclusive declaration of the
20 public interest; the application goes so far as to claim (at pages 5-6) that the
21 "interim" invalidation of a statute by itself "constitutes sufficient grounds to enter a
22 stay." Leaving aside the question of whether this Court's permanent injunction
23 following a full trial on the merits is in any sense "interim," it is simply not the case
24 that a stay is required whenever a statute is held unconstitutional. The cases cited
25 by the government do not support that proposition.

26 The language the government cites from New Motor Vehicle Bd. v. Orrin W.
27 Fox Co., 434 U.S. 1345, 1351, 54 L. Ed. 2d 349, 98 S. Ct. 359 (1977) (Rehnquist,
28 J., in chambers) ("[A]ny time a State is enjoined by a Court from effectuating

1 statutes enacted by representatives of its people, it suffers a form of irreparable
2 injury.”) was the ipse dixit of a single Justice. Citing no law, Justice Rehnquist
3 granted a stay of a three-judge district court’s injunction because he disagreed that
4 the plaintiff challenging a state statute had a protected 14th Amendment liberty or
5 property interest. By contrast, there is no question that a protected liberty interest is
6 implicated here; Witt v. Department of the Air Force, supra, makes that clear.
7 Coalition for Econ. Equity v. Wilson, 122 F.3d 718, 719 (9th Cir. 1997) relied on
8 that same unsupported statement in New Motor Vehicle Board. Moreover, the
9 procedural posture of the case is distinguishable; the case was about whether to
10 grant a stay pending a petition for writ of certiorari, which was unlikely to be
11 granted.

12 Finally, the government cites Bowen v. Kendrick, 483 U.S. 1304, 1304, 97 L.
13 Ed. 2d 787, 108 S. Ct. 1 (1987) (Rehnquist, J., in chambers) for the proposition that
14 the Supreme Court tends to hear cases on the merits where a district judge declares
15 an Act of Congress unconstitutional and often grants a stay upon the government’s
16 request. But Justice Rehnquist (again deciding the matter as a single Justice in
17 chambers) goes on to explain that there is no categorical rule mandating such a stay
18 in all cases. Rather, he explains that presumption of an act’s constitutionality is but
19 a factor to be considered in balancing the equities. Id. And far from the case here,
20 the Bowen balancing analysis did not require consideration of a statute that the
21 executive branch admitted did not further its stated goals.

22 III.

23 **THE GOVERNMENT’S CLAIMED HARDSHIP IS A RED HERRING**

24 As noted above, the heart of the government’s argument in its application is
25 to bemoan the administrative and rulemaking burden that would supposedly be
26 placed on the military if the Court’s injunction remains in place, and to plead that
27 the current military Working Group be allowed to complete its “orderly,” if
28 ponderous, research and recommendations project without interference from courts

1 fulfilling their constitutional function.⁶ The Court should reject these arguments,
2 because they do not establish good cause for a stay of the injunction.

3 First, not only is the timing of the working group's research arbitrary, but its
4 result is uncertain. As the Court has recognized when the government has
5 requested previous stays based on the working group's process, that group's report
6 could be negative; its conclusions could be rejected, by the Executive or the
7 military; and the Congress could disagree. Indeed, there is significant opposition
8 today in the Congress to a legislative repeal of DADT even if the working group's
9 report supports repeal. Homosexual servicemembers are fighting and dying today
10 in two wars for their fellow Americans' Constitutional rights; their own
11 Constitutional rights should not be held hostage to an uncertain bureaucratic
12 process that wants time to develop educational and training materials.

13 Secondly, the government has known since July 24, 2009, when this case
14 was set for trial, that there was a possibility that DADT would be declared
15 unconstitutional and that it might have to prepare for that eventuality. If it chose
16 not to do so with sufficient time, and not to start the Working Group review until a
17 time when its work would overlap with this trial, that is not reason to stay this
18 injunction now. And, critically, nothing in the injunction prevents the military from
19 developing all the policies and educational programs it needs to; its ability to do so
20 does not depend on the DADT policy remaining in place.

21 Finally, the military has announced that it is now complying with the
22 injunction and has stopped enforcing DADT pending these stay proceedings. See

23 ⁶ The ten-page Declaration of Clifford L. Stanley – who, it now appears, should
24 have been the government's 30(b)(6) witness on the topic of "the compatibility or
25 incompatibility of gay and lesbian Americans with service in the United States
26 Armed Forces, including the effect of the presence of such individuals, if any, on
27 unit cohesion, combat effectiveness, unit morale, good order, discipline, and
28 readiness to fight" – goes into excruciating detail of the minutiae of the military's
supposed response to any change in DADT, and sheds crocodile tears for the
uncertainty that would supposedly hang over "our men and women in uniform" if
the military were forced to adjust to changing conditions "on-the-fly," while
completely ignoring the Constitutional rights of tens of thousands of homosexual
servicemembers.

1 <http://www.defense.gov/news/newsarticle.aspx?id=61279> (Attachment 2). If this is
2 so, it belies the claim defendants make that compliance would cause ongoing
3 irreparable harm to the military. As shown at trial, the military already regularly
4 suspends DADT discharges in times of need, such as during combat operations;
5 there is no reason to believe that maintaining the injunction should cause any harm
6 to the military any more than any other such stop-loss order.

7 **IV.**

8 **CONCLUSION**

9 The government's stated public position is that Don't Ask, Don't Tell
10 weakens our national security and must end. Log Cabin could not agree more with
11 the government on that point; the evidence at trial bore that out to a fare-thee-well.
12 This Court has now ended the policy, consistent with its Constitutional duties.
13 Staying the injunction that has been entered would have the effect of *continuing* to
14 weaken our national security, a result the government should be ashamed to be
15 seeking. This Court should deny the application.

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18 Dated: October 15, 2010

WHITE & CASE LLP

19 By: /s/ Dan Woods

20 Dan Woods

21 Attorneys for Plaintiff
22 Log Cabin Republicans
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