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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL D. ALMY, ANTHONY J. LOVERDE, and JASON D. KNIGHT, Plaintiffs, v. UNITED STATES DEPARTMENT OF DEFENSE, ROBERT M. GATES, Secretary of Defense; DEPARTMENT OF THE AIR FORCE; MICHAEL B. DONLEY, Secretary, Department of the Air Force; DEPARTMENT OF THE NAVY; and RAY MABUS, Secretary, Department of the Navy, Defendants.	Case No. 3:10-cv-5627 (RS) FEDERAL DEFENDANTS' NOTICE OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, CROSS-MOTION FOR SUMMARY JUDGMENT, OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, AND MEMORANDUM IN SUPPORT Hearing Date: Thursday, October 13, 2011 Time: 1:30 P.M. Courtroom: San Francisco Courthouse, Courtroom 3 - 17th Floor 450 Golden Gate Avenue, San Francisco, CA 94102

NOTICE OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on October 13, 2011 at 1:30 p.m. or as soon thereafter as the matter may be heard before the Honorable Richard Seeborg, in the District Court for the Northern District of California, in Courtroom 3 – 17th Floor, Defendants United States, Secretary of Defense, Department of the Air Force, Secretary of the Air Force, Department of the Navy, and Secretary of the Navy, will and hereby do move to dismiss this action or, in the alternative, for summary judgment as to the claims set forth in Plaintiffs' First Amended Complaint, pursuant to Fed. R. Civ. P. 12 and 56(a).

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

The effective date of the repeal of 10 U.S.C. § 654 pursuant to the Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010), is nearly here. The Department of Defense has worked steadfastly to prepare the necessary policies and regulations to effectuate repeal, and to train 2.2 million Service members, including senior leadership, the Chaplain Corps, and the judge advocate community on the implications of repeal. The President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff have certified that the congressionally mandated prerequisites to repeal have been satisfied. Repeal of Section 654 will become effective on September 20, 2011. Through the work of the political Branches and the efforts of the military, open service by gay and lesbian Service members will be permitted, and Service members who have been previously discharged under Section 654 will be permitted to reapply. Indeed, plaintiffs may submit applications for re-accession now, and the Services will begin processing those applications once they are received. The Services will (among other things) review the individual applications, conduct ordinary records and background checks, and consider service needs, including any limitations on service end strength and skill requirements. Although no readmission will occur prior to September 20, the Services expect to be able to decide plaintiffs' request for readmission promptly after September 20, provided that plaintiffs submit applications for re-accession within the next week, provide necessary information, and no presently unforeseeable issues arise. And, although the Services have not undertaken a formal review of plaintiffs' records, an informal review of those records, including a preliminary examination of plaintiffs' fields of expertise and the current needs of the military, suggests that one or more plaintiffs will be a strong candidate for re-accession to the Service.

The claims that plaintiffs present here thus arise at a critical juncture in the repeal process. All three plaintiffs are former service members discharged pursuant to Section 654 and its

implementing regulations. All waited years before filing suit, and then did so just weeks before the passage of the Repeal Act. And all seek from this Court an order of immediate reinstatement to military service.

The court-ordered reinstatement that plaintiffs seek would undermine the repeal process that the political Branches have worked hard to effectuate. An animating principle of the Repeal Act is that a smooth and effective transition is most likely to result when decisions are made by civilian and military leadership of the Department of Defense, implemented in the manner those leaders think most appropriate. And while the judgments of civilian and military leaders have been important at every stage, those judgments are especially important with respect to decisions regarding re-accession, where leaders must assess and address the needs of a military that is engaged in multiple conflicts, while at the same time making the difficult personnel decisions required by increasingly limited military resources.

Plaintiffs, in short, are asking this Court to adjudicate their claims in a very different world from that in which their initial discharges occurred. Particularly in light of those changed circumstances, settled principles of equitable restraint, as well as restrictions on court-ordered equitable relief, preclude plaintiffs from successfully pursuing their claims for reinstatement. In keeping with long-standing traditions of deference to the judgments of military leaders concerning military matters, specific re-accession decisions – which individuals should be selected to serve in what capacities in our Nation's military – should be made by military leaders, rather than this Court.

BACKGROUND

I. DADT Repeal Act and Implementation

In December 2010, Congress provided for repeal of 10 U.S.C. § 654 and its implementing regulations (collectively, DADT), effective 60 days after the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff certify to Congress that the military has made the preparations necessary for an orderly repeal. Don't Ask, Don't Tell Repeal Act of 2010 ("ADT Repeal Act", § 2(b), Pub. L. No. 111-321, 124 Stat. 3515, 3516 (2010). The certifications called

for in the Repeal Act were issued on July 22, 2011. *See* Certifications, *available at:* http://www.whitehouse.gov/sites/default/files/uploads/dadtcert.pdf. Section 654 will be repealed effective September 20, 2011.

The repeal of DADT caps a careful process of study, deliberation, and implementation by the political Branches. Congress enacted 10 U.S.C. § 654 in 1993. Developed as an alternative to the military's prior regulations effecting a total ban on service by gay and lesbian individuals, DOD Directive 1332.14.H.1.a, 32 C.F.R. Pt. 41, App. A (1991) (superseded), Section 654 provides for separation from the military if a member of the armed forces has (1) "engaged in, attempted to engage in, or solicited another to engage in a homosexual act"; (2) "stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding . . . that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts"; or (3) "married or attempted to marry a person known to be of the same biological sex." 10 U.S.C. § 654(b)(1)-(3).

When President Obama took office, he made clear that his administration would support repeal of § 654 through the political process. To that end, the Secretary of Defense in March 2010 established the Department of Defense Comprehensive Review Working Group, which the Secretary tasked with both assessing the impact of a repeal of § 654 and recommending policy changes that repeal would necessitate. *See* Report of the Comprehensive Review of the Issues Associated with a Repeal of Don't Ask Don't Tell, Executive Summary (dated Nov. 30, 2010) at 29, *available at:* www.defense.gov/home/features/2010/0610_dadt/DADTReport_FINAL _2010 1130(secure-hires).pdf.

The Working Group solicited the views of hundreds of thousands of members of the military on the effects associated with a repeal of § 654. It conducted a large scale, professionally developed survey of both Service members and their families that generated 115,052 responses from Service members and 44,266 responses from spouses. *Id.* at 36-39. The Working Group consulted military scholars and historians, various outside advocacy groups and military organizations, and foreign military organizations. *Id.* at 39-42. And it commissioned the RAND

Corporation to provide additional research and analysis. *Id.* at 43-44.

The Working Group issued a Report on November 30, 2010, summarizing the results of its comprehensive study and its recommended changes to military policy. It concluded that "repeal can be implemented now, provided that it is done in a manner that minimizes the burden on leaders in deployed areas." *Id.* at 127; *see also id.* at10.[1] The Working Group accompanied its report with a Support Plan for Implementation – a comprehensive framework for carrying out the necessary training and preparation associated with repeal of the statute.

In accordance with the Working Group's recommendations, Congress enacted the Repeal Act. Congress provided that repeal of § 654 would become effective 60 days after: (1) the Secretary of Defense has received the Comprehensive Working Group's report, and (2) the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff all certify that they have considered the Working Group's recommendations, and have prepared the necessary policies and regulations to implement repeal consistent with military readiness, military effectiveness, unit cohesion, and both recruiting and retention in the Armed Forces. Pub. L. No. 111-321 § 2(b), 124 Stat. 3515, 3516. Congress also provided, however, that the former statutory policy would remain in effect until repeal occurs. *Id.* § 3(c), 124 Stat. at 3516.

In the wake of the Repeal Act, the Department of Defense set about to accomplish the training of the Force and the revisions to policies and regulations needed to effectuate the orderly process laid out by Congress in the Act. The Department has trained 2.2 million Service members, both within the U.S. and deployed abroad, including senior leadership, the Chaplain Corps, and the judge advocate community on the implementation of repeal.

At the same time, the Department of Defense has reviewed nearly 90 separate regulations and policies that are to be adopted on the date of repeal. The revised regulations and policies will provide, *inter alia*, that Service members such as plaintiffs, who were discharged under DADT, will

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[1]The Working Group noted that its recommendations were "based on conditions we observe in today's U.S. military" and thus that "[n]othing in this report should be construed as doubt by us about the wisdom of enacting 10 U.S.C. § 654 in 1993, given circumstances that existed then." *Id.* at 3 n.2.

be allowed to seek re-accession into the Armed Forces. "Upon repeal, statements about sexual orientation or lawful acts of homosexual conduct will not be considered as a bar to military service or admission to Service academies, ROTC or any other accession program." *See* Memorandum for Secretaries of the Military Departments, "Repeal of Don't Ask, Don't Tell" and Future Impact on Policy, Jan. 28, 2011, at 1, attached. Indeed, the Services are already open to receiving applications for re-accession from previously discharged Service members, and will begin to process those applications prior to September 20.

II. Nature of Lawsuit

Plaintiffs are three former Service members who challenge the constitutionality of their discharge under DADT.

Plaintiff Michael Almy was a communications officer with the Air Force who attained the rank of major. Am. Compl. ¶¶ 24-25, ECF No. 38.[2] After Almy returned from a 2005 deployment in Iraq, Air Force officials allegedly searched his Air Force email account and found e-mails from Almy to another man discussing homosexual conduct. *Id.* ¶ 29. Almy subsequently stated that he was gay, and he was discharged from the military in 2006 pursuant to DADT. *Id.* ¶¶ 29, 35.

Plaintiff Anthony Loverde was an enlisted member of the Air Force who served as an aircraft equipment technician. Loverde informed his superior officers that he was gay and in 2008 was discharged from the Air Force pursuant to DADT. *Id.* ¶¶ 42, 47.

Plaintiff Jason Knight was an enlisted member of the Navy. *See* Decl. of Patrick A. Count, attached. In late February 2005, Knight told his command that he was gay. *Id.* ¶ 3. Contrary to his claim that this resulted in a discharge under DADT, the Navy decided not to initiate separation proceedings under DADT because Kight had only weeks remaining on his active duty enlistment contract. *Id.* ¶5. Instead, the Navy discharged Knight on April 3, 2005, at the end of his active duty service obligation. *Id.* Knight remained a member of the Individual Ready Reserve ("IRR") and, in the fall of 2006, was recalled to active duty and deployed to Kuwait. Decl. of Kathy Wardlaw,

[2] The allegations in plaintiffs' First Amended Complaint are accepted solely for the purpose of defendants' Motion to Dismiss.

United States Navy, ¶5, attached. During his time in Kuwait, Knight made statements that appeared in a newspaper article indicating that he was gay. Am. Compl. ¶¶ 5,6. Based on those statements, Knight was discharged from the Navy in May 2007 under the DADT policy. *Id*. at ¶¶ 5,7. Knight's eight-year enlistment contract with the Navy expired on April 3, 2009. *Id.* at ¶ 3.

III. Procedural History

Years after discharge and just weeks before passage of the Repeal Act, plaintiffs filed this lawsuit in December 2010 claiming that their discharges were unconstitutional.

All three plaintiffs initially sought reinstatement to the military and credit towards retirement for the time each would have served had they not been discharged, Compl. ¶¶ 65, 70, 75, ECF No. 1, and all sought a declaratory judgment that DADT is facially unconstitutional. *Id.* at 19 (Prayer for relief). Almy also asked the Court to promote him to Lieutenant Colonel. *Id.* at 19 (Prayer for relief). And Almy claimed that his discharge violated the Administrative Procedure Act ("APA"), alleging that the Air Force's search of his government-provided computer violated military regulations and infringed his privacy rights and that evidence from that search was improperly used as a basis for his discharge. *Id.* ¶¶ 103-107.

Defendants moved to transfer the case to the Court of Federal Claims, contending that plaintiffs' claims for back pay and other monetary remedies could be heard only in that court. Mot. To Transfer Action to Court of Federal Claims, ECF No. 19. Plaintiffs opposed transfer, and they sought leave to file a First Amended Complaint ("FAC"), which omitted any claims for monetary relief. *See* Mot. Seeking Leave to File FAC. ECF No. 30; Opp. To Mot. to Transfer Action to Court of Federal Claims, ECF Nos. 32. Claims I-III of the First Amended Complaint ("FAC") presented as-applied substantive due process challenges to DADT. Claim IV of the FAC sets forth a facial substantive due process challenge to DADT. Claims V-X of the FAC set forth facial and as-applied equal protection and First Amendment challenges to DADT. Claim VI of the FAC sets forth Almy's APA claim, discussed above. *See generally*, Am. Compl.

On May 3, 2011, the Court denied the motion to transfer and granted plaintiffs leave to file the FAC. Order Granting Mot. For Leave to File First Am. Compl., ECF No. 37. The Court ruled

that it had subject-matter jurisdiction over this action because plaintiffs had clearly and expressly disavowed any intention to recover monetary damages in this proceeding. The sole relief plaintiffs now seek in this litigation is a declaration that their discharges were unconstitutional and an order requiring their reinstatement into the military. *See* Am. Compl. (Prayer for Relief).

Prior to any chance for discovery, plaintiffs moved for partial summary judgment on the as-applied substantive due process claims presented in Counts I-III of the FAC. They ask that the Court order their reinstatement in the Armed Forces, effective 30 days after the Court's hearing, *see* Plaintiffs' Proposed Order, ECF No. 44, currently noticed for October 13, 2011.

SUMMARY OF ARGUMENT

The Court should dismiss the FAC or, in the alternative, grant defendants' motion for summary judgment and deny plaintiffs' partial motion for summary judgment on the claims presented in Counts I-III of the FAC.

In December 2010, Congress provided for repeal of DADT effective 60 days after the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff certify to Congress that the military has made the preparations necessary for an orderly repeal. The certifications called for in the law were issued on July 22, 2011, and Section 654 will be repealed effective September 20, 2011. Plaintiffs may now submit applications seeking re-accession into the Armed Forces, and, if they meet the current needs of the Services and the criteria for re-accession – which do not consider sexual orientation – they may be re-accessed. Doctrines of equitable restraint counsel the Court to refrain from adjudicating plaintiffs' claims and their request for reinstatement when plaintiffs have administrative procedures that may result in their re-accession into the Armed Forces without judicial involvement. Such doctrines have particular force where, as here, constitutional avoidance counsels against adjudicating the merits of plaintiffs' constitutional challenge to § 654 unnecessarily.

Even if this Court could exercise jurisdiction now, constraints on the Court's equitable authority would limit the availability of reinstatement here. For Knight, those limits are absolute. Knight's eight-year enlistment contract would have expired in April, 2009. Because enlistments

are subject to limited terms of service, enlisted personnel, even if improperly discharged, are not entitled to reinstatement after the expiration of their then-current terms of enlistment. Knight's claim for reinstatement thus must be dismissed.

Even as to Almy and Loverde, equitable considerations counsel restraint. Decisions about re-accession are in the circumstances here properly left to the military, which now has a process for considering applications of Service members discharged under DADT. And that is all the more so here for two reasons. First, court-ordered reinstatement outside of the re-accession process could hinder acceptance of the process of repeal and undermine the goals of the Repeal Act. Second, re-accession in the wake of repeal and against the backdrop of increasingly limited resources requires a host of difficult judgments that are properly made by military leaders responsible for the overall Force, with the expertise and perspective needed to make these critical decisions in a time of ongoing conflicts, rather than by any individual judge in the context of a particular case.

Plaintiffs' claims for injunctive relief are in any event barred by laches. In contrast to other Service members who have challenged their discharge, plaintiffs delayed for substantial periods of time – more than four years in Almy's case – before seeking reinstatement. Plaintiffs' long delay before filing suit would make this litigation more difficult to defend, as memories have faded, and key witnesses have changed units or left the military altogether. Because of plaintiffs' delay in seeking judicial review, defendants are forced to search for stale evidence to prove facts better adjudicated in the immediate aftermath of a challenged discharge.

Almy's APA claim (Am. Compl. ¶¶ 103-107 ("Claim XI")) that his discharge resulted from the improper search of his Air Force email account must also be rejected. Almy had no reasonable expectation of privacy in the contents of the government-provided and government-owned computer, particularly after the computer was returned to the government and was no longer in his possession. The Air Force's search of that computer was reasonable. His discharge, moreover, was an administrative rather than a criminal, proceeding. The function of discharge proceedings is to determine eligibility for further military service, not to punish for past wrongs. Reliance on such emails, even if the emails were obtained improperly, would thus not negate an otherwise lawful

discharge.

Even if the Court finds that any of plaintiffs' claims may proceed past dismissal under Rule 12 or summary judgment under Rule 56, moreover, this action may not proceed in its current form. Plaintiffs' cases should be severed and adjudicated individually, as none satisfies the prerequisites for joinder under the Federal Rules of Civil Procedure. And, standing alone, the claims of Almy and perhaps those of Knight should be dismissed because venue is not proper in this district under 28 U.S.C. §1391(e).

Under no circumstances should the Court grant plaintiffs summary judgment on the as-applied substantive due process claims set forth in Counts I-III of the FAC at this time. While the Government recognizes that the Court may be bound by the test set forth in *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008), regarding plaintiffs' as-applied, substantive due process challenge, there must be development of a factual record to apply this test. And such factual development is all the more important here, where it has been years since plaintiffs' discharges and discovery is needed to ensure that this Court has all relevant information before determining whether to grant the intrusive relief that plaintiffs seek. Given that plaintiffs have filed their motion before discovery has even commenced, the Court should deny plaintiffs' motion for partial summary judgment or, at a minimum, defer ruling on it until defendants are provided the opportunity to develop a fuller factual record through appropriate discovery.

ARGUMENT

I. FOR PRUDENTIAL REASONS, THIS COURT SHOULD REFRAIN FROM EXERCISING JURISDICTION OVER PLAINTIFFS' CLAIMS

The Court should refrain from exercising its jurisdiction, and thus should decline to rule upon the constitutionality of a federal statute because plaintiffs can apply for re-accession to the Armed Forces. Indeed, once plaintiffs submit applications for re-accession, the Services will begin processing those applications, reviewing the individual applications, conducting ordinary records and background checks, and considering service needs, including any limitations on service end strength and skill requirements. Although no readmission will occur prior to September 20, the

Services expect to be able to decide plaintiffs' requests for readmission promptly after September 20, provided that plaintiffs submit applications for re-accession within the next week, provide necessary information, and no presently unforeseeable issues arise. Any plaintiff that is granted re-accession will have received all of the relief that he seeks from this Court, allowing this Court to avoid intruding into military affairs and resolving difficult constitutional questions. For prudential reasons, therefore, the Court should defer to the military and require plaintiffs to avail themselves of the re-accession process.

District courts have power to stay proceedings on equitable grounds to allow other proceedings to go forward. *Leyva v. Certified Grocers of Cal. Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979) ("A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case.") (Kennedy, then-judge); *see also e.g.*, *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936). This is true "whether the separate proceedings are judicial, administrative, or arbitral in character, and does not require that the issues in such proceedings are necessarily controlling of the action before the court." *Leyva*, 593 F.2d at 863-64; *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983) (same); *see also Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183-84 (1952) (upholding stay to allow other litigation to proceed).

Courts have, for example, frequently stayed claims to allow for the resolution of issues that have been placed within the special competence of an administrative body, *see, e.g.*, *United States v. W. Pac. R. Co.*, 352 U.S. 59, 63-64 (1956) (applying doctrine of primary jurisdiction); *see also Gen. Am. Tank Car Corp. v. El Dorado T. Co.*, 308 U.S. 422, 433 (1940), giving the agency an opportunity to attempt to resolve the matter through its proceedings. And courts have likewise declined to exercise jurisdiction where doing so would serve an important counterveiling interest, such as permitting, as here, the military to address matters within their unique institutional expertise, *see e.g*, *Schlesinger v. Councilman*, 420 U.S. 738 (1975) (recognizing that civilian courts should abstain, in light of expertise of military courts, from intervening in court martial proceedings

until plaintiff has exhausted military remedies), or permitting courts to avoid adjudicating constitutional questions that may be rendered moot, *see e.g.*, *R. R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941) (holding that federal courts should ordinarily abstain from resolution of federal constitutional issues that may be rendered irrelevant by determination of predicate state law question). *See generally Landis*, 299 U.S. at 256 ("Especially in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.").

Withholding adjudication here in light of the administrative process for re-accession is appropriate. First, permitting the re-accession process to proceed is consistent with the traditional reluctance of the Judicial Branch to intervene unnecessarily in military affairs, and to defer when possible to the Executive Branch and the military regarding such matters. *See Gilligan v. Morgan*, 413 U.S. 1, 10-11 (1973) ("The complex, subtle, and professional decisions as to the *composition*, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.") (emphasis added). The question of what mix of skills and experience will best serve the needs of the military, especially during a time of reductions in force, is one that should be answered in the first instance by the military.

Second, letting the military re-accession process proceed is consistent with Congress' intent in enacting the Repeal Act. As noted, the Repeal Act envisioned an orderly process for allowing gay and lesbian service members to serve in the military, with decisions to be made by military and civilian leaders. That approach reflects the view that those leaders are the ones with the expertise and experience to ensure that repeal is implemented consistent with the needs of military readiness and effectiveness. Repeal Act § 2(b)(2)(C), 124 Stat. at 3516 (requiring certifications by Executive Branch and military officials prior to permitting service by gay and lesbian service members so to ensure "standards of military readiness, military effectiveness, unit cohesion, and recruitment and retention of the Armed Forces"). Indeed, the legislative history of the Repeal Act suggests that one concern was the risk that, absent passage, courts could assert control over the process of ending

DADT. *See*, e.g., 156 Cong. Rec. S10,689 (statement of Sen. Carper) (daily ed. Dec. 18, 2010) (Repeal Act "implement[s] this repeal of don't ask, don't tell in a thoughtful manner rather than to have the courts force them into it overnight"); *id.* at S10,649 (statement of Sen. Durbin) ("Congress or the courts. That is the choice."); *id.* at E2,177 (statement of Rep. Cummings) (noting that "the courts have become involved" and that "Secretary Gates has warned that judicial repeal will put an administrative burden on the Department of Defense, and has asserted that Congressional action is most favorable").

Nor is expertise the only consideration. In the Repeal Act, Congress ensured that responsibility for repeal would lie ultimately with military leaders, including the Commander-in-Chief. This allowed Service members to see the military and civilian leadership of the Department of Defense take the lead in implementing the repeal, giving members confidence that the repeal was being handled consistent with the judgment of those entrusted with ensuring the readiness and effectiveness of the Armed Forces. In so doing, Congress maximized the likelihood that the military itself would "own" the process of repeal, consistent with Congress' judgment that change from within the organization will be more effective than change imposed from the outside. Allowing plaintiffs to bypass the re-accession process that the Services have set up in response to repeal is at odds with this congressional judgment.

Third, the doctrine of constitutional avoidance counsels the same approach. To enter judgment for plaintiffs and award them relief in the form of reinstatement, the Court would have to conclude that plaintiffs' discharges, although required by statute, were unconstitutional. But it is well-established that courts should not decide constitutional issues if they can reasonably avoid doing so. *See Spector Motor Servs. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."); *United States v. Vilches-Navarrete*, 523 F.3d 1, 10 n.6 (1st Cir. 2008) ("The maxim that courts should not decide constitutional issues when this can be avoided is as old as the Rocky Mountains and embedded in our legal culture for about as long."); *Ashwander v. Tenn.*

Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case") (internal citation omitted). Here, this Court may be able to avoid deciding the constitutionality of DADT by requiring plaintiffs to employ existing administrative channels in order to seek re-accession. When such an avenue is available, doctrines of constitutional avoidance counsel this Court to take it. *See Kremens v. Bartley*, 431 U.S. 119, 128 (1977) (noting the role of policy considerations in the doctrine of constitutional avoidance).

Nor are there substantial interests on the plaintiffs' side that would justify disregarding the availability of the re-accession process. The Services are now accepting applications for re-accession and are prepared to act promptly on those applications. If granted re-accession through this process, plaintiffs will have received all of the relief they seek here. And there is no serious concern about delay. Indeed, plaintiffs have the opportunity through the re-accession process to return to military service more quickly than they would through successful litigation of this matter. And, in any event, plaintiffs are not well-positioned to complain about delay, having waited for as many as four years from their discharge to file suit for reinstatement.

For these reasons, the Court should refrain from exercising its jurisdiction over plaintiffs' claims in deference to the administrative re-accession process.

II. THE EQUITABLE REMEDIAL AUTHORITY OF THE COURTS STRONGLY COUNSELS FOR RESTRAINT WITH RESPECT TO PLAINTIFFS' REQUEST FOR REINSTATEMENT

Limits on the equitable authority of the federal courts similarly preclude the relief plaintiffs seek here. "The decision to grant or deny [] injunctive relief is an act of equitable discretion by the district court[.]" *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) ("The exercise of equitable discretion . . . must include the ability to deny as well as grant injunctive relief[.]"). "In exercising their sound discretion, courts of equity should pay particular attention to the public consequences in employing the extraordinary remedy of injunction." *Weinberger*, 456 U.S. at 312; *see also Yakus v. United States*, 321 U.S. 414, 440 (1944) (explaining that where an injunction will adversely affect a public

interest even temporarily, the court may in the public interest withhold relief until a final determination of the rights of the parties). And, where such prudential principles apply so as to render inappropriate an injunction, the same principles also render inappropriate the award of declaratory relief. *Samuels v. Mackell*, 401 U.S. 66, 69-74 (1974).

Limits on equitable discretion preclude the grant of relief here. Knight's claim for reinstatement, for example, cannot proceed; even if the Court were to find that Knight had been improperly discharged, his eight-year enlistment service contract would have expired on April 3, 2009. *See* Wardlaw Decl. ¶ 3. Enlisted personnel are not entitled to reinstatement following the expiration of their terms of enlistment. *Dodson v. Dep't of the Army*, 988 F.2d 1199, 1208 (Fed. Cir. 1993); *Thomas v. United States*, 42 Fed. Cl. 449, 452-53 (1998), aff'd, 217 F.3d 854 (Fed. Cir. 1999) (per curiam) (table). Indeed, in virtually all cases, service Secretaries and their authorized designees possess absolute discretion in determining whether enlisted personnel should be granted a new term of enlistment, which courts may not second-guess. *Dodson*, 988 F.2d at 1208 (recognizing unreviewable authority regarding decisions to permit reenlistment). Because enlisted personnel cannot assert a cognizable cause of action beyond an expired term of enlistment, *id.; see, e.g., Thomas*, 42 Fed. Cl. at 452-53, and because Knight's eight year enlistment service contract would have expired on April 3, 2009, he is not entitled to reinstatement, the only remedy he seeks.[3]

Even as to Almy and Loverde, limits on the proper scope of equitable relief counsel against court-ordered reinstatement. That is, assuming *arguendo* that this Court has authority to order reinstatement and that plaintiffs' claims were justiciable, the Court should decline to exercise its authority to grant the declaratory and injunctive relief plaintiffs seek. As the Supreme Court has observed, "[t]he complex, subtle, and professional decisions as to the composition, training,

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[3] And once Mr. Knight's claim for reinstatement is dismissed, no "substantial controversy" would exist between the parties that would permit the award of the declaratory relief Mr. Knight also seeks. *S. Cal. Painters & Allied Trades Dist. Council No. 36 v. Rodin & Co.*, 558 F.3d 1028, 1036 (9th Cir. 2009). All that would be left for the Court to provide would be an advisory opinion, which the Court lacks Article III jurisdiction to provide. *Id*.

equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." *See Gilligan*, 413 U.S. at 10-11. "[J]udges are not given the task of running the Army." *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953). And "[o]rderly government requires that the judiciary be as scrupulous not to interfere with legitimate [military] matters as the [military] must be scrupulous not to intervene in judicial matters." *Id.*

To be sure, some courts have ordered reinstatement in the context of a challenge to the constitutionality of an individual discharge. *See, e.g.*, *Witt v. Dep't of the Air Force*, 739 F. Supp. 2d 1308, 1317 (W.D. Wash. 2010); *Meinhold v. Dept. of Defense*, 808 F. Supp. 1455 (C.D. Cal. 1993). Regardless of the propriety of such orders, *see, e.g.*, *Watson v. Arkansas Nat'l Guard*, 886 F.2d 1004, 1009 (8th Cir. 1989) ("Watson's claim for reinstatement as a member of the Guard must be considered nonjusticiable, and we so conclude."); *Charette v. Walker*, 996 F. Supp. 43, 50 (D.D.C. 1998) ("[P]laintiff's request for reinstatement and promotion reconsideration are clearly not justiciable because consideration of these claims would require this Court to intrude upon military personnel decisions committed exclusively to the legislative and executive branches."), there are strong bases for the courts to exercise restraint with respect to its equitable powers here.

First, those cases involved situations in which DADT flatly barred plaintiffs' return to the military. As noted above, that is not the case here. Plaintiffs may file applications for re-accession now, and the effective date of repeal is only weeks away.

Second, for many of the reasons noted above, the Court should exercise particular restraint in intruding on military personnel decisions under the circumstances here. Consistent with the congressional judgments reflected in the DADT Repeal Act, repeal of DADT has been directed by the political Branches, with ultimate responsibility for a successful repeal lodged with our military and civilian leaders. A court order that bypasses the system those leaders have established threatens to undermine the goals of the Act. Moreover, because there may be many applicants for re-accession, and because the military already faces resource constraints, difficult personnel decisions will need to be made. Those decisions are properly made by military experts tasked with

ensuring the readiness of the entire Force, rather than by any individual court with jurisdiction over a single case. *Cf. Dodson*, 988 F.2d at 1205 ("This court does not sit as a super-selection board making personnel decisions for the Army").

Third, as discussed below, much time has passed since plaintiffs were discharged, and neither defendants nor this Court can assess on the existing record how plaintiffs' experiences in that time affect their current fitness for service. In the absence of completion of the administrative re-accession process, defendants are entitled to discovery on that score, so the Court has a complete record when considering whether reinstatement is appropriate.

Fourth, with respect to Almy, our constitutional structure and the level of responsibility of his position reinforce the conclusion that the Court should not order Almy re-commissioned as an officer in the Air Force. The Constitution provides that the President "shall Commission all the Officers of the United States." U.S. Const. Art. II, § 3. As the Supreme Court has advised, "[i]t is obvious that the commissioning of officers in the Army is a matter of discretion within the province of the President as Commander in Chief." *Orloff*, 345 U.S. at 90. This is for good reason – military officers are charged with leading forces, and are responsible for the well-being of troops who report to them. Given that a non-discriminatory process now exists for Almy to seek re-accession, consistent with the manpower needs of the Air Force, it would be particularly inappropriate for the Court to order the Air Force to restore him to his prior position nearly five years after his discharge.

Plaintiffs' contention that they are entitled to summary judgment and the equitable remedy of immediate reinstatement must be rejected.

III. THE COURT SHOULD DENY PLAINTIFFS' CLAIMS GIVEN PLAINTIFFS' PREJUDICIAL DELAY IN CHALLENGING THEIR DISCHARGES

In addition to the other equitable and prudential reasons to deny reinstatement, plaintiffs' claims and requests for relief thereunder are barred by laches, and the Court should reject plaintiffs' motion or, in the alternative, enter judgment in favor of defendants.

Laches is an equitable time limitation on a party's right to bring suit. *Boone v. Mech. Specialties Co.*, 609 F.2d 956, 958 (9th Cir.1979). To obtain a judgment on this affirmative defense, a defendant must prove both an unreasonable delay by the plaintiff and prejudice to the defendant. *Kling v. Hallmark Cards Inc.*, 225 F.3d 1030, 1036 (9th Cir. 2000) (citing *Couveau v. Am. Airlines*, 218 F.3d 1078, 1083 (9th Cir. 2000) (citations omitted); *see also Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1381 (9th Cir. 1998). Both of these factors are satisfied here.

In military discharge cases, a cause of action accrues immediately upon the service member's discharge. *Nichols v. Hughes*, 721 F.2d 657, 659 (9th Cir. 1983). Courts have concluded that delays in contesting allegedly wrongful discharges, or contesting the underlying reason for the discharge, of three to four years are unreasonable and inexcusable for the purpose of laches. *See e.g. Alligood v. United States*, 14 Cl. Ct. 11 (1987) (plaintiff's four-and-a-half-year delay found to establish the first element of laches); *Park v. United States*, 10 Cl. Ct. 790, 793 (Cl. Ct. 1986) (plaintiff's delay in filing four years and eleven months after discharge found to be inexcusable); *Ellersick v. United States*, No. 466-78, 1979 WL 30806, at *1 (Ct. Cl. Sept. 21, 1979). Almy, Knight, and Loverde waited four-and-a-half years, two-and-a-half years, and more than three years, respectively, to contest their discharges in court. Indeed, plaintiffs' approach here stands in marked contrast to the approach taken by other Service members who sought to challenge their discharges promptly. *See, e.g.*, *Witt*, 444 F. Supp. 2d 1138, 1140 (W.D. Wash. 2006) (noting that Major Witt sought a preliminary injunction upon learning that the Air Force had initiated the separation process); *Meinhold v.*, 808 F. Supp. at 1455 (C.D. Cal. 1993) (suit filed promptly after discharge and sought preliminary injunction pending discharge proceedings); *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997) (plaintiff sought injunction to present discharge); *Fehrenbach v. Dep't of the Air Force*, No. 10-402 (D. Idaho) (same).

Defendants have been prejudiced by plaintiffs' unreasonable delay. Because plaintiffs waited years before challenging their discharges, defendants now must attempt to identify and locate those within plaintiffs' chains-of-command, many of whom have since transferred to other

units (or are no longer in the military), gather evidence relevant to each individual's circumstances, and examine plaintiffs' discharges today based upon facts and circumstances that existed years ago. *See* Decls. of Feroz A. Assa, United States Air Force and Mark Sakowski, United States Navy, attached. Litigating under heightened scrutiny (as required by *Witt*) with such stale evidence makes the government's task more challenging. *See* Assa Decl. ¶¶ 6-7; Sakowski Decl. ¶ 17.

Plaintiffs seek to absolve themselves of responsibility for their delay, suggesting that defendants failed to show that plaintiffs' discharge would meet the *Witt* standard and "ignored evidence" that the discharges would actually harm the government's interests. *E.g.*, Mot. for Partial Summ. J. 14:24, ECF No. 43. As plaintiffs are well aware, however, *Witt* had not even been decided at the time of two of the discharges (and preceded the third by mere months), and, in any event, plaintiffs were discharged pursuant to a statute that rendered such evidence irrelevant.

More to the point, the issues that plaintiffs identify (and that the Ninth Circuit has made relevant in *Witt*) are the very ones that could have been worked out in litigation had plaintiffs filed a prompt challenge to their discharge, as did (for example) Major Witt. Had plaintiffs done so, thereby indicating their desire to hold the Government to the proof the Ninth Circuit requires, relevant evidence could have been gathered and assessed. Now, for example, it has been some five years since Almy was discharged. The harm to the defendants' interests in that circumstance is evident.

Where, as here, a party "unreasonably delays in filing a suit and as a result harms the defendant," *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121 (2002), the party cannot thereafter maintain suit for equitable relief in light of its prejudicial delay. The Court thus should find that plaintiffs' claims are barred by laches.

IV. CLAIM XI OF THE FIRST AMENDED COMPLAINT MUST BE DISMISSED

Almy asserts that his discharge should be set aside because it was undertaken based upon an improper search of the government-provided computer he was issued for official business. *See* Claim XI of FAC. Even in a criminal setting where the exclusionary rule is applicable, the presumption is that a military member lacks any expectation of privacy in communications sent and

received over government computers. *United States v. Larson*, 66 M.J. 212, 215-216 (C.A.A.F. 2008); *see also City of Ontario v. Quon*, —— U.S. ——, 130 S. Ct. 2619, 2628-29, 177 L. Ed. 2d 216 (2010) (explaining that the Fourth Amendment does not prohibit a government employer from conducting a reasonable search of its work place). This is particularly so here, where Almy saved personal information to a government owned and provided computer and left that information on the computer when he transferred from the area. Am. Compl. ¶ 29.

Almy's discharge, of course, was an administrative, rather than a criminal matter. The function of military discharge proceedings is to determine eligibility for further military service, not to punish for past wrongs. *Garrett v. Lehman*, 751 F.2d 997, 1002 (9th Cir. 1985). The inadmissibility of evidence, such as evidence obtained in alleged violation of the Fourth Amendment's exclusionary rule, does not negate an otherwise valid discharge. *Id.* (holding that exclusionary rule does not extend to administrative discharge proceedings); *see also Kindred v. United States*, 41 Fed. Cl. 106, 113-114 (1998).

Air Force regulations, moreover, specifically state that "all relevant evidence obtained from any search and seizure is admissible" in an officer discharge board. AFI 51-602, paragraph 2.1.3.[4] Air Force regulations also provide that rules of evidence do not govern administrative discharge boards. AFI 36-3206, paragraph 7.6. Thus, even if the Court were to assume that Almy's allegations regarding the search of his computer are true, that would not be a basis to negate his otherwise lawful discharge under the DADT statute. This claim thus fails to state a claim upon which relief can be granted, and must be dismissed.

V. BECAUSE THE INDIVIDUAL CLAIMS HERE ARE IMPROPERLY JOINED, THE COURT SHOULD SEVER THE PARTIES' CLAIMS AND DISMISS THE CLAIMS OF ALMY AND KNIGHT

Even if plaintiffs could overcome the legal hurdles already described, their cases should be severed because the complaint improperly joins three distinct cases that, under Fed. R. Civ.

[4] Air Force Instructions ("AFI") are publically available at the Department's website: www.e-publishing.af.mil.

P. 20, should be brought separately. And once the claims are severed, the claims of Almy, and perhaps those of Knight as well, should be dismissed without prejudice, because venue is not proper in this district under 28 U.S.C. § 1391(e).[5]

Federal Rule of Civil Procedure. 20 provides that: Persons may join in one action as plaintiffs if:

> **(a)** they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
> **(b)** any question of law or fact common to all plaintiffs will arise in the action.

Fed. R. Civ. P. 20(a).

Plaintiffs' claims do not meet the first prong of Rule 20 because the rights they assert do not arise out of the same transaction or occurrence. In determining whether claims arise under the same transaction or occurrence, courts use the logical relationship test. *See Pochiro v. Prudential Ins. Co. of Am.*, 827 F.2d 1246, 1249 (9th Cir.1987). The logical relationship test considers " 'whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit.' " *Pochiro*, 827 F.2d at 1249 (quoting *Harris v. Steinem*, 571 F.2d 119, 123 (2d Cir.1978)). Claims possess sufficient factual similarity if they "arise out of a systematic pattern of events." *Bautista v. Los Angeles Cnty.*, 216 F.3d 837, 842-43 (9th Cir. 2000) (concurring opinion, J. Reinhardt).

In this case, plaintiffs' claims arose at different times, as the result of different actions, and from different circumstances. Am. Compl. ¶¶ 17-58. Plaintiffs cannot demonstrate the same transaction or occurrence "by merely asserting claims under the same right to relief or by alleging that the claims have a common characteristic." *See Saval v. BL Ltd.*, 710 F.2d 1027, 1031-1032 (4th Cir. 1983). Though DADT applied throughout the Department of Defense, plaintiffs were not discharged at the same time, were not serving in the same units or the same locations, and were

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[5]Plaintiffs have not claimed that Knight or Almy would be a "required party" in Loverde's challenge under the mandatory joinder provisions of Fed. R. Civ. P. 19. Indeed, given that challenges to DADT have been brought repeatedly by individual service members without the participation of other discharged service members, no such claim could be seriously made.

discharged by different Services, each with its own DADT regulations and policies. *See* AFI 36-3206; AFI 36-3208; MILPERSMAN 1910-148 (attached as an enclosure to the Count Decl.); Am. Compl. ¶¶ 17-58. Rather than serving as a convenience, therefore, joining the plaintiffs' cases complicates this litigation by forcing three distinct sets of facts to be resolved in a single proceeding. Plaintiffs thus do not meet the first prong of permissive joinder.

Plaintiffs also fail to meet the second prong, as there are not common questions of law, given the individualized, factual showing now required under the *Witt* test, or other common questions of fact, to warrant permissive joinder. The fact that the plaintiffs' claims arise under the same general law does not necessarily satisfy this prong. *Turner v. Lafond*, No. 09-683, 2009 WL 3400987 at *4 (N.D. Cal. Oct. 20, 2009) (quoting *Mosley v. Gen. Motors Corp.*,, 497 F. 2d 1330, 1351 (8th Cir. 1974)). In *Coughlin v. Rogers*, the 9th Circuit stated:

> Further, although Plaintiffs' claims are all brought under the Constitution and the Administrative Procedure Act, the mere fact that all Plaintiffs' claims arise under the same general law does not necessarily establish a common question of law or fact. Clearly, each Plaintiff's claim is discrete, and involves different legal issues, standards, and procedures. Indeed, even if Plaintiffs' cases were not severed, the Court would still have to give each claim individualized attention. Therefore, the claims do not involve common questions of law or fact.

130 F.3d 1348, 1351 (9th Cir.1997). Similarly, in the recent case of *Robinson v. Geithner*, No. 5 - 01258, 2011 WL 66158, at *9 (E.D. Cal. Jan. 10, 2011), a district court in this Circuit found misjoinder in a Title VII action filed by several IRS employees. The court determined that the claims did not involve the same questions of law or fact because they arose out of separate employment decisions, in different divisions, with different supervisors, and because the plaintiffs suffered different types of adverse employment decisions. *Id.* As the Court noted, the "fact that all the claims arise under Title VII is simply not enough." *Id*.

As in *Coughlin* and *Robinson*, the primary thrust of plaintiffs' allegations is identical: their discharge pursuant to Section 654 is unconstitutional. Am Compl. ¶¶ 17-58. However, the claims arise out of entirely different factual circumstances. The Ninth Circuit in *Witt*, moreover, specifically required an individualized record reagrding the discharge of each of the plaintiffs. *See*

527 F.3d at 821. Thus, each case would require individualized factual development. As *Coughlin* and *Robinson* instruct, the fact that plaintiffs were discharged under the same statute is "not enough."

If the requirements of Rule 20 are not satisfied, "a court, in its discretion, may sever the misjoined parties, so long as no substantial right will be prejudiced by the severance." *Coughlin*, 130 F.3d at 1350. In such a case, "the court can generally dismiss all but the first named plaintiff without prejudice to the institution of new, separate lawsuits by the dropped plaintiffs." *Id.* Here, there will be no prejudice to any party from having the cases severed and heard separately, as plaintiffs' cases do not present common questions of law or fact, and there is no statute of limitations bar that would prevent the severed parties from refiling their claims. Accordingly, severance – and dismissal without prejudice, *see generally Coughlin*, 130 F.3d at 1351 (dismissing claims of misjoined plaintiffs) – is the proper resolution.

Although Almy is "the first named plaintiff," 130 F.3d at 1351, it is the claim against Loverde that should remain here. Because Almy resides in the District of Columbia, *see* Am Compl. ¶ 3, there would be no venue over Almy's separate claim, *see* 28 U.S.C. §1391(e), and thus Almy's lawsuit should be dismissed without prejudice to the institution of a new separate suit in a forum of proper venue.[6] It may be appropriate to dismiss Knight's separate suit without prejudice as well. Although Knight alleges that he resides "within this judicial district," his last known address on file with the Navy is in La Jolla, California (outside this District), and the Complaint provides no further details of his residence. *See* Wardlaw Decl. ¶ 5. Under Rule 20 and Section 1391(e), only Loverde's claims are properly before the Court.

[6]Notably, the conduct that was the basis for Almy's discharge did not occur within this district or circuit, Almy was not stationed in this district or circuit, and Almy's discharge action was not initiated within this district or circuit.

VI. PLAINTIFFS ARE NOT ENTITLED TO PARTIAL SUMMARY JUDGMENT ON THEIR SUBSTANTIVE DUE PROCESS CLAIMS

Finally, plaintiffs' motion for summary judgment on their as applied challenges to their discharges (Counts I-III of the FAC) must be denied. *See* Mot. For Partial Summ. J.; Proposed Order Granting Mot. for Partial, ECF No. 44. In *Witt*, the Ninth Circuit held that such as applied challenges are subject to a plaintiff-specific, heightened-scrutiny review. The Government respectfully disagrees with the Ninth Circuit's decision in *Witt*. The Government recognizes, however, that this Court may be bound by *Witt* in adjudicating plaintiffs' as-applied substantive due process challenges. Even so, plaintiffs cannot prevail at this stage even under *Witt*. Defendants have not had the opportunity to undertake the discovery necessary to address the fact-specific inquiry that the Ninth Circuit decision in *Witt* requires – the same sort of discovery that the parties conducted on remand in *Witt* itself. In *Witt*, the Ninth Circuit set forth its approach for addressing a substantive due process challenge to a discharge under DADT. The Court of Appeals held first that, in light of the Supreme Court's decision in Lawrence v. *Texas*, 539 U.S. 558 (2003), some form of heightened scrutiny is required. *Witt*, 527 F.3d at 817. Turning for guidance to *Sell v. United States*, 539 U.S. 166 (2003), the Ninth Circuit adotped a three-part test. *Witt*, 527 F.3d at 818-19 (citing *Sell*, 539 U.S. at 179). To justify a discharge that implicates the rights identified in *Lawrence*, "the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest." *Witt*, 527 F.3d at 819.

Critically, the Ninth Circuit determined that "this heightened scrutiny analysis is as-applied, rather than facial." *Id.* Under this as-applied analysis, generalized justifications about the need for DADT do not suffice; instead, a court must determine "whether a justification exists for the application of the policy as applied" to the particular service member. *Id.*

When applying the new standard to the plaintiff in *Witt*, the Court of Appeals made clear that a well-developed factual record was required to conduct the as-applied analysis. The Ninth Circuit held that as to the first *Witt* factor – an important governmental interest – the government

had met its burden, as the interests put forth to justify DADT (unit cohesion and morale) constituted an important governmental interest. *See id.* at 821 ("[i]t is clear that the government advances an important governmental interest."). But the Court concluded that the inquiry under the second and third factors could not be resolved on the existing record, and the Ninth Circuit remanded the matter to the district court for further factual development. *Id*.

Against this backdrop, plaintiffs' motion for summary judgment must be denied. The Ninth Circuit has recognized that where summary judgment is sought early in the litigation before a party has had a realistic opportunity to pursue discovery, courts should grant a Rule 56(d) motion "fairly freely." *Burlington N. Santa Fe R.R. Co. v. Assinboine and Sioux Tribes of Fort Peck Reservation,* 323 F.3d 767, 773 (9th Cir. 2003). That approach is required here. There has been no development of the record at all, and in particular no opportunity to probe the circumstances of plaintiffs' conduct and its impact on the government interests at stake.

Plaintiffs argue to the contrary, contending that they are entitled to summary judgment based merely upon their assertion that they are fit to serve in the Armed Forces. The same assertions were present in *Witt*, *see* 527 F.3d at 821 n.11, yet the Ninth Circuit determined that a more developed factual record was required. *See id.*, 527 F.3d at 821 (ordering remand to develop factual record to determine whether interests served by § 654 were furthered through plaintiff's discharge despite plaintiff's assertion of meritorious military service and assertion that conduct occurred outside of military).

Consistent with the approach that *Witt* requires, defendants intend to conduct limited discovery – including both written discovery and depositions – into the impact of plaintiffs' discharges in light of the governmental interests that the Ninth Circuit identified in *Witt*.[7] Indeed

[7] For example, relevant discovery could include inquiry into whether any of the plaintiffs' conduct involved relationships with subordinate Service members, or that might have otherwise been disruptive to the effective operation of their unit. Discovery would also include whether plaintiffs' discharges were justified under the governmental interests identified by Congress in enacting DADT. *See Witt*, 527 F.3d at 819 (recognizing that factual record must be developed

this is the exact sort of discovery that the Government sought – and that plaintiff provided without objection – on remand in *Witt*.

Moreover, discovery is particularly appropriate here because of the long lapse in time between discharge and ultimate relief. Almy, for example, was discharged some five years ago. Plaintiffs' experiences in that intervening period could well affect the appropriateness of equitable relief. Absent completion of the a re-accession process by the plaintiffs, a narrowly-tailored inquiry into plaintiffs' experiences – and in particular the impact of those experiences on fitness for service – could be critical to the delicate remedial questions that this Court would face, even if plaintiffs were to prevail on the merits of their claims.

In short, as in *Witt*, to the extent the Court exercises jurisdiction and proceeds to adjudicate plaintiffs' claims, defendants should be afforded the appropriate opportunity, through discovery, to develop the factual record contemplated by the Ninth Circuit in *Witt* regarding the effect each plaintiffs' conduct had on military readiness and unit cohesion. The Court should thus deny or defer any consideration of plaintiffs' motion for partial summary judgment, in accordance with *Witt* and Fed. R. Civ. P. 56(d). *See e.g.*, *Hamilton v. Thompson*, No. 09-648, 2011 WL 2580659, at *1 (N.D. Cal. June. 29, 2011) (denying summary judgment and permitting party to conduct discovery).

CONCLUSION

For the foregoing reasons, the Court should dismiss plaintiffs' claims or, in the alternative, grant defendants summary judgment. Alternatively, if plaintiffs' claims survive, the Court should deny Plaintiffs' motion for partial summary judgment with respect to Counts I-III of the FAC, and permit defendants the opportunity to develop the factual record now required under the *Witt* standard.

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before district court linking factual circumstances surrounding an individual discharge and the governmental interests in enacting the statute). *See generally*, Fed. R. Civ. P. 56(d) Decl. of Counsel. It is only when such a factual record is developed through discovery, and presented to the Court, that each of plaintiffs' discharges can be evaluated under the test set forth in *Witt*. *Id.* at 821.

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