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Log Cabin Republicans

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOG CABIN REPUBLICANS, a non-profit corporation,

Plaintiff,

vs.

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. CV04-8425 GPS (ex)

LOG CABIN REPUBLICANS'

(1) *EX PARTE* APPLICATION FOR ORDER VACATING STAY;

(2) MEMORANDUM OF POINTS AND AUTHORITIES; AND

(3) DECLARATION OF PATRICK HUNNIUS

Filed: October 12, 2004
Trial Date: None scheduled

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

Pursuant to Local Rule 7-19, plaintiff Log Cabin Republicans hereby applies *ex parte* for an order from the Court vacating its Order Staying Action in Light of Ninth Circuit's May 21, 2008 Decision in *Witt v. Department of Air Force, et al*. Because the constitutional rights of gay and lesbian soldiers who are bravely serving in our nation's armed forces continue to be violated as long as this Court-ordered stay of indefinite duration remains in place, Log Cabin Republicans seeks immediate relief from this stay and, accordingly, seeks this relief *ex parte*.

Good cause exists for the Court to grant this application. The stay exceeds the limits of the Court's discretion for the following reasons: (1) the indefinite duration of the stay will cause undue delay and further hardship to gay and lesbian service members; (2) the Ninth Circuit's decision in Witt is currently valid and binding precedent that can and should be applied by this Court; and (3) because there are material differences between the issues raised in Witt and those here – Witt does not address the First Amendment claim at issue here and Witt involves an "as-applied" challenge while this case involves a facial constitutional challenge to "Don't Ask, Don't Tell" – staying this matter pending further proceedings in Witt would not contribute to the resolution of issues that must be decided in this case.

Pursuant to Local Rule 7-19, Log Cabin Republicans has provided notice of this *ex parte* application to opposing counsel, as set forth in the accompanying Declaration of Patrick Hunnius, and asked opposing counsel whether they would oppose the application. As of the time of this filing, counsel for Log Cabin Republicans had not received a response.

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This application is based on this *ex parte* application, the accompanying memorandum of points and authorities, the accompanying Declaration of Patrick Hunnius, all pleadings, records, and files in this action, and such evidence and argument that may be presented at any hearing on this application.

DATED: May 30, 2008

WHITE & CASE LLP

By: /S/
Patrick Hunnius
Attorneys for Plaintiff Log Cabin Republicans

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I.

INTRODUCTION

Gay and lesbian soldiers are bravely serving in our nation's armed forces. Gay and lesbian soldiers are bravely dying in the war in Iraq. As bravely as they serve and die for our country, they cannot demonstrate a propensity or intent to engage in homosexual acts, nor can they openly state that they are homosexual, or they will be punished by the "Don't Ask, Don't Tell" policy.[1] This lawsuit seeks to ensure that they are able to continue to serve our country while being free to exercise the constitutional rights they are fighting for.

Log Cabin Republicans filed this case three and a half years ago to vindicate the rights of present and former servicepersons. Last week, the Ninth Circuit issued its groundbreaking decision in Witt v. Department of Air Force, No. 06-35644 (9th Cir. May 21, 2008), a case filed **18 months after** this case.[2] At the same time gay and lesbian soldiers are bravely fighting and dying for our country, this Court has avoided ruling on the important constitutional issues in the case. The Court waited a year to decide the government's first motion to dismiss and then granted it on the limited basis of the standing issue; misplaced the file after the Log Cabin Republicans amended the complaint; and did not decide the government's second motion to dismiss.

Now, instead of deciding the government's motion in light of Witt, the Court has stayed this action pending the resolution of *hypothetical* further proceedings in Witt, such as possible *en banc* review. The government, however, has not yet decided whether it will seek further proceedings before the Ninth Circuit (and may never do so). Declaration of Patrick Hunnius ("Hunnius Decl."), ¶ 3. Moreover, the

[1] See Washington Post, "Public Death, Private Life," by Deborah Howell, p. B06, March 30, 2008 (regarding Army Maj. Alan G. Rogers, a decorated war hero killed in an explosion in Baghdad, who was also gay) (attached as Exhibit A to the accompanying Declaration of Patrick Hunnius).

[2] Major Witt filed her complaint on April 12, 2006. The Log Cabin Republicans filed its complaint on October 12, 2004.

Court entered its stay order even though neither party asked it to do so and without giving the parties an opportunity to brief or address whether a stay would be appropriate.

By this *ex parte* application, plaintiff Log Cabin Republicans seeks to vacate the stay. As shown below, however well meaning the Court's wish to spare the parties from "undertak[ing] briefing [regarding the impact of Witt on the present case] until the future impact of the three-judge panel determination in Witt is settled" (May 23 Order, p. 2), the stay exceeds the limits of the Court's discretion.

First, the indefinite duration of the stay will cause undue delay and further hardship to gay and lesbian service members whose constitutional rights continue to be violated. Second, the Ninth Circuit's decision in Witt is currently valid, **binding** precedent that can and should be applied by this Court. Finally, there are material differences between the issues raised in Witt and those here: (1) Witt does not address the First Amendment claim at issue here; and (2) Witt involves an "as-applied" challenge while this case involves a facial constitutional challenge to "Don't Ask, Don't Tell." As such, staying this matter pending further proceedings in Witt would not contribute to the resolution of legal issues that must be decided in this case.

This case urgently needs to be decided so that it, like Witt, can proceed through the Ninth Circuit and, potentially, to the Supreme Court before any more brave gay or lesbian soldiers die for our country without the full protection of our Constitution, including its "substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." Witt, supra, slip op. at 5864 (quoting Lawrence v. Texas, 539 U.S. 558, 572 (2003)).

II.

PROCEDURAL BACKGROUND

On October 12, 2004, plaintiff Log Cabin Republicans filed its complaint in this action seeking a declaration that the "Don't Ask, Don't Tell" policy codified in 10 U.S.C. § 654 is unconstitutional, because it violates the rights of gay and lesbian

service members to: (1) privacy under the Due Process Clause of the Fifth Amendment; (2) freedom of speech under the First Amendment; and (3) equal protection of the laws under the Fifth Amendment. This lawsuit was the first direct challenge to the "Don't Ask, Don't Tell" policy since the Supreme Court's decision in Lawrence v. Texas, 539 U.S. 558 (2003), which held that the criminalization of homosexual conduct by the State of Texas was unconstitutional under the Due Process Clause.

Defendants United States of America and Donald H. Rumsfeld, Secretary of Defense ("Defendants") filed a motion to dismiss on December 14, 2004.[3] Log Cabin Republicans filed opposition papers on January 10, 2005. Defendants filed reply papers on January 31, 2005. On March 3, 2005, without hearing oral argument, the Court took the government's motion under submission as of March 7, 2005. Following completion of the parties' briefing on the motion, the parties filed two joint requests for decision in accordance with Local Rules 83-9.2 and 83-9.4.

On March 21, 2006, more than one year after taking the motion under submission, the Court issued its ruling on the government's motion to dismiss. The Court did not address any constitutional issues. Instead, the Court ruled that the complaint did not adequately allege Log Cabin Republicans' standing to sue. The Court ordered that Log Cabin Republicans file an amended complaint and declaration that identifies by name a Log Cabin Republican member injured by "Don't Ask, Don't Tell."

In accordance with the Court's order, in April 28, 2006, Log Cabin Republicans filed a first amended complaint and the Declaration of John Alexander Nicholson, identifying him as a member of Log Cabin Republicans and a former member of the U.S. Army who was subjected to separation proceedings and discharged under the "Don't Ask, Don't Tell" policy.

[3] Pursuant to FRCP 25(d), Secretary of Defense Robert M. Gates is substituted for Donald H. Rumsfeld.

Once again, Defendants moved to dismiss the first amended complaint on June 12, 2006. Log Cabin Republicans filed opposition papers on June 30, 2006, and Defendants filed a reply on July 7, 2006. Although the hearing on the government's motion was scheduled for July 24, 2006, the Court took the hearing off calendar, stating its intent to reschedule the hearing after further consideration of the parties' submissions. With no hearing date in place, the parties filed a joint request for determination on November 14, 2006. On November 27, 2006, the Court notified the parties that it had discovered that the case file was destroyed because it was inadvertently marked as "Closed" by courthouse staff. The Court advised that it would set a hearing date at a future date. On January 12, 2007, the parties filed another joint request for decision with the Court. In response to a Court order requiring a "John Doe" declaration, Log Cabin Republicans filed a John Doe declaration on behalf of a member who is currently serving in the armed forces.

A hearing was finally held on the government's motion on June 18, 2007, almost one year after the parties had originally briefed the motion. At the conclusion of the hearing, the Court stated that the matter was submitted for decision. Because the Court did not issue a decision on the matter within 120 days of the hearing as required by Local Rule 83-9.1, the parties filed yet another joint request for decision on October 24, 2007. On October 30, 2007, the Court denied the parties' joint request for decision as moot in light of a brief memorandum of supplemental authority. In accordance with Local Rule 83-9.1.2(a)(ii), the matter was again submitted for decision when, on November 13, 2007, the parties completed briefing in connection with the submitted supplemental authority.

Because the Court did not issue a decision within 120 days of the matter being submitted for decision again, the parties filed another joint request for decision on March 20, 2008. The Court did not issue a decision or advise the parties of an intended decision date within 30 days of the joint request for decision. Thus, the

parties filed a joint request for a decision to the Chief Judge of the Central District on April 30, 2008.

To date, the Court has not issued a decision on the government's motion to dismiss. Rather, on May 23, 2008, the Court issued an order staying the action in light of the Ninth Circuit's May 21, 2008 Decision in Witt v. Department of Air Force, et al. The order staying the action relies on the Court's assumption that "*en banc* relief will be requested and *certiorari* possibly sought" in the Witt decision, such that the Court does not wish to issue a ruling on the government's motion "until the future impact of the three-judge panel determination in *Witt* is settled." The order does not specify a duration or deadline for the stay.

Significantly, while the Court's order assumes that the government will seek *en banc* review, counsel for the government informed Log Cabin Republicans that no such decision has been made yet. Hunnius Decl., ¶ 3.

III.

GOOD CAUSE EXISTS FOR THE COURT TO VACATE THE STAY

There are limits to a court's discretionary power to stay proceedings. Landis v. North American Co., 299 U.S. 248, 254-256 (1936). As the Supreme Court held,

> A district court has inherent power to control the disposition of the causes on its docket in a manner which will promote economy of time and effort for itself, for counsel, and for litigants. The exertion of this power calls for the exercise of a sound discretion. Where it is proposed that a pending proceeding be stayed, the competing interests which will be affected by the granting or refusal to grant a stay must be weighed. Among these competing interests are the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.

Id. at 254-55. If there is a "fair possibility" that the stay will "work damage" to one of the parties, the stay is inappropriate absent a showing of hardship or inequity by the party required to go forward. Id. at 255.

"Only 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. That is exactly what the Court has done in this case. The Court has issued a stay which requires a litigant in one action, the Log Cabin Republicans, to stand aside while a litigant in another action, Major Witt, settles the rule of law that affects both actions. While well-intentioned, the Court's order staying the action exceeds the limits of sound discretion and must be vacated. Neither the balance of hardships, nor the prospect of settling the law or simplifying the issues, justifies a stay. Rather, the stay will cause further hardship and damage to the members of Log Cabin Republicans who, nearly four years after the filing of this case, are still waiting for their day in court. Further, the stay will not settle or simplify the legal issues to be decided in this case. The time for delay is over. The time for the Court to act is now.

A. The Indefinite Duration Of The Stay Will Cause Undue Delay And Further Hardship To Gay And Lesbian Service Members

In Landis, the District Court for the District of Columbia stayed a lawsuit until a related lawsuit in the District Court for the Southern District of New York was decided on appeal by the Supreme Court or otherwise finally resolved. The Supreme Court in Landis reversed the lower court's decision, holding that a stay lasting until the New York district court suit was finally resolved exceeded "the limits of fair discretion." Id. at 256. The Supreme Court remanded to the District of Columbia district court to consider whether to grant a stay of what was likely to be fairly short duration. Id. at 259.

The Ninth Circuit has held 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). In other words, "stays should not be indefinite in nature." Dependable Highway Express, Inc. v. Navigators Ins. Co., 498 F.3d 1059, 1066 (9th Cir. 2007). In Dependable Highway Express, the Ninth

Circuit held that the district court abused its discretion by issuing a stay that provides no specific deadline for the stay's termination and no indication that the stay would last only for a reasonable time. Id. at 1066-67.

Here the Court's order runs afoul of Landis, Levya, and Dependable Highway Express because it provides no specific deadline for the stay's termination and no indication that the stay will last only for a fairly short time. Rather, the Court's order provides that "proceedings in this action are STAYED pending the final disposition in *Witt*." While it is not clear what the Court means by "final disposition" of *Witt*, at a minimum, the Court contemplates the government's *potentially* seeking *en banc* relief. However, the government has not decided what course of action, if any, it will seek with respect to the Witt decision. Hunnius Decl., ¶ 3. The Court's order is, therefore, based on a contingency (the rehearing of the Witt decision or seeking *certiorari*) which may or may not even occur.

Moreover, a stay pending *en banc* review could extend for *twelve to eighteen months*. See, e.g., U.S. v. W.R. Grace, -- F.3d --, No. 06-30192, 2008 WL 2052204 (9th Cir. May 15, 2008) (*en banc* decision filed May 15, 2008; initial three-judge panel decision filed on July 12, 2007); Odom v. Microsoft, 486 F.3d 541(9th Cir. 2007) (*en banc* opinion filed on May 4, 2007; initial argument before three-judge panel occurred in November 2005).

Furthermore, this Court's stay will simply prolong and exacerbate the hardships suffered by the members of the Log Cabin Republicans and other gay and lesbian soldiers who are bravely serving in our nation's armed forces. It has been almost four years since the filing of this lawsuit, and the Court has yet to rule on the government's motion to dismiss this case, which has prevented this case from moving forward. In the meantime, gay and lesbian soldiers continue to serve their nation with honor and sacrifice their lives without the benefit of the full protection of our Constitution. Issuing a stay of indefinite duration will cause further undue delay, deprive the members of Log Cabin Republicans of their day in court, and permit the

continued violation of constitutional rights of gay and lesbian soldiers who are fighting to protect those very same constitutional rights.

B. The Ninth Circuit's Decision In Witt Is Good Law And Should Be Applied

Aside from the prejudice to Log Cabin Republicans arising from the indefinite delay that would result from deferring to lengthy, potential further proceedings in Witt, the Court's hesitancy to apply the rule enunciated in Witt is unwarranted; Witt is currently good law, binding on this Court, and ready to be applied. See, e.g., United States v. Mitlo, 714 F.2d 294, 298 (3d Cir. 1983) (emphasizing that "precedents set by higher courts are conclusive on courts lower in the judicial hierarchy and leave to the latter no scope for independent judgment or discretion" (internal quotations and citations omitted)); Mendenhall v. Cedarapids, Inc., 5 F.3d 1557, 1570 (Fed. Cir. 1993) ("Stare decisis in essence makes each judgment a statement of law, or precedent, binding in future cases before the same court or another court owing obedience to its decision").

The Ninth Circuit's ruling in Witt has given this Court the framework to rule on the government's motion to dismiss in this case. Considering competing briefs that, like the briefs before this Court, parsed the Supreme Court's decision in Lawrence v. Texas, 539 U.S. 558 (2003), the Ninth Circuit rejected the government's argument that rational basis review was appropriate. Witt, supra, slip op. at 5853 ("Having carefully considered *Lawrence* and the arguments of the parties, we hold that *Lawrence* requires something more than traditional rational basis review"). The Ninth Circuit held that, in light of Lawrence, the proper level of scrutiny to apply to Major Witt's substantive due process challenge to the "Don't Ask, Don't Tell" policy is that of heightened scrutiny, not the rational basis review applied in the past. Witt, supra, slip op. at 5863. The Ninth Circuit also affirmed the dismissal of Major Witt's equal protection claim under rational basis review. Id. at 5867-68. It would not be difficult for this Court to apply Witt to this case and make similar rulings with respect to the substantive due process and equal protection claims.

The Ninth Circuit could have readily stayed or postponed the effectiveness of its ruling in Witt, as it has done in other cases concerning controversial legal issues. E.g., Newdow v. United States Congress, No. 00-16423, 2002 U.S.App. LEXIS 12826, at *1 (9th Cir. June 27, 2002) (Ninth Circuit stayed its own judgment in Newdow v. United States Congress, 292 F.3d 597 (9th Cir. 2002) (overruled by Elk Grove Unified School District v. Newdow, 542 U.S. 1, 17-18 (2004)), that the words "under God" in pledge of allegiance violate Establishment Clause of Constitution, pending resolution of any petitions for rehearing or *en banc* consideration).

However, the Ninth Circuit did not stay its ruling in Witt. Rather, the Ninth Circuit allowed its ruling in Witt to have immediate effect. By postponing the application of Witt to this case, this Court has elected to do what the Ninth Circuit did not do. By staying this action, the Court has denied the application of Witt to only one litigant in the Ninth Circuit, the Log Cabin Republicans, and has rendered Witt good law everywhere except in this action. This is improper.

C. A Stay Of This Action Pending Final Resolution Of Witt Would Not Simplify The Legal Issues To Be Decided In This Case

One factor to consider in issuing a stay is whether the stay will allow for issues of law to be simplified as a result of the stay. Landis, supra, 299 U.S. at 254-255. Although Witt gives this Court significant guidance by setting forth the heightened scrutiny test which the government must satisfy in order to justify its intrusion on the substantive due process rights of homosexual service members, Witt does not address certain key legal issues presented in this case.

First, the Ninth Circuit's opinion in Witt does not address whether the "Don't Ask, Don't Tell" policy violates the First Amendment rights of gay and lesbian servicemembers, and, therefore, staying this action pending the "resolution" of Witt will not contribute to the resolution of, or otherwise simplify, this pressing constitutional issue raised by the complaint in this case. The first amended complaint alleges that the "Don't Ask, Don't Tell" policy violates the First Amendment by

impermissibly restricting, punishing and chilling all public and private speech that would tend to identify military members of Log Cabin Republicans as gays or lesbians. First Amended Complaint, ¶ 47. This restriction on speech and expression is vast and over-inclusive, because it applies to not only public but also private speech and applies "at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty." 10 U.S.C. § 654(a)(10). Witt does not address this important constitutional issue.

Second, Witt involves an "as-applied" constitutional challenge to the "Don't Ask, Don't Tell" policy, and, therefore, the Ninth Circuit also held that its heightened scrutiny analysis is as-applied rather than facial. Witt, supra, slip op. at 5864. This case, on the other hand, involves a facial constitutional challenge to the "Don't Ask, Don't Tell" policy.

In support of its facial challenge to the constitutionality of "Don't Ask, Don't Tell," Log Cabin Republicans alleges several facts in its complaint evidencing the animus of the policy towards gay and lesbian members of the nation's armed forces. First Amended Complaint, ¶ 36. Such facts include: service members in non-combat positions have been discharged under "Don't Ask, Don't Tell," including medical personnel and translators; the policy is applied more frequently in peace time than in war time; the policy disproportionately impacts women; and members of the U.S. military fight side by side with coalition forces from other nations which allow gay and lesbian service members to serve openly. Id. The facial challenge to "Don't Ask, Don't Tell" based on these and other facts is not addressed in Witt.

Because Witt addresses neither the First Amendment claim nor the facial constitutional challenge at issue here, these issues will not be addressed during any potential *en banc* review of Witt. As such, staying this action pending final resolution of Witt will not help to resolve these significant constitutional issues that must be decided by this Court. Accordingly, the stay is unnecessary and will serve only to further delay the adjudication of this case.

IV.

OPPOSING COUNSEL

Pursuant to Local Rule 7-19, the names, address and telephone number of counsel for opposing parties, the United States of America and Secretary of Defense Robert Gates, are as follows:

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Counsel for Log Cabin Republicans has provided notice of this *ex parte* application to opposing counsel, as explained in paragraph 4 of the accompanying Declaration of Patrick Hunnius.

V.

CONCLUSION

Justice delayed is justice denied. Log Cabin Republicans, and its members who are bravely serving in our nation's armed forces and protecting our constitutional rights, are entitled to their day in court, which is long overdue. The time for the Court to act is now. For all the reasons discussed above, the Court should vacate its Order Staying Action in Light of Ninth Circuit's May 21, 2008 Decision in *Witt v. Department of Air Force, et al*. and allow the case to move forward, so that it can continue its journey through the appellate courts.

Respectfully submitted,

DATED: May 30, 2008

WHITE & CASE LLP

By: /S/
Patrick Hunnius
Attorneys for Plaintiff Log Cabin Republicans

DECLARATION OF PATRICK HUNNIUS

I, Patrick Hunnius, say that:

1. I am an attorney licensed to practice law before this Court. I am a partner in the law firm of White & Case LLP, counsel for plaintiff Log Cabin Republicans ("Plaintiff") in this action. I have personal knowledge of the following facts, and if called as a witness I could and would competently testify thereto.

2. A true and correct copy of the March 30, 2008 Washington Post article, "Public Death, Private Life," by Deborah Howell, p. B06, regarding Army Maj. Alan G. Rogers, a decorated war hero killed in an explosion in Baghdad, who was also gay, is attached hereto as Exhibit A.

3. On May 28, 2008, I spoke telephonically with Paul G. Freeborne, counsel for the U.S. government in Witt v. Department of Air Force, et al. During the telephone call, Mr. Freeborne stated that the government has not yet decided whether it will seek further proceedings in Witt before the Ninth Circuit. Mr. Freeborne agreed to advise me when the government determines its course of action, if any, with respect to Witt.

4. On May 29, 2008, I sent a letter to Mr. Freeborne via facsimile at approximately 12:59 p.m. on May 29, 2008, providing notice of the date and substance of this *ex parte* application in accordance with Local Rule 7-19.1(a). My letter also advised that, if Defendants choose to file an opposition, the opposition must be filed within 24 hours of service of this application, with a courtesy copy to chambers, per this Court's rules. A true and correct copy of my letter is attached hereto as Exhibit B.

I declare under penalty of perjury under the laws of the United States of America that foregoing is true and correct.

Executed on May 30, 2008 at Los Angeles, CA

/S/
Patrick Hunnius

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EXHIBIT A

washingtonpost.com

Public Death, Private Life

By Deborah Howell
Sunday, March 30, 2008; B06

What should a newspaper print about a person's most private life in a story after his death?

The Post ran a story March 22 about the burial at Arlington National Cemetery of Army Maj. Alan G. Rogers, a decorated war hero killed in an explosion in Baghdad. The subject of much journalistic soul-searching, the story did not mention that Rogers's friends said that he was gay and was well known in local gay veterans' circles. The Washington Blade, a gay-oriented newspaper, identified him as gay in a story Friday that was critical of The Post.

For The Post, Rogers's death raised an unanswerable question: Would he have wanted to be identified as gay? Friends also struggled with that question but decided to tell The Post that he was because, they said, he wanted the military's "don't ask, don't tell" rule repealed. Yet a cousin and a close friend felt that his sexual orientation was not important; his immediate family members are deceased.

The Post story would have made any soldier proud. It quoted his commanding officer: "As God would have it . . . he shielded two men who probably would have been killed if Alan had not been there." Rogers was "an exceptional, brilliant person -- just well-spoken and instantly could relate to anyone."

A gay group tipped The Post that there should be a story saying Rogers was the first openly gay soldier to die in Iraq. Reporter Donna St. George was assigned to the story and interviewed friends who said that he was gay but couldn't share that in the military under the "don't ask, don't tell" rule.

St. George first wrote a story that included his friends talking about his orientation; some at the paper felt that was the right thing to do. But the material was omitted when the story was published. Many editors discussed the issue, and it was "an agonizing decision," one said. The decision ultimately was made by Executive Editor Len Downie, who said that there was no proof that Rogers was gay and no clear indication that, if he was, he wanted the information made public.

Downie said that what Rogers's friends said and the fact that Rogers was a former treasurer of American Veterans for Equal Rights (AVER) were not enough. Downie pointed out that many straight journalists belong to the National Lesbian and Gay Journalists Association.

Downie's ruling was in line with The Post's stylebook policy. "A person's sexual orientation should not be mentioned unless relevant to the story . . . . Not everyone espousing gay rights causes is homosexual. When identifying an individual as gay or homosexual, be cautious about invading the privacy of someone who may not wish his or her sexual orientation known."

Rogers's cousin, Cathy Long of Ocala, Fla., said that she was the closest in the family to him. To her, "The Post did a wonderful job. Personally, as far as the family is concerned, we really didn't know about this until after his death. It was in the back of our minds, but we didn't discuss it." She is glad The Post story did not say that he was gay. "I really feel Alan was a lot more than that." She thought the Blade story was "self-serving whatever their cause is and that they're trying to use Alan to do that."

Shay Hill, his beneficiary and University of Florida roommate, said that he and Rogers were "like

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EXHIBIT A

brothers" and that he knew Rogers was gay. "He worked to change the system from within. You don't out yourself to make a point. Just because he's gay should have no more relevance than I'm straight. It's not fair to make a bigger deal out of this than it needs to be."

Other friends felt differently. James A. "Tony" Smith of Alexandria, an Air Force veteran, knew Rogers through AVER. He said that Rogers "was very open about being gay. It was a major part of his life. It does a disservice to his memory" not to mention it.

Rogers abided by "don't ask, don't tell" only because "he wanted to stay a soldier," Smith said. "He was first and foremost a soldier, and he loved serving his country." Rogers's ties to the veterans group were "widely and publicly known." Austin Rooke, Rogers's friend and a former Army captain, said, "He was among the most open active-duty military people I've ever met. I can't imagine him not wanting people to know."

Tami Sadowski said that she was one of Rogers's closest friends. She and her husband traveled and socialized with him regularly. "Being gay was a huge and very defining part of his life."

Sharon Alexander, director of legislative affairs for the Servicemembers Legal Defense Network, was a friend of Rogers and lobbies for the repeal of "don't ask, don't tell." She ultimately concluded that he would have wanted "that part of his story to be told to help move the issue of repeal forward."

Kevin Naff, editor of the Blade, said in an e-mail, "It's a double standard to report basic facts about straight subjects like marital status, while actively suppressing similar information about gay subjects. It was clear that Maj. Rogers led as openly gay a life as was possible, given his military service. He worked for a gay rights organization, had gay friends and patronized D.C.-area gay clubs. It's unfortunate The Post . . . chose not to present a full picture of this brave man's life."

The Post was right to be cautious, but there was enough evidence -- particularly of Rogers's feelings about "don't ask, don't tell" -- to warrant quoting his friends and adding that dimension to the story of his life. The story would have been richer for it.

Deborah Howell can be reached at 202-334-7582 or atombudsman@washpost.com.

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EXHIBIT B

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May 29, 2008

VIA FACSIMILE

Paul G. Freeborne
U.S. Department of Justice
Civil Division, P.O. Box 883
Washington, D.C. 20044

Re: Log Cabin Republicans v. United States et al. (Case No. CV 04-8425 GPS (Ex))

Dear Mr. Freeborne:

On Friday, May 30, 2008, Plaintiff Log Cabin Republicans will file and serve an *ex parte* application to lift the stay ordered by the Court on May 23, 2008. The application will argue that the stay should be lifted for the following reasons, *inter alia*: (1) the indefinite duration of the stay will cause undue delay and further hardship to gay and lesbian service members; (2) the stay does not simplify or settle the legal issues to be applied in this case (e.g., the Ninth Circuit's opinion in *Witt v. Department of Air Force, et al.*, No. 06-35644, slip op. (9th Cir. May 21, 2008), did not address whether the "Don't Ask Don't Tell" policy violates First Amendment rights of gay and lesbian service members); and (3) the Ninth Circuit itself did not say the effectiveness of its rulings in *Witt*, thus the effect of the Court's stay is to deny the application of *Witt* to only one litigant in the Ninth Circuit, namely the Log Cabin Republicans. *Ex parte* relief is necessary because the constitutional rights of gay and lesbian service members continue to be violated as long as this stay of indefinite duration remains in place.

Pursuant to Local Rule 7-19.1, Plaintiff must inform the Court in writing whether Defendants oppose the application or request to be present when the application is presented to the Court. Please advise your response to the application. If Defendants wish to file an opposition, please do so within 24 hours of service with a courtesy copy to chambers, Room 218-P, pursuant to Judge Schiavelli's rules.

Please do not hesitate to contact me should you have any questions regarding this matter.

Sincerely,

-Patrick Hunnius sc

Patrick Hunnius

FACSIMILE

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Date: May 29, 2008

No. of Pages (including cover): 2

To: Paul G. Freeborne
U.S. Department of Justice
Civil Division

Fax Number: (202) 616-8202
Contact Number: (202) 353-0543

From: Patrick O. Hunnius

Reference No.: 1490091-0050

Re: LCR v. United States of America, et al.

********** -COMM. JOURNAL- ********** DATE MAY-29-2008 ***** TIME 12:59 ********

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 633 W. Fifth Street, Suite 1900, Los Angeles, CA 90071-2007. I am employed by a member of the Bar of this Court at whose direction the service was made.

On May 30, 2008, I served the foregoing document(s) described as

1. LOG CABIN REPUBLICANS' (1) EX PARTE APPLICATION FOR ORDER VACATING STAY; (2) MEMORANDUM OF POINTS AND AUTHORITIES; AND (3) DECLARATION OF PATRICK HUNNIUS

2. [PROPOSED] ORDER GRANTING LOG CABIN REPUBLICANS' *EX PARTE* APPLICATION TO VACATE STAY

on the person(s) below, as follows:

Jeffrey Bucholtz
Assistant Attorney General
U.S. Department of Justice, Civil Division
Federal Programs Branch
P.O. Box 883
Washington, DC 20044

Telephone: (202) 353-0543
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☒ **(BY MAIL)** I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed above and placed the envelope for collection and mailing at White & Case, LLP, Los Angeles, California, following our ordinary business practices. I am readily familiar White & Case's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the correspondence would be deposited in the United States Postal Service on that same day in the ordinary course of business.

☒ **(BY FACSIMILE)** I also caused such document to be served via facsimile to the above addressees at the facsimile numbers above.

Executed on May 30, 2008, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Diane M. Petrek