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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOG CABIN REPUBLICANS, a non-profit corporation,

Plaintiff,

v.

UNITED STATES OF AMERICA and ROBERT M. GATES, SECRETARY OF DEFENSE, in his official capacity,

Defendants.

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

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

Judge: Hon. Virginia A. Phillips

Hearing: October 18, 2010

Time: 2:30 p.m.

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I.

INTRODUCTION

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

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

[1] It is not only Admiral Mullen who tweets (Trial Ex. 330). President Obama, using his verified Twitter account, tweeted yesterday, *on the very day that the Government filed both its appeal to the Ninth Circuit and this emergency motion for stay*, that "Anybody who wants to serve in our armed forces and make sacrifices on our behalf should be able to. DADT will end & it will end on my watch." See Attachment 1. And in the fuller remarks that his tweet encapsulated, the President made it clear that he agrees with the principles underlying the Court's judgment: "we recently had a Supreme Court -- a district court case that said, 'don't ask, don't tell' is unconstitutional. I agree with the basic principle that anybody who wants to serve in our armed forces and make sacrifices on our behalf, on behalf of our national security, anybody should be able to serve. And they shouldn't have to lie about who they are in order to serve." See http://www.whitehouse.gov/the-press-office/2010/10/14/remarks-president-a-youth-town-hall.

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

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

II.

DEFENDANTS DO NOT MEET THE STANDARDS FOR A STAY UNDER RULE 62(C)

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

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

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

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

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

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

[2] The application's apologetic footnote 1 acknowledges as much.

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

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

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

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

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

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

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

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

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

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

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

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

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

The supposed "injury" to the military that the government claims would result from the Court's order invalidating DADT is, by the government's own account, entirely a matter of rewriting handbooks and personnel manuals,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III.

THE GOVERNMENT'S CLAIMED HARDSHIP IS A RED HERRING

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

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

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

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

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

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

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

IV.

CONCLUSION

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

Dated: October 15, 2010

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