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 13 United States of America and Robert M. Gates

14 UNITED STATES DISTRICT COURT
 15 CENTRAL DISTRICT OF CALIFORNIA

17 LOG CABIN REPUBLICANS, a non-
 18 profit corporation,

19
 20 Plaintiff,

21 vs.

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

26
 27 Defendants.
 28

Case No. CV04-8425 VAP (Ex)

JOINT STATUS REPORT

Status Conference:
 Date: January 28, 2009
 Time: 9:00 a.m.

Complaint Filed: October 12, 2004
 Trial Date: None scheduled

1 Plaintiff Log Cabin Republicans (“Plaintiff”), on the one hand, and
2 Defendants United States of America and Robert M. Gates (substituted for Donald
3 H. Rumsfeld pursuant to FRCP 25(d)), Secretary of Defense, in his official capacity
4 (“Defendants”), on the other hand, submit the following Joint Status Report in
5 anticipation of the January 28, 2009 status conference in this action.

6 7 **Procedural History**

8 Plaintiff filed its complaint in the above-captioned action on October 12,
9 2004. The action presents a constitutional challenge to the United States Military’s
10 “Don’t Ask, Don’t Tell, Don’t Pursue” statute. The case was initially assigned to
11 Judge Schiavelli. On December 14, 2004, Defendants moved to dismiss Plaintiff’s
12 complaint. On March, 12, 2006, the Court granted the motion to dismiss with leave
13 to amend, on standing grounds.

14 Plaintiff filed its first amended complaint on April 28, 2006. Defendants
15 again moved to dismiss on June 12, 2006. A hearing on the motion to dismiss was
16 held on June 18, 2007 before Judge Schiavelli, at the conclusion of which the Court
17 stated that the matter was submitted for decision.

18 In May 2008, while the motion remained under submission, the Ninth Circuit
19 issued its decision in *Witt v. Air Force*, 527 F.3d 806 (9th Cir. 2008). As a result of
20 that decision, on May 23, 2008, Judge Schiavelli stayed all further proceedings in
21 this action and vacated the submission of the motion to dismiss. The stay was to
22 remain in effect until the final disposition in *Witt*.

23 On July 24, 2008, Plaintiff filed a Petition for Writ of Mandamus before the
24 Ninth Circuit challenging the stay order as improperly indefinite. On October 16,
25 2008, the Ninth Circuit ordered the Government to respond to Plaintiff’s Petition.
26 On October 30, 2008, the Government responded to the Petition. The Petition is
27 currently pending.

28 While the stay was in effect, Judge Schiavelli retired from the bench and the

1 case was reassigned to this Court.

2 On December 4, 2008, the Ninth Circuit denied rehearing and denied
3 rehearing *en banc* in *Witt*. 548 F.3d 1264 (9th Cir. 2008).

4
5 **Plaintiff's Position**

6 In light of the Ninth Circuit's denial of rehearing and of rehearing *en banc* in
7 *Witt*, Plaintiff submits that the stay order should be lifted and this case should
8 resume. The *Witt* holding is now authoritative and provides added guidance to this
9 Court in adjudicating the currently pending motion to dismiss. As a result, Plaintiff
10 requests that this Court set a schedule for the parties to submit additional briefing
11 and argument addressing the effect of the *Witt* holding upon the pending motion to
12 dismiss. Plaintiff further requests that, at the conclusion of this briefing, the motion
13 to dismiss again be argued and then decided.

14 Defendants' discussion, below, provides the Court a preview of their
15 arguments regarding the effect of the *Witt* decision. Plaintiff will not burden this
16 Court with substantive argument at this time. Plaintiff notes, however, that while
17 defendants initially advocate for the maintenance of stay, the balance of their
18 submission augurs in favor of lifting of the stay. For example, defendants
19 recognize that *Witt* does not impact Plaintiff's First Amendment and equal
20 protection challenges to the "Don't Ask, Don't Tell, Don't Pursue" statute. Those
21 challenges remain ripe for this Court to decide without further briefing or argument.

22 Defendants also correctly note that the panel in *Witt* adjudicated an "as-
23 applied" challenge to the statute. The impact of *Witt* upon facial challenges to the
24 statute is thus similarly an issue ripe for determination by this Court. It calls for
25 added argument by the parties. However, the additional briefing plaintiff requests
26 should not be limited to this narrow issue. Plaintiff requests the opportunity to
27 address the entirety of the *Witt* holding and its effect upon any and all aspects of the
28 pending due process claim.

1 This Court should also vacate the stay in the interests of judicial efficiency as
2 it would moot Plaintiff's pending Petition for Writ of Mandamus.

3 4 **Defendants' Position**

5 Defendants believe that the Court's Order staying this matter should remain
6 in effect until the Government has a full and adequate opportunity to decide
7 whether to seek a writ of *certiorari* of the Ninth Circuit's decision in *Witt* and, if
8 such a writ is sought, for the Supreme Court to review that request and render a
9 decision. The Ninth Circuit's substantive due process analysis in *Witt*, requiring
10 heightened scrutiny of the policy, reflects a shift in Ninth Circuit precedent. The
11 Court properly recognized that the analysis adopted by the panel in *Witt* should not
12 be applied to allegations presented in the complaint in this case until the impact of
13 *Witt* is finally settled. Defendants also note that the issue between the parties is the
14 same issue that is now before the Ninth Circuit on Plaintiff's Mandamus Petition in
15 which it asks the Ninth Circuit to vacate the existing stay order. This Court may
16 wish to await the Ninth Circuit's decision before acting upon Plaintiff's scheduling
17 request.

18 To the extent the Court believes that the effect of *Witt* should be briefed now,
19 Defendants propose that such briefing be focused upon having Plaintiff explain
20 how it can pursue a "facial" challenge to the Don't Ask, Don't Tell statute,
21 10 U.S.C. § 654, rather than an "as-applied" challenge in light of *Witt*. The panel in
22 *Witt* held that its analysis "is as-applied rather than facial." *Witt*, 527 F.3d at 819.
23 In so holding, the panel noted that "[t]his is the preferred course of adjudication
24 since it enables courts to avoid making unnecessarily broad constitutional
25 judgments.'" *Id.* (quoting *Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432 447,
26 105 S. Ct. 3249, 87 L.Ed.2d 313 (1985)). This distinction is of great significance in
27 constitutional jurisprudence. In fact, it is the only basis that the panel had for
28 distinguishing the Ninth Circuit's precedent in *Beller v. Middendorf*, 632 F.2d 788,

1 (9th Cir. 1980), which ruled that a predecessor policy to the Don't Ask, Don't Tell
2 statute survived heightened scrutiny. *See Witt*, 527 F.2d at 820-21.

3 Yet, Plaintiff has represented that its challenge is a facial challenge. *See e.g.*,
4 Writ of Mandamus filed by Log Cabin Republicans, dated July 21, 2008, at 4 (“*Witt*
5 involves an “as-applied” challenge to the policy while the Log Cabin Republicans’
6 complaint involves a facial challenge to the policy”). In light of that position,
7 Plaintiff should first explain how its facial substantive due process challenge can
8 proceed under the threshold, as-applied analysis in *Witt* before the Court wades into
9 the other aspects of the *Witt* panel’s decision. If Plaintiff cannot make this
10 showing, the case can come to a conclusion and no further briefing is necessary.
11 *Witt* does not impact the First Amendment and equal protection claims already
12 briefed, and argued, by the parties under the Defendants’ already submitted motion
13 to dismiss.

14
15
16 Dated: January 21, 2009

WHITE & CASE LLP

17
18 By: /s/
19 Patrick Hunnius
20 Attorneys for Plaintiff Log Cabin
Republicans

21 Dated: January 21, 2009

U.S. DEPARTMENT OF JUSTICE

22
23 By: _____
24 Paul G. Freeborne
25 Attorneys for Defendants United States of
26 America and Robert M. Gates
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17
18 By: /s/
19 Patrick Hunnius
20 Attorneys for Plaintiff Log Cabin
Republicans

21 Dated: January 21, 2009

U.S. DEPARTMENT OF JUSTICE

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23 By: Paul G. Freeborne
24 Paul G. Freeborne
25 Attorneys for Defendants United States of
26 America and Robert M. Gates
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1 PROOF OF SERVICE

2 I am employed in the County of Los Angeles, State of California. I am over
3 the age of 18 and not a party to the within action. My business address is 633 W.
4 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.

5 On January 21, 2009, I served the foregoing document(s) described as JOINT
6 STATUS REPORT on the person(s) below, as follows:

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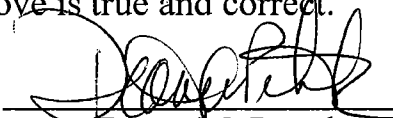
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18 (BY MAIL) I enclosed the document(s) in a sealed envelope or
19 package addressed to the person(s) at the address(es) listed above and
20 placed the envelope for collection and mailing at White & Case, LLP,
21 Los Angeles, California, following our ordinary business practices. I
22 am readily familiar White & Case's practice for collection and
23 processing of correspondence for mailing with the United States Postal
24 Service. Under that practice, the correspondence would be deposited
25 in the United States Postal Service on that same day in the ordinary
26 course of business.

24 Executed on January 21, 2009, at Los Angeles, California.

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

27 
28 Diane M. Petrek