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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

LOG CABIN REPUBLICANS,

Plaintiff,

v.

UNITED STATES OF AMERICA AND ROBERT M. GATES, Secretary of Defense,

Defendants.

Case No. CV04-8425 (GPS)

OPPOSITION TO PLAINTIFF'S *EX PARTE* APPLICATION FOR ORDER VACATING STAY

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1 On May 23, 2008, this Court exercised its discretion to stay this action
2 pending the final disposition of the court of appeals decision in Witt v.
3 Department of Air Force, No. 06-35644, slip op. (9th Cir. May 21, 2008).
4 May 23, 2008 Order [Dkt. 52], at 2. "[A]nticipating that *en banc* relief will be
5 requested and certiorari possibly sought [of the panel's decision]," the Court opted
6 to stay further proceedings until the impact of that decision is settled. The
7 government is currently considering whether to seek *en banc* review of the panel
8 decision in Witt. A rehearing *en banc* petition must be authorized by the Solicitor
9 General, 28 C.F.R. § 0.20(b), but his office has not yet had the opportunity to
10 review that decision.
11 Contrary to plaintiff's assertion, the Court has not "exceed[ed] the limits" of
12 its discretion in staying this matter. Pl's *Ex Parte* Application, at 6. "[T]he power
13 to stay proceedings is incidental to the power inherent in every court to control the
14 disposition of the causes on its docket with economy of time and effort for itself,
15 for counsel, and for litigants." Landis v. North American Co., 299 U.S. 248, 254,
16 57 S.Ct. 163, 81 L.Ed. 153(1936). "A trial court may, with propriety, find it is
17 efficient for its own docket and the fairest course for the parties to enter a stay of
18 an action before it, pending resolution of independent proceedings which bear on
19 the case." Levya v. Certified Grocers of Calif., 593 F.2d 857, 863 (1979). While
20 plaintiff is correct in recognizing that such a stay may not be "indefinite in
21 nature[,]" Pl's *Ex Parte* Application, at 6 (citing Dependable Highway Express,
22 Inc. v, Navigators Ins. Co., 498 F.3d 1059, 1066 (9th Cir. 2007)), the stay put in
23 place here is clearly limited in duration and specifically defined to end when the
24 courts resolve the binding nature of the panel decision in Witt.
25 Moreover, the Ninth Circuit's mandate in Witt will not issue "until 7
26 calendar days after the time to file a petition for rehearing expires [*i.e.*., on July
27 14, 2008,] or 7 calendar days after entry of an order denying a timely petition for
28 panel rehearing, petition for rehearing en banc, or motion for stay of mandate,

1 whichever is later." Fed. R. App. P. 41(b). Because the district court in Witt itself
2 cannot now proceed with remand proceedings, it would make no sense for this
3 Court to proceed before the Witt mandate issues.
4 While plaintiff asserts that it is somehow the Court's fault that the issues
5 presented have not yet been decided, omitted from that discussion is any
6 acknowledgment by plaintiff that this case was delayed at the outset by its
7 persistent refusal to identify a single member among its membership who suffered
8 any harm as a result of the "Don't Ask, Don't Tell" statute. And while plaintiff
9 now claims that the "Court's stay will simply prolong and exacerbate the
10 hardships suffered by the members of the Log Cabin Republicans and other gay
11 and lesbian soldiers who are bravely serving in the nation's armed forces[,]" Pl's
12 *Ex Parte* Application, at 7, no such harm has been presented in this case. The
13 Court has previously recognized that "[i]t is well settled . . . that a plaintiff
14 invoking associational standing must allege facts sufficient to show that "'its
15 members would otherwise have standing to sue in their own right[.]'" Order, dated
16 March 21, 2006 [Dkt. # 24], at 9 (quoting Hunt v. Washington State Apple
17 Advertizing Comm'n, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383
18 (1977)). Associational standing thus requires a showing that a plaintiff's members
19 have suffered a "concrete and particularized injury sufficient to give [them] a
20 personal stake in the outcome of the case." Id. Despite that ruling, plaintiff has
21 refused to identify a single current member of the Armed Forces who has suffered
22 the harm that it continues to allege. Plaintiff's purported attempt to thus assert a
23 "facial" challenge to the statute on behalf of all current service members (Pl's *Ex*
24 *Parte* Application, at 10) is a claim that plaintiff has failed to properly present and
25 is one that the Court could not consider even if the stayed were lifted.
26 Lastly, the fact that plaintiff's case presents a First Amendment claim is not
27 grounds to vacate the stay. Pl's *Ex Parte* Application, at 9-10. The claims
28 presented here and in Witt need not be identical for the Court to enter a stay based

upon principles of judicial economy; in Landis, the Supreme Court specifically rejected any "suggestion that before proceedings in one suit may be stayed to abide the proceedings in another, the parties to the two causes must be shown to be the same and the issues identical." Landis, 299 U.S. at 166.

The Court's May 23, 2008 Order should thus remain in force, and plainitff's *ex parte* application to vacate that order should be denied.

Respectfully submitted,

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/s/ Paul G. Freeborne

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