No. 10A–_____

In the Supreme Court of the United States

LOG CABIN REPUBLICANS,

Applicant,

vs.

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

Respondents.

ON APPLICATION TO VACATE AN ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPLICATION TO VACATE ORDER STAYING JUDGMENT AND PERMANENT INJUNCTION

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TO THE HONORABLE ANTHONY M. KENNEDY, CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Log Cabin Republicans, plaintiff and appellee below, applies for an order vacating the Order of the United States Court of Appeals for the Ninth Circuit in Case No. 10-56634, entered November 1, 2010 (App. 001a–008a), which stayed pending appeal the judgment of the United States District Court for the Central District of California in Case No. 04-CV-08425, entered October 12, 2010 (App. 009a–011a). The district court's judgment permanently enjoined the government respondents (the United States and the Secretary of Defense) from enforcing and applying the "Don't Ask, Don't Tell" Act, 10 U.S.C. section 654, and its implementing regulations ("DADT"). Unless the court of appeals' stay is vacated, the respondents will be free to continue to investigate and discharge American servicemembers for no reason other than their homosexuality, in violation of their due process and First Amendment rights.

Following six years of pretrial proceedings, numerous reasoned interim orders, and a two-week bench trial, the district court found that "Don't Ask, Don't Tell" violates American servicemembers' Fifth Amendment substantive due process rights under this Court's holding in *Lawrence v. Texas*, 539 U.S. 558 (2003), and their First Amendment rights of free speech and petition. The district court entered a permanent injunction enjoining the government from enforcing or applying DADT. The district court's judgment was

supported by a lengthy Memorandum Opinion (App. 012a–097a), extensive Findings of Fact and Conclusions of Law (App. 098a–181a), and a detailed Order Granting Permanent Injunction (App. 182a–196a), all of which delineated why the judgment was compelled by the evidence at trial.

The government applied to the district court for a stay of its judgment pending appeal, which was denied (App. 197a–202a). The government renewed its application in the Ninth Circuit (App. 203a–227a). That court granted a stay on Monday, November 1, 2010, over a partial dissent.

The Ninth Circuit's order, however, was an abuse of discretion. It ignored controlling precedent, including *Lawrence*. It sidestepped the requirement that respondents show a likelihood of success on the merits, a showing they failed to make. It gave no consideration whatsoever to the injury that will befall the applicant from a stay. And it applied the wrong standard to respondents' claim of irreparable injury, which rested entirely on speculation, by accepting as sufficient the respondents' "colorable" assertions of harm and injury, rather than requiring them to show a "likelihood" of irreparable injury as this Court's precedents dictate.

Any alleged harms to the government are entirely bureaucratic, procedural, and transitory in nature, and are sharply outweighed by the substantial constitutional injury that servicemembers will sustain from a stay of the district court's judgment. The court of appeals' three stated

reasons for issuing a stay do not withstand minimal scrutiny. The order should be vacated.

ARGUMENT

A. The Don't Ask, Don't Tell statute and the proceedings below.

This case arises on applicant's facial constitutional challenge to DADT. That statute, codified at 10 U.S.C. § 654, was enacted in 1993. It mandates discharge of homosexual personnel in the United States military, pursuant to regulations issued by the Secretary of Defense, if, *inter alia,* they have "engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts," or "stated that he or she is a homosexual or bisexual, or words to that effect."[1] The ostensible purpose of the statute is to maintain "high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." *See* 10 U.S.C. § 654(a)(15).

When DADT was enacted, *Bowers v. Hardwick*, 478 U.S. 186 (1986), was the law of the land. But in 2003, this Court overruled *Bowers* in its landmark decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), holding that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct," 539 U.S. at 562, that "individual decisions by married [and unmarried] persons, concerning the intimacies of their physical relationship ... are a form of 'liberty' protected by

[1] The district court's Memorandum Opinion goes into greater detail concerning the background and provisions of the statute. *See* App. 057a–059a.

the Due Process Clause," *id.* at 578, and that the state must justify an intrusion into an individual's recognized liberty interest, *id.* After *Lawrence*, the Ninth Circuit decided an as-applied challenge to DADT, *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008). *Witt* concluded that *Lawrence* requires that DADT be subjected to a heightened level of constitutional scrutiny, and held that

> when the government attempts to intrude upon the personal and private lives of homosexuals, in a manner 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. In other words, for the third factor, a less intrusive means must be unlikely to achieve substantially the government's interest.

Witt, 527 F.3d at 819. Against this backdrop, and under the standard established in *Witt* as the law of the Ninth Circuit,[2] the district court conducted the trial here.

At trial, applicant presented more than twenty witnesses, including seven expert witnesses and six former servicemembers, and introduced over 100 exhibits, including studies showing that sexual orientation is not germane to military service (App. 134a-135a, 154a). The government called no witnesses and introduced no evidence other than the legislative history of

[2] The government did not petition this Court for *certiorari* in *Witt*. It did petition the Ninth Circuit for rehearing and rehearing en banc, which was denied over a lengthy dissent by Judge O'Scannlain, the senior member of the motions panel that issued the stay order in question here. *Witt v. Department of the Air Force*, 548 F.3d 1264, 1265-76 (9th Cir. 2008).

the statute. It relied solely on the Congressional record and the findings set forth in the statute to support its position that DADT advances the objectives of morale, good order and discipline, and unit cohesion. But, as the 17 years that the statute has been in place have shown, "Don't Ask, Don't Tell" does not accomplish those objectives, and in fact undermines those objectives. The district court heard extensive evidence, both documentary and testimonial, as to how and why that is so, and found after trial that DADT results in: the discharge of qualified servicemembers despite troop shortages; the discharge of servicemembers with critically needed skills and training; negative impacts on recruiting; and the admission of lesser qualified enlistees, including convicted felons and misdemeanants under "moral waivers" and recruits lacking required levels of education and physical fitness. The district court also found that the military routinely acts in ways inconsistent with the asserted necessity of excluding homosexuals, including by decreasing and delaying discharges of servicemembers suspected of violating DADT until after they had completed overseas deployments (*see* App. 068a–077a).

The evidence at trial, furthermore, included uncontroverted admissions from officials at the highest level of government that DADT does not fulfill its stated objectives, including the Secretary of Defense's admission that the assertions purportedly justifying DADT's intrusion on the personal and private lives of homosexuals "have no basis in fact"; the Chairman of the Joint Chiefs of Staff's admissions that he is unaware of any studies or

evidence suggesting that repeal of DADT would undermine unit cohesion, and that "allowing homosexuals to serve openly is the right thing to do" and is a matter of "integrity"; and the admissions of President Obama, the Commander in Chief, that DADT "doesn't contribute to our national security," "weakens our national security," and reversing DADT is "essential for our national security" (*see* App. 077a–078a, 262a–263a). The government rebutted none of this showing.

In sum, the district court found, based on the uncontroverted evidence at trial, that "the effect of the Act has been, not to advance the Government's interest of military readiness and unit cohesion, much less to do so significantly, but to harm that interest" (App. 076a). In addition, the district court found that DADT infringes on servicemembers' First Amendment rights in two distinct ways: it imposes content-based restrictions on their speech, since heterosexuals are free to discuss their sexual orientation (and thus their personal lives) while homosexuals are not; and it chills their ability to complain of harassment and to openly join organizations that seek to change the military's policy, thereby preventing them from petitioning the government for redress of grievances (*see* App. 091a–096a). DADT thus requires discharge for pure speech, not merely for conduct; the district court specifically found that "the sweeping reach of the restrictions on speech in the Don't Ask, Don't Tell Act is far broader than is reasonably necessary to protect the substantial government interest at stake here" (App. 093a).

Accordingly, the district court found that DADT violated both servicemembers' Fifth Amendment due process rights, and their First Amendment rights to freedom of speech and to petition the Government for redress of grievances. The district court declared DADT unconstitutional for both those reasons, and permanently enjoined the respondents from enforcing or applying DADT (App. 009a–011a).

Respondents appealed the district court's judgment, and concurrently applied to the district court for a stay of its judgment pending appeal. The district court denied the application. It held that the only evidence submitted by respondents, a declaration from a civilian official in the Defense Department, was conclusory, vague, and belied by the evidence at trial that respondents had chosen not to rebut, and found specifically that respondents had not demonstrated a likelihood of success on the merits, had not shown that the appeal presented a serious legal question, and had not shown a likelihood that they would suffer irreparable harm (App. 198a–201a).

Respondents then moved in the court of appeals for the same relief, supported by the same declaration. While professing to express no opinion on the constitutional validity of DADT – and therefore bypassing any finding of respondents' likelihood of success on the merits – the court of appeals granted respondents' motion, over a partial dissent by Judge William Fletcher who would have allowed the district court's judgment to remain in effect insofar

as it enjoins the respondents from actually discharging any servicemember pursuant to DADT during the pendency of the appeal (App. 007a–008a).

This application seeks to vacate the court of appeals' stay order and reinstate the district court's judgment into full effect.

B. A stay of the district court's order is not a matter of right, and respondents failed to make the required showing for a stay.

A stay of injunction is "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 (1971) (Burger, C.J., in chambers) (denying stay of desegregation order). "'A stay is not a matter of right, even if irreparable injury might otherwise result.' It is instead 'an exercise of judicial discretion,' and … the party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken v. Holder*, ___ U.S. ___, 129 S. Ct. 1749, 1760-61 (2009) (citations omitted).

A stay of a district court judgment, including stay of injunction, pending appeal is governed by four factors: (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 (1987). These are the same four factors that must be shown by a party moving for a preliminary injunction, "because similar

concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *Nken*, *supra*, 129 S. Ct. at 1761. The moving party must show the existence of all four factors and must show not merely the "possibility" of irreparable injury absent a stay – "colorable allegations," as the court of appeals here phrased it (App. 005a-006a) – but the *likelihood* of irreparable injury. *Winter v. Natural Resources Defense Council*, 555 U.S. ___, 129 S. Ct. 365, 375 (2008) (rejecting the Ninth Circuit's earlier "possibility" standard). The Ninth Circuit ignored these requirements.

C. The court of appeals completely failed to balance the hardships, or to take into account at all the injury to applicant that a stay causes.

The most glaring omission from the court of appeals' order – and this flaw alone compels vacation of that order – is its lack of analysis of the harms to *both* parties that would follow from a stay of the district court's judgment.[3] The court of appeals' order relies entirely on respondents' assertions of the harm to the military that they claim would be caused by the lack of an "orderly transition" to a post-DADT world. Other than this asserted need for an orderly transition, respondents do not contend that an end to DADT would harm the military, and such a contention would contradict admissions by the nation's highest military leaders in any case. Regardless, the court of

[3] If, as here, the party requesting a stay fails to show irreparable injury from denial of a stay, likelihood of success on the merits need not even be considered and the stay is properly denied. *Ruckelshaus v. Monsanto,* 463 U.S. 1315, 1316-17 (1983), citing *Whalen v. Roe*, 423 U.S. 1313, 1316-17 (1975) (Marshall, J., in chambers); that is particularly the case when the granting of a stay might cause irreparable harm to the opposing party. *Monsanto* at 1317.

appeals did not even address, much less weigh in the balance, the nature of the injury to applicant and to homosexual American servicemembers that will result from the issuance of a stay.

Respondents' claim that the military will be harmed if the district court's injunction remains in place pending appeal is entirely based on the military's asserted need to prepare new policies, regulations, training, and guidance. *See* App. 002a-003a. But the district court's injunction does not require the military to take any affirmative measures: it does not order the military to redesign its barracks, to retool its pay scales or benefits, to re-ordain its chaplains, to rewrite its already extensive anti-harassment or "dignity and respect" rules, or anything else. Nor does it prevent the military from undertaking the acts respondents argued it must do if DADT is enjoined – revising policies, preparing educational and training materials, and the like.[4] The district court's injunction requires only one thing: to cease investigating and discharging servicemembers for reasons unrelated to their performance and military ability, including for exercising their freedom of thought, belief, expression, and certain intimate conduct.

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

[4] The injunction does not even prevent the military from warning current and prospective homosexual servicemembers that the current legal environment is uncertain, and letting them reach their own decisions whether to enlist or disclose their sexual orientation.

forces, or anything else that pertains to the important governmental interest that the military serves. As the district court recognized from the evidence at trial, homosexual men and women already serve today. They are deployed to theaters of combat when needed – indeed, retained overall in greater numbers during times of combat – even if they are openly homosexual. It is their discharge, not their presence, that impacts morale and good order. As the district court held, "[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." App. 071a. The evidence at trial "directly undermine[d] any contention that the Act furthers the Government's purpose of military readiness," App. 076a; and respondents 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." *See* App. 077a. The uncontroverted evidence at trial established that enjoining the enforcement of DADT, far from injuring respondents, will actually *improve* morale, readiness, cohesion, and overall military effectiveness.

The supposed "injury" to the military that the government claims would result from the district court's injunction is entirely to the military's institutional interests and its bureaucratic needs; and it is entirely temporary, lasting only until the "orderly transition" can be completed. This

is not "irreparable injury" of the type that must be shown for a stay. And the injury to applicant and to all American servicemembers from granting a stay is both immediate and truly irreparable.

If the court of appeals' stay order remains in place, the government will continue to investigate and discharge homosexual servicemembers under DADT.[5] Such investigations and discharges have been found to violate servicemembers' due process and First Amendment rights, and deprivation of constitutional rights is *ipso facto* irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). The Ninth Circuit's order does not address at all the issue of this constitutional injury to applicant and to homosexual servicemembers.

By contrast, maintaining the injunction in place pending appeal preserves servicemembers' constitutional rights. 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. But the ill effects to homosexual servicemembers of the stay – disruption and termination of their military careers, with merely the hollow satisfaction of abstract vindication when the district court's judgment is ultimately upheld – are irreparable. These individuals may not be reinstated, even if reinstatement could make

[5] DADT is that *rara avis*, a statute that goes beyond merely not protecting individuals against discrimination on some basis, but actually *mandates* discrimination on that basis.

them whole for the deprivation of constitutional rights they would have suffered. The concrete injury to them from an illegitimate 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 applicant.

Witnesses at trial – men and women, officers and enlisted personnel, from multiple branches of the service – presented powerful testimony of the effects of DADT on their personal lives, the lives of their unit comrades, and, most importantly, on the performance of their units. They are American heroes. 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 witnesses proved that DADT causes, *every day that it remains in force,* irreparable injury to American servicemembers. In a conflict between bureaucratic concerns and preventable human suffering caused by violation of constitutional rights, there can be no doubt which way the balance of hardships tips.[6]

[6] In this regard, four *amicus curiae* briefs were filed with the court of appeals, which described in great detail the harms to servicemembers and others, including to the public at large. The court of appeals did not address the *amicus* briefs, and failed to take the harms they demonstrated into the balance as well.

D. The court of appeals' order ignored both the uncontroverted evidence and controlling precedent to reach a result-oriented outcome.

The court of appeals reached its result-oriented outcome by ignoring the four-factor test that this Court has held must govern a stay order. Instead, it selectively invoked three concepts – the presumption of constitutionality accorded to acts of Congress, deference to military judgment, and inter-circuit comity – and issued a stay on the basis of those concepts. In doing so, the court of appeals conflated the success on the merits factor with the irreparable harm and substantial injury factors, but disregarded Log Cabin's evidentiary showing altogether, relied exclusively on the speculative evidence proffered by the government,[7] and paid only lip service to the required balancing analysis. Worse, the court of appeals failed even to mention *Lawrence v. Texas*, or its own decision in *Witt v. Air Force*.

1. A presumption of constitutionality does not trump a balancing of the equities.

First, the court of appeals took it as given that "Acts of Congress are presumptively constitutional," and gave that equity heavy weight in favor of respondents. App. 003a. But the court of appeals ignored the body of law holding that where the balance of equities weighs in favor of those who successfully challenge the constitutionality of a statute, a stay of an injunction against enforcement of that statute is unwarranted. *E.g.,*

[7] Speculation is insufficient support for a stay of a lower court order, for speculation cannot substitute for the evidence necessary to show irreparable harm. *Cf. Brewer v. Landrigan*, No. 10A416, 562 U.S. ___ (October 26, 2010) (vacating lower court's temporary restraining order that was based on speculation as to risk of harm).

Ruckelshaus v. Monsanto Co., 463 U.S. 1315, 1316-17 (1983) (Blackmun, J., in chambers) (denying stay of injunction against enforcement of certain provisions of FIFRA which respondent claimed constituted an unconstitutional taking of its property, and noting that the granting of a stay "might well cause irreparable harm to [respondent]").[8]

2. Deference to military judgment does not outweigh constitutional rights.

Second, the court of appeals accepted respondents' argument that deference to military judgment essentially forecloses judicial evaluation of military policies, ignoring both this Court's teachings and its own precedents which caution against blind deference to military judgment. App. 004a. As the district court correctly recognized throughout the proceedings below, the military is not immune to the demands of the Constitution. "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 (1994); and, as the Ninth Circuit itself recognized in this very context, "deference does not mean abdication." *Witt*, 527 F.3d at 821, *citing Rostker v. Goldberg*, 453 U.S. 57, 70 (1981). *See also Hamdi v. Rumsfeld*, 542 U.S. 507, 527, 533-34 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557, 588 (2006).

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[8] *See also Blum v. Caldwell*, 446 U.S. 1311, 1315-16 (1980) (Marshall, J., in chambers) (state statute) and additional cases cited in *Nken*, 129 S. Ct. at 1763-64 (Kennedy, J., concurring); *cf. Edwards v. Hope Medical Group*, 512 U.S. 1301 (1994) (Scalia, J., in chambers) ("The practice of the Justices has consistently been to grant a stay only when three conditions obtain. There must be a reasonable probability that certiorari will be granted, a significant possibility that the judgment below will be reversed, and a likelihood of irreparable harm (assuming the applicants' position is correct) if the judgment below is not stayed").

Congress cannot subvert the guarantees of the Constitution merely because it is legislating in the area of military affairs. While the doctrine of military deference may be an important consideration when the Ninth Circuit considers the merits of this case, the court of appeals abused its discretion by allowing that doctrine to control the decision whether to stay the district court's judgment here. This error is particularly egregious because respondents presented no evidence to support a finding that open service by gay and lesbian individuals harmed the military's interests, and because both civilian and military leaders admitted that DADT actually impairs military interests. Deference to military judgment here tips the scales against a stay, rather than in favor of one.

3. The court of appeals incorrectly ignored controlling law and claimed that an injunction would interfere with the pronouncements of other circuits.

Finally, the court of appeals based its issuance of a stay on the observation that the district court's judgment was "arguably at odds" with decisions of four other circuits outside the Ninth Circuit, and that therefore "principles of comity" require that courts in the Ninth Circuit should not grant relief that would interfere with the pronouncements of sister circuits (*see* App. 004a–005a).

The sister-circuit cases that the court referred to were *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). *Able*, *Richenberg*, and *Thomasson*, however, all predated this Court's decision in *Lawrence v. Texas*. Indeed, *Richenberg*, the only case that analyzed DADT under the Due Process Clause, expressly relied on the now-overruled *Bowers v. Hardwick*. 97 F.3d at 260-62. Moreover, *Able*, 528 F.3d at 635, *Richenberg*, 97 F.3d at 261, and *Thomasson*, 80 F.3d at 928-29, all relied on a distinction between homosexual *status* and the propensity to engage in homosexual *conduct*, a distinction this Court has since repudiated. "Our decisions have declined to distinguish between status and conduct" in the context of homosexuals because private consensual intimate conduct with members of the same sex is "closely correlated with being homosexual." *Christian Legal Society v. Martinez*, ___ U.S. ___, 130 S. Ct. 2971, 2990 (2010) (citing *Lawrence*).

The conclusion in these cases that DADT did not violate the Fifth Amendment therefore rested on outdated and repudiated constitutional analysis. And *Cook v. Gates*, a First Circuit decision, is not controlling in the Ninth Circuit and could not override the Ninth Circuit's own precedent. While *Cook v. Gates* was decided after *Lawrence*, it explicitly disagreed with *Witt*; moreover, *Cook* was decided on an appeal from a motion to dismiss, without the benefit of the extensive evidence that the district court here heard and considered at a full trial. *Cook*'s analysis is inconsistent with *Witt*'s; but the motions panel here, like the district court below it, was bound to follow *Witt* as the law of its circuit.

The court of appeals belittled applicant's position regarding these out-of-circuit cases by characterizing it as contending that the cases were merely "irrelevant" to the analysis. But applicant had shown that those cases are irrelevant because they are either bad law today, or, in the case of *Cook*, because they contradict existing, binding, in-circuit precedent. The Ninth Circuit ignored those defects. Its order does not discuss or even mention *Lawrence*; the motions panel completely ignored the impact of that case on the issue confronting it. Furthermore, and inexplicably, even while it cited these out-of-circuit cases, the Ninth Circuit nowhere even mentioned its own decision, *Witt v. Air Force*, and thereby failed to take account of the fact that the district court's judgment here was squarely in line with that controlling post-*Lawrence* Ninth Circuit precedent. The court of appeals' reliance on out-of-circuit cases, especially cases whose analytical underpinnings have been overruled, to the exclusion of controlling in-circuit precedent, to justify the stay here is another example of how the order is arbitrary and an abuse of discretion.

Moreover, comity is not a factor in determining whether a stay of injunction is appropriate, nor do mere considerations of comity permit the perpetuation of a denial of constitutional rights in the name of avoiding interference with judicial pronouncements. Whatever may be the merits of comity in the context of statutory construction – where, for example, our legal system tolerates differing rules in different circuits for issues of the law of

bankruptcy, securities, antitrust, tax, and the like – it can hold no sway on issues of constitutional rights.[9] An individual's constitutional rights must outweigh considerations of comity. Principles of comity did not justify the Ninth Circuit in acquiescing in other courts' erroneous failures to find that DADT violates the Constitution, particularly when the district court's decision was specifically based on the standard established in *Witt*, which controls in the Ninth Circuit. In effect, the Ninth Circuit motions panel here erroneously used respondents' motion to stay as a vehicle to ignore *Lawrence* and tacitly overrule *Witt* – a step it could not take.

E. At a minimum, discharges under DADT must be suspended.

The military's claimed need for an "orderly transition" to an end of DADT relies on an assumption that Congress will repeal the statute following a report by the Department of Defense due on December 1 of this year. But what the district court recognized, and the court of appeals did not, is that reliance on Congressional repeal is pure speculation.[10]

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[9] The only case on which the court of appeals rested its comity analysis, *United States v. AMC Entertainment, Inc.*, 549 F.3d 760 (9th Cir. 2008), was a statutory construction case involving Title III of the Americans With Disabilities Act (48 U.S.C. §§ 12181 *et seq.*), not a constitutional case.

[10] While the 2011 National Defense Authorization Act as passed by the House (H.R. 5136) includes repeal language, the bill was filibustered in the Senate and never reached a floor vote. No date is scheduled for another Senate vote, there is no assurance that there will not be another filibuster, and there is no assurance that the lame-duck Senate will pass the legislation, particularly given the results of Tuesday's election. Even if the legislation passes the Senate, it is still subject to reconciliation of the differing Senate and House versions of the bill and Presidential approval. Even then repeal of DADT is still conditional on multiple events, including a written certification, signed by the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff, that they have considered the military working group recommendations and proposed plan of action (which may not even

There is no reason an orderly transition cannot occur in connection with judicial action. This Court has not hesitated in the past to order that unconstitutional regimes be transitioned out of existence under judicial oversight, and not through an uncertain political process. *E.g., Brown v. Bd. of Educ.*, 349 U.S. 294, 298-301 (1955).

From the foregoing, it is apparent that the irreparable harm to applicant and to all homosexual American servicemembers from staying the district court's judgment sharply outweighs the speculative bureaucratic consequences to the military from implementation of that judgment. But even if an "orderly transition" is the touchstone, there is no reason the government should not be required to make a "prompt and reasonable start toward full compliance" and to complete the transition with "all deliberate speed." *See id.* at 300, 301. This is particularly so when the government's claimed harm is merely from too quick a transition, not from the eventual end of the transition itself.

Indeed, Judge Fletcher, dissenting from the stay order here, would have required a form of prompt and reasonable start to the orderly transition:

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recommend repeal); that the Defense Department has prepared necessary policies and regulations, and that the implementation of those policies and regulations is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces. All that is no small task, and repeal would not take place until 60 days after the last of all those events occurs; and the pending legislation also specifically provides that DADT "shall remain in effect" until these requirements and certifications are met and, if they are not met, DADT "shall remain in effect." It is completely unknown – respondents provided no evidence to either the district court or the court of appeals – whether or when any of these events may occur.

a moratorium on DADT discharges pending resolution of the appeal. Such a moratorium, implemented immediately under the oversight of the district court, would be consistent with the method approved in *Brown* and would protect, at least in part, the liberty interests to which all American servicemembers are entitled under *Lawrence*.

CONCLUSION

The Ninth Circuit's order staying the district court's judgment and injunction is unsupported by evidence, based entirely on speculation, and devoid of analysis of the factors governing a stay pending appeal and the important constitutional issues at stake. It altogether ignored applicant's showing of irreparable harm. This Court should vacate the stay and reinstate the district court's judgment in full force and effect.

November 5, 2010

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, counsel for Log Cabin Republicans certifies that Log Cabin Republicans is a not-for-profit corporation organized pursuant to the District of Columbia Nonprofit Corporation Act and section 501(c)(4) of the Internal Revenue Code. Log Cabin Republicans issues no stock and has no parent corporation. No publicly-held corporation owns ten percent or more of the stock of Log Cabin Republicans.