Case No. 10-56634

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOG CABIN REPUBLICANS,
a non-profit corporation

Plaintiffs-Appellee,

v.

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

Defendants-Appellants.

APPEAL FROM DISTRICT COURT CASE NO. CV04-8425 VAP(Ex)

The Honorable Virginia A. Phillips

AMICUS BRIEF IN SUPPORT OF APPELLEE LOG CABIN REPUBLICANS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, counsel for *Amicus Curiae* Servicemembers Legal Defense Network, certifies that:

1. Servicemembers Legal Defense Network is a not-for-profit corporation.

2. Servicemembers Legal Defense Network has no parent corporation and no publicly-held corporation owns ten percent or more of Servicemembers Legal Defense Network.

October 25, 2010 **BRYAN CAVE LLP**

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Amicus curiae, Servicemembers Legal Defense Network ("SLDN") submits this brief in support of the position of appellee, Log Cabin Republicans ("Appellee"), which opposes the motion of appellants, the United States of America and Robert M. Gates, Secretary of Defense ("Appellants"), for a stay pending appeal of the judgment entered by the District Court on October 12, 2010, in the case captioned, *Log Cabin Republicans v. United States of America and Gates*, Case No. CV 04-08425-VAP, United States District Court for the Central District of California. This brief is filed pursuant to the consent of both Appellants and the Appellee.

INTEREST OF THE AMICUS CURIAE

SLDN is a non-partisan, non-profit organization which provides free legal services to military personnel affected by 10 U.S.C. § 654, the law known as "Don't Ask, Don't Tell" ("DADT"). Since DADT became the law seventeen years ago, SLDN has responded to more than 10,000 requests for assistance. SLDN is interested in this case because it affects the tens of thousands of gays and lesbians who currently serve in the armed forces and others who hope to serve in the future.

SLDN respectfully urges this Court to deny the relief sought by Appellants, which is a stay of the injunction ordered by the United States District Court on October 12, 2010. In its September 9, 2010 Memorandum Opinion, amended on October 12, 2010, the District Court determined that DADT violates both the Fifth

and First Amendments to the U.S. Constitution. On October 14, 2010, Appellants requested that the District Court issue a stay pending appeal of the injunction. In its October 19, 2010 Order, the District Court denied Appellants' request.

ARGUMENT

A STAY PENDING APPEAL SHOULD NOT BE GRANTED IN THIS CASE

A stay of the judgment of the District Court pending appeal would cause substantial and irreparable harm to members of the armed services and is against the public interest.

A. A Stay Pending Appeal Is Not Appropriate Where Substantial and Irreparable Harm to Interested Parties Will Result, and the Public Interest Militates Against a Stay

In deciding whether to issue a stay pending appeal, the court considers:

> (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.

Golden Gate Restaurant Ass'n v. City and County of San Francisco, 512 F.3d 1112, 1115 (9th Cir. 2008) (*quoting Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

If the District Court's judgment is stayed, tens of thousands of interested individuals, namely valuable gay and lesbian members of the armed forces, will continue to be at risk of discharge, and this constitutes substantial and irreparable

harm. DADT's violation of the Fifth and First Amendments alone represents irreparable injury. *See Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997); *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976). A stay pending appeal is improper where, as here, substantial and irreparable harm will result. *See e.g. Valdivia v. Schwarzenegger*, 2008 WL 1990800 (E.D.Cal. May 6, 2008) (denying a stay pending appeal due to, in part, the irreparable harm being caused to the "personal relationships and career stability" of those affected, as well as the "personal distress" caused by the unlawful statute); *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983) (stay pending appeal denied due in part to irreparable harm caused by lost disability benefits, which was not outweighed by administrative expense).

Further, the public interest lies in protecting the core principles of our Constitution as set forth in the First and Fifth Amendments. *See Gay Lesbian Bisexual Alliance v. Sessions*, 917 F. Supp. 1558, 1563 (M.D. Ala. 1996) (denial of stay pending appeal where Alabama statute found to violate the First Amendment both facially and as applied). More specifically, the public has a strong interest in a military that conducts itself in accordance with the Constitution. *McVeigh v. Cohen*, 983 F. Supp. 215, 221-22 (D.D.C. 1998).

B. Issuance of the Proposed Stay Will Substantially and Irreparably Harm SLDN Clients and Countless Others

DADT harms tens of thousands of lesbian and gay service members. Service members live in constant fear of being exposed. They are forced to "live a lie" and not reveal who they really are to their comrades-in-arms. If Appellants' proposed stay is granted, these service members will continue to suffer this needless significant and irreparable harm.

Since January 20, 2009, SLDN has responded to more than 1,200 requests for assistance and counseled hundreds of service members, including 45 who are or believe they are under investigation; 39 who have been outed by third parties; 31 who were threatened with outing; 13 who have been harassed; and 21 with family issues resulting from DADT.[1]

There are numerous service members for whom the harm of DADT is even more tangible and imminent. These are the service members already in the military discharge process and threatened with separation before this appeal is heard. Appellants have announced that they have adopted additional review procedures before a service member is discharged. While this may be a positive development, the injunctive relief granted by the District Court remains necessary.

[1] These categories are not mutually exclusive, as one client may have multiple issues.

The individuals discussed below represent only a few examples of these service members.

1. *Lieutenant Colonel Victor J. Fehrenbach*

SLDN's client, Lt. Col. Fehrenbach, is a highly decorated veteran of the current conflicts in both Iraq and Afghanistan. In addition to his numerous medals and commendations, he has been recognized by the Air Force for saving advancing coalition troops from enemy ambush while evading constant hostile fire during the opening days of Operation IRAQI FREEDOM. Throughout his more than 19-year career in the Air Force, Lt. Col. Fehrenbach consistently has been praised by his commanders and peers alike for his superior skill, leadership and excellence at building morale and unit cohesion.

On May 16, 2008, Lt. Col. Fehrenbach was questioned in connection with an allegation of sexual assault made by a male civilian. Compelled by the necessity of exonerating himself, Lt. Col. Fehrenbach told the detective that he had engaged in consensual sexual relations with the civilian. Although both civilian and military authorities found the sexual assault accusation to be meritless, the Air Force initiated DADT proceedings, and an administrative Board of Inquiry recommended that Lt. Col. Fehrenbach be discharged. To challenge his discharge, Lt. Col. Fehrenbach initiated an action in the District Court of Idaho seeking a

declaratory judgment that DADT is unconstitutional both facially and as applied to him.[2]

If he is discharged as a result of his private, constitutionally protected conduct, Lt. Col. Fehrenbach will lose his job, income, right to a pension, health and life insurance, and all other benefits associated with being an Air Force officer. Lt. Col. Fehrenbach will suffer a stigma from being discharged involuntarily from the military for violating Air Force regulations.[3] Most important, however, Lt. Col. Fehrenbach will suffer and continue to suffer serious and irreparable injuries in that he has and will continue to be prevented from fully exercising his most fundamental and constitutional rights. These injuries are real and cannot be retroactively cured.

2. *Major Jane Smith*[4]

SLDN's client, Jane Smith, is a Major in the United States Air Force with over 20 years of service. Major Smith has deployed overseas, has consistently

[2] In the District of Idaho action (Case No. 1:10-cv-00402-EJL), the Government agreed to enter into a stipulation with Lt. Col. Fehrenbach, pursuant to which should the Secretary of the Air Force or his designee decide to discharge Lt. Col. Fehrenbach, he will be given 21 days notice before that decision is executed, and during which time the Government will respond to Lt. Col. Fehrenbach's preliminary injunction motion.

[3] Courts have held that the "stigma" of being discharged for violating military policies and regulations provides sufficient irreparable harm to warrant injunctive relief. *See McVeigh*, 983 F. Supp. at 221; *Elzie v. Aspin*, 841 F. Supp. 439, 443 (D.D.C. 1993); *May v. Gray*, 708 F. Supp. 716, 722 (E.D.N.C. 1988).

[4] Major Jane Smith's real name has been withheld at her request to protect her privacy.

received excellent performance evaluations from her superiors, and has been awarded numerous service medals for her outstanding contributions to the success of her unit.

Major Smith recently volunteered for a deployment to Afghanistan and was scheduled to depart, but as she was preparing to leave her home for pre-deployment training and processing she received news that her deployment had been canceled. Major Smith was further informed that the orders for her next duty station after her deployment were also canceled. She was provided no explanation for these sudden and unexpected changes in her assignment.

A friendly officer in Major Smith's chain of command informed her that the reason for the cancellation of her deployment was an investigation under DADT.[5] While the details of the investigation have not yet been provided to Major Smith, she suspects that someone in her unit learned that she had married her same-sex partner. Under DADT, marriage to someone of the same biological sex constitutes "homosexual conduct," and is grounds for discharge.[6] Major Smith has no idea

[5] It is common for service members to hear about DADT investigations only through word-of-mouth, as there is no regulatory requirement to inform them that they are under investigation.

[6] *See* 10 U.S.C. § 654(b)(3). No reported case has discussed DADT's restriction on same-sex marriage and its implication of the freedom of association protected under the First Amendment. Nonetheless, this prohibition on same-sex marriage is a further example of the significant tension between DADT and the constitutional rights of service members, particularly in jurisdictions where same-sex marriage is lawful. In California, where marriage has recently been determined to be a fundamental constitutional right available to same-sex

how anyone in the Air Force learned of the marriage and has no idea who might be responsible for passing this information on to her chain of command. She did nothing to bring her sexual orientation to the attention of the military.

Major Smith had been deemed eligible for promotion to Lieutenant Colonel. In fact, she was given a recommended "definitely promote" by her commander, but in order to be competitive for that promotion, Major Smith needed to serve on her deployment and take the new assignment with increased responsibility. On October 18, 2010, after the District Court's injunction was put in place, Major Smith received word that her assignment to her next duty station had been reinstated. But now that this Court has issued a temporary stay, her new assignment and the state of the investigation have been placed in question. The prior cancellation and current doubt regarding her deployment has severely jeopardized her promotion, and without promotion, Major Smith will be forced to retire within two years.

3. *Master Sergeant Mary Johnson*[7]

SLDN's client, MSG Mary Johnson, served for many years in the United States Army on Active Duty and in the Reserves before becoming a member of the

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couples, the tension is even greater. *See Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D.Cal. 2010).

[7] Master Sergeant Mary Johnson's real name has been withheld at her request to protect her privacy.

National Guard. In her more than 20 years of service, MSG Johnson has deployed overseas five times and has earned numerous achievement and commendation medals for her important contribution to her unit's success.

MSG Johnson is also the captain of a non-military sports team. During the course of a recent season, members of the team began to suspect that their coach was embezzling money from the team's owner. MSG Johnson and others reviewed the finances of the organization and determined that there was substantial evidence that their coach was using team money for his personal expenses, and the evidence was turned over to the State Attorney General's office. The Attorney General has since opened an investigation.

When the accused coach learned of the investigation, he retaliated by writing to a member of the team who is a Captain in the National Guard. The correspondence stated the coach's belief that several women on the team were gay and asked how he could turn them in. Although MSG Johnson was not identified by name, enough personal details were provided to allow the Captain to identify MSG Johnson. He then felt compelled to forward the correspondence on to MSG Johnson's Commanding Officer. MSG Johnson was informed on September 17, 2010 that she was being investigated on the basis of statements made about her sexual orientation. She now faces the imminent threat of losing her career as a result of a third-party outing.

CONCLUSION

For all the reasons set forth in this Brief, it is respectfully requested that Appellants' motion for a stay pending appeal be denied.

Dated: October 25, 2010

Respectfully submitted,

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STATEMENT OF RELATED CASES

Amicus Curiae, Servicemembers Legal Defense Network, is unaware of any pending related cases before this Court.

Dated: October 25, 2010

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CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 120 Broadway, Suite 300, Santa Monica, California 90401-2386.

I herby certify that on October 25, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF will be served by the appellate CM/ECF system.

Executed on October 25, 2010, at Santa Monica, California.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

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

/s/ Christine A. Kehlenbeck
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