IN THE SUPREME COURT OF THE UNITED STATES

No. 10A-465

LOG CABIN REPUBLICANS, APPLICANT

v.

UNITED STATES, ET AL.

OPPOSITION TO THE APPLICATION
TO VACATE ORDER STAYING
JUDGMENT AND PERMANENT INJUNCTION

In this case, the United States District Court for the Central District of California entered a global injunction that permanently enjoins the government from enforcing 10 U.S.C. 654, the federal statute entitled, "Policy concerning homosexuality in the armed forces." As the court of appeals recognized, that global and permanent injunction -- which was entered at the behest of an organization that asserted standing based on two of its members -- causes the government the kind of irreparable injury that routinely forms the basis for a stay pending appeal. See, e.g., Bowen v. Kendrick, 483 U.S. 1304, 1305 (1987) (Rehnquist, C.J., in chambers). Having concluded that this case raises serious constitutional questions and that the balance of hardships tips strongly in the government's favor, the court of appeals properly granted such a stay. App. 3a-6a.

Applicant Log Cabin Republicans (Log Cabin) now asks this Court to reweigh the equities and substitute its own judgment for that of the court of appeals. This Court, however, will dissolve a stay entered by a court of appeals only "with the greatest of caution" and in "exceptional circumstances." CFTC v. British Am. Commodity Options Corp., 434 U.S. 1316, 1319 (1977) (Marshall, J., in chambers) (internal quotation marks omitted). This case does not present the sort of exceptional circumstances that would warrant interference with an interim order of the court of appeals. That court's stay simply preserves the status quo pending its consideration of the merits of this facial challenge to a federal statute governing military affairs that has been in force for 17 years. Moreover, the court of appeals properly held that the government was entitled to a stay pending appeal under settled legal principles. Indeed, in Department of Defense v. Meinhold, 510 U.S. 939 (1993), this Court granted a stay of a comparable worldwide injunction barring the enforcement of the regulations governing service by gays and lesbians in the military prior to the enactment of 10 U.S.C. 654. A fortiori, such a stay is warranted in this case, which involves the constitutionality of an Act of Congress. This Court should therefore deny the application to vacate the stay entered by the court of appeals.

STATEMENT

1. Section 654 of Title 10 of the United States Code provides for separation from military service if, pursuant to regulations, the military makes and approves a finding that 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, made and approved in accordance with procedures set forth in the regulations, 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). Military regulations provide that "[a] Service member's sexual orientation is considered a personal and private matter, and is not a bar to continued service * * * unless manifested by homosexual conduct" as specified by the regulations. DoD Ins. No. 1332.14 Encl. 3 ¶ 8.a.1 (Mar. 29, 2010); DoD Ins. No. 1332.30 Encl. 2 ¶ 3 (Mar. 29, 2010).

When Congress enacted 10 U.S.C. 654, it made several legislative findings. In particular, Congress found that the longstanding "prohibition against homosexual conduct * * * continues to be necessary in the unique circumstances of military service." 10 U.S.C. 654(a)(13). Congress also determined that "[t]he

presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. 654(a)(15); see 10 U.S.C. 654(a)(8) (finding that military life "is fundamentally different from civilian life" and "is characterized by * * * numerous restrictions on personal behavior" "that would not be acceptable in civilian society").

2. Log Cabin is a non-profit membership organization founded in 1977 that identifies its mission as "to work within the Republican Party to advocate equal rights for all Americans, including gays and lesbians." Mission Statement, Sept. 26, 2009, http://online.logcabin.org/about/mission.html. Log Cabin brought the present action in 2004, claiming that on their face Section 654 and its implementing regulations violate service members' free speech, substantive due process, and equal protection rights under the First and Fifth Amendments. Log Cabin sought declaratory and injunctive relief preventing further enforcement of Section 654. The district court denied the government's motion to dismiss the complaint for failure to state a claim upon which relief could be granted, see Fed. R. Civ. P. 12(b)(6), as well as the government's motion for summary judgment, see Fed. R. Civ. P. 56(a).

Following a bench trial, the district court held that Section 654 is facially unconstitutional under both the First and Fifth Amendments. App. 12a-97a. As a threshold matter, the court concluded that Log Cabin had demonstrated representational standing to challenge Section 654 on the basis of injuries that the statute allegedly had caused to two of Log Cabin's members. App. 15a-25a. Turning to Log Cabin's substantive due process challenge, the court held that Section 654 "constitutes an intrusion 'upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in Lawrence [v. Texas, 539 U.S. 558 (2003)], and is subject to heightened scrutiny.'" App. 60a (quoting Witt v. Department of the Air Force, 527 F.3d 806, 819 (9th Cir. 2008)). The court therefore required the government to show that Section 654 "advance[s] an important governmental interest, the intrusion * * * significantly further[s] that interest, and the intrusion [is] necessary to further that interest." Ibid. (quoting Witt, 527 F.3d at 819, and brackets omitted).

Under that standard of heightened scrutiny, the district court acknowledged the "important governmental interest" in military readiness and unit cohesion. App. 60a (quoting Witt, 527 F.3d at 821). The court held, however, that the statute "adversely affects the [g]overnment's interests in military readiness and unit cohesion." App. 68a; see App. 60a-77a. The court further held, contrary to Congress' determination, that Section 654 "is not

necessary to further the [g]overnment's interest in military readiness." App. 84a; see App. 77a-86a. The court also upheld Log Cabin's free speech challenge, concluding that Section 654 is an impermissible content-based restriction because it permits discharge based on a service member's admission that he or she is gay or lesbian. App. 86a-97a.

The district court therefore declared that Section 654 violates the free speech and substantive due process rights of current and prospective service members. App. 10a. The court then permanently enjoined the "United States of America and the Secretary of Defense, their agents, servants, officers, employees, and attorneys, and all persons acting in participation or concert with them or under their direction or command, from enforcing or applying" Section 654 and its implementing regulations "against any person under their jurisdiction or command." Ibid. The court further ordered the "United States of America and the Secretary of Defense immediately to suspend and discontinue any investigation, or discharge, separation, or other proceeding, that may have been commenced" under Section 654 and its implementing regulations. Ibid.

3. a. On October 14, 2010, the government moved in the district court for a stay pending appeal, as well as an administrative stay pending resolution of the government's stay motion. On

October 19, 2010, the district court denied the government's motion for a stay pending appeal.

b. On October 20, 2010, the government moved in the court of appeals for a stay pending appeal, as well as a temporary stay pending resolution of the government's stay motion. That same day, the court of appeals granted a temporary stay "in order to provide * * * an opportunity to consider fully the issues presented." App. 246a. To expedite consideration of the government's motion, the court of appeals ordered that Log Cabin file any response by October 25, 2010, and that the government not file any reply. Ibid. On October 25, 2010, Log Cabin filed a response in opposition to a stay pending appeal. App. 247a-292a. On November 1, 2010, the court of appeals granted the government's motion for a stay pending appeal. App. 1a.

A panel majority held that the government had satisfied the standard for a stay pending appeal, because the government's appeal raises serious legal questions; the declaration of a federal statute unconstitutional tips the balance of hardships in the government's favor; the deference traditionally afforded to legislative judgments about military policy counsels careful consideration of the appeal's merits; and the district court's decision is arguably at odds with the decisions of four courts of appeals. App. 3a-5a. The panel majority concluded that "the government's colorable allegations that the lack of an orderly

transition in policy will produce immediate harm and precipitous injury are convincing." App. 5a-6a. It further concluded that "the public interest in ensuring orderly change of this magnitude in the military -- if that is what is to happen -- strongly militates in favor of a stay." App. 6a. Judge Fletcher partially dissented. He agreed that the district court's order should be stayed, except "insofar as it enjoins [the government] from actually discharging anyone from the military." App. 7a.

ARGUMENT

Although this Court has the power to dissolve a stay entered by the court of appeals, "[its] cases make clear that this power should be exercised with the greatest of caution and should be reserved for exceptional circumstances." CFTC v. British Am. Commodity Options Corp., 434 U.S. 1316, 1319 (1977) (Marshall, J., in chambers) (internal quotation marks omitted); see Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas, 448 U.S. 1327, 1330 (1980) (Powell, J., in chambers) ("A Circuit Justice should not disturb, 'except upon the weightiest considerations, interim determinations of the Court of Appeals in matters pending before it.'") (quoting O'Rourke v. Levine, 80 S. Ct. 623, 624 (1960) (Harlan, J., in chambers)). This Court's reluctance to disturb an interim order of a court of appeals stems from the recognition that "when a court of appeals has not yet ruled on the merits of a controversy, the vacation of an interim order invades

the normal responsibility of that court to provide for the orderly disposition of cases on its docket." Id. at 1330-1331.

Log Cabin therefore bears a heavy burden before this Court. An applicant for vacatur of a stay pending appeal granted by a court of appeals ordinarily must demonstrate, first, "a reasonable probability that the case will eventually come before this Court for plenary consideration"; second, "a significant possibility that a majority of the Court eventually will agree with the District Court's decision"; and, third, "that the failure to vacate the stay probably will cause * * * irreparable harm" that outweighs the irreparable harm to the government from a vacatur of the stay. Certain Named and Unnamed Non-Citizen Children and Their Parents, 448 U.S. at 1330-1331; cf. British Am. Commodity Options Corp., 434 U.S. at 1320 (noting as one of the factors in whether to vacate a stay granted by the court of appeals "the balance of equities between the opposing parties") (internal quotation marks omitted).

Log Cabin does not even attempt to satisfy the first and second of those prongs. The district court's decision is unprecedented: it declares Section 654 facially unconstitutional and immediately enjoins its application anywhere in the Nation and indeed the world without any ability for the government to develop and implement an orderly transition in policy. Log Cabin does not attempt to show that if the court of appeals were to reverse the district court's decision, in accord with the decisions of four

other courts of appeals, there is a reasonable probability that the case would warrant this Court's plenary consideration, see Sup. Ct. R. 10(a), let alone a significant possibility that a majority of this Court would agree with the district court's decision. Log Cabin focuses entirely on the third prong, but its arguments essentially ask this Court to reweigh the equities in lieu of the court of appeals. That is precisely what this Court has routinely refused to do, and there is no reason for a different outcome in this case.

1. At the outset, Log Cabin misstates the applicable legal standard. Log Cabin recites (Appl. 8-9) the standard that applies to lower courts in deciding whether to grant a stay pending appeal. See, e.g., Hilton v. Braunskill, 481 U.S. 770, 776 (1987). But that is not the standard that is ordinarily applied in deciding whether to vacate a stay pending appeal. To vacate a stay pending appeal, Log Cabin must demonstrate "a reasonable probability that the case will eventually come before this Court for plenary consideration," "a significant possibility that a majority of the Court eventually will agree with the District Court's decision," and "that the failure to vacate the stay probably will cause [Log Cabin] irreparable harm" that outweighs the harms to the government from a vacatur of the stay. Certain Named and Unnamed Non-Citizen Children and Their Parents, 448 U.S. at 1330-1331. Log Cabin says

almost nothing about the first two of those factors. Those omissions alone warrant denial of its application.

a. Just as an applicant who requests a stay pending appeal from this Court must show a "reasonable probability" that four members of the Court would vote to grant certiorari if the court of appeals were to affirm the district court, see Packwood v. Senate Select Comm. on Ethics, 510 U.S. 1319, 1319 (1994) (Rehnquist, C.J., in chambers), an applicant who requests a vacatur of a stay pending appeal from this Court must show a reasonable probability that four members of the Court would vote to grant certiorari if the court of appeals were to reverse the district court. See Certain Named and Unnamed Non-Citizen Children and Their Parents, 448 U.S. at 1330 ("The well-established principles that guide a Circuit Justice in considering an application to stay a judgment entered below are equally applicable when considering an application to vacate a stay.").

Log Cabin does not attempt to make that showing. As the court of appeals noted in granting a stay, four other courts of appeals have upheld Section 654 against similar constitutional challenges. See App. 4a-5a; see also Cook v. Gates, 528 F.3d 42, 65 (1st Cir. 2008), cert. denied, 129 S. Ct. 2763 (2009); Able v. United States, 155 F.3d 628, 636 (2d Cir. 1998); Richenberg v. Perry, 97 F.3d 256, 262 (8th Cir. 1996), cert. denied, 522 U.S. 807 (1997); Thomasson v. Perry, 80 F.3d 915, 934 (4th Cir.) (en banc), cert. denied,

519 U.S. 948 (1996). Log Cabin contends (Appl. 16-18) that most of those cases have been undermined by this Court's decision in Lawrence v. Texas, 539 U.S. 558 (2003), but that contention misses the point. If the court of appeals were to reverse the judgment of the district court, its decision would not conflict with any decision of another court of appeals, and accordingly there is not a reasonable probability that the case would merit plenary consideration by this Court. This Court recently denied review after the First Circuit, post-Lawrence, upheld Section 654 against free speech, substantive due process, and equal protection challenges, see Cook, supra, and Log Cabin does not point to any reason why there would be a different outcome in this case.

b. Log Cabin also does not attempt to show that there is "a significant possibility that a majority of the Court eventually [would] agree with the District Court's decision." Certain Named and Unnamed Non-Citizen Children and Their Parents, 448 U.S. at 1330. The government argued in its stay motion to the court of appeals that the district court had committed four separate legal errors in finding that Log Cabin has representational standing, in sustaining Log Cabin's substantive due process and free speech challenges, and in granting military-wide relief to a single organizational plaintiff purporting to advance the interests of two individuals. App. 211a-220a. In its application to this Court, Log Cabin says virtually nothing about any of those issues.

Rather, Log Cabin focuses (Appl. 9-13, 19-21) on the harms to gay and lesbian service members, which it contends outweigh any harms to the government from a permanent injunction against enforcement of the statute.

On the threshold issue of standing, the government explained in its stay motion to the court of appeals why the district court had erred in finding that Log Cabin has representational standing. App. 211a-214a. Log Cabin has attempted to establish such standing based on alleged injuries to two of its members, John Nicholson and an unidentified John Doe. But neither of those members has standing to sue in his own right. App. 212a-213a. Nicholson was not a member of Log Cabin at the time that this suit was commenced, nor has he satisfied Log Cabin's criteria for membership since that time. App. 212a-213a. Doe also has not demonstrated that he was or has been a member of Log Cabin, nor has he alleged that he faces any realistic prospect of discharge under Section 654. App. 213a-214a. In any event, the point here is that Log Cabin does not even attempt to demonstrate that the district court should have reached the merits of Log Cabin's claims.

On the merits, it is well established that "'judicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies." Rumsfeld v. Forum for Academic & Institutional Rights, 547 U.S. 47, 58 (2006) (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1981)); Beller v. Middendorf,

632 F.2d 788, 810-811 (9th Cir. 1980) (Kennedy, J.) (upholding against constitutional challenge the prior, more restrictive regulations regarding gays and lesbians in the military), cert. denied, 452 U.S. 905, 454 U.S. 855 (1981). In the military context, a court must be "careful not to substitute [its] judgment of what is desirable for that of Congress, or [its] own evaluation of evidence for a reasonable evaluation by the Legislative Branch." Rostker, 453 U.S. at 68. As the First Circuit recently explained in upholding Section 654 against a similar constitutional challenge, the "detailed legislative record" that Congress assembled in enacting Section 654 "makes plain that Congress concluded, after considered deliberation, that the Act was necessary to preserve the military's effectiveness as a fighting force, 10 U.S.C. § 654(a)(15), and thus, to ensure national security." Cook, 528 F.3d at 60.

Rather than defer to Congress' judgment, the district court applied a heightened scrutiny standard based on the court of appeals' decision in Witt v. Department of the Air Force, 527 F.3d 806 (9th Cir. 2008), in contrast to other courts of appeals that have previously upheld Section 654. App. 60a. Log Cabin contends (Appl. 17) that this Court's decision in Lawrence requires that different result, but Lawrence did not involve a challenge to a federal noncriminal statute involving military service. Rather, this Court in Lawrence sustained a substantive due process

challenge to a state criminal statute that prohibited homosexual conduct among consenting civilian adults. 539 U.S. at 578. Lawrence therefore did not involve the judicial deference owed to congressional enactments regarding military affairs. The only court of appeals to rule on whether Section 654 is facially constitutional following Lawrence has upheld the statute on the basis of the deference traditionally afforded to the Legislative and Executive Branches in the military context. See Cook, 528 F.3d at 60; cf. Witt, 527 F.3d at 821-822 (holding that a heightened scrutiny standard governs as-applied challenges to discharges under Section 654, but remanding for application of that standard to the particular discharge at issue).

The government also explained in its stay motion to the court of appeals why the district court had erred in finding that Section 654 violates the First Amendment. App. 216a-217a. Section 654 simply creates a rebuttable presumption that an individual who identifies himself as gay or lesbian intends or has a propensity to engage in homosexual conduct (for which conduct the service member may be discharged). This Court has recognized that "[t]he First Amendment * * * does not prohibit the evidentiary use of speech * * * to prove motive or intent." Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993); Wayte v. United States, 470 U.S. 598, 611 (1985). For that reason, the courts of appeals have uniformly concluded that Section 654 does not violate the First Amendment.

See Able, 155 F.3d at 636 (citing Able v. United States, 88 F.3d 1280, 1296 (2d Cir. 1996)); Holmes v. California Army Nat'l Guard, 124 F.3d 1126, 1136 (9th Cir. 1997), cert. denied, 525 U.S. 1067 (1999); Richenberg, 97 F.3d at 262-263; Thomasson, 80 F.3d at 931-934. At the least, as the court of appeals concluded, the government's appeal presents "serious legal questions" warranting a stay. App. 3a.

On the scope of relief, even though this case is not a class action, the district court awarded what is in essence classwide relief. It immediately enjoined application of Section 654 to any member of the military anywhere in the world in a case brought by a single organizational plaintiff purporting to advance the interests of two individuals. In so doing, the district court neglected the principle that injunctive relief is an extraordinary remedy and "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Califano v. Yamasaki, 442 U.S. 682, 702 (1979); see Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2760 (2010) (narrowing injunction in part because the plaintiffs "do not represent a class, so they could not seek to enjoin such an order on the ground that it might cause harm to other parties"); Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) ("[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plain-

tiffs.”). The breadth of the district court’s injunction provides yet another reason why Log Cabin is not entitled to the extraordinary relief of a vacatur of the court of appeals’ stay pending appeal.

2. Log Cabin discusses (Appl. 9-13, 19-21) at length the harms to service members that, in its view, the court of appeals ignored. But Justices of this Court have recognized that “interference with an interim order of a court of appeals cannot be justified solely because [a Circuit Justice] disagrees about the harm a party may suffer.” Doe v. Gonzales, 546 U.S. 1301, 1308 (Ginsburg, J., in chambers) (quoting Certain Named and Unnamed Non-Citizen Children and Their Parents, 448 U.S. at 1330-1331). Log Cabin essentially asks this Court to reweigh the harms to the parties and substitute its judgment for that of the court of appeals. That is precisely what this Court has repeatedly refused to do. See Certain Named and Unnamed Non-Citizen Children and Their Parents, 448 U.S. at 1331 (observing that an applicant for vacatur of a stay “bear[s] an augmented burden” of showing irreparable harm).

a. In any event, Log Cabin is simply incorrect (Appl. 9) that the court of appeals failed to balance the hardships to the parties caused by the district court’s injunction. To the contrary, the court of appeals faithfully applied this Court’s precedents in this area. Invalidation of an Act of Congress causes

the government irreparable injury, which is an equity to be weighed heavily in the government's favor in balancing hardships. See, e.g., United States v. Comstock, No. 08A863 (Apr. 3, 2009) (order of Roberts, C.J.) ("The presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of applicants in balancing hardships.") (quoting Walters v. National Ass'n of Radiation Survivors, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers)); Doe v. Gonzales, 546 U.S. at 1308-1309 ("[W]eighing in favor of keeping the stay in effect pending the full airing the Second Circuit has ordered, the District Court held unconstitutional * * * a provision of an Act of Congress. A decision of that moment warrants cautious review."); cf. New Motor Vehicle Bd. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (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.").

Because of this well-recognized harm, "[i]t has been the unvarying practice of this Court * * * to note probable jurisdiction and decide on the merits all cases in which a single district judge declares an Act of Congress unconstitutional. In virtually all of these cases the Court has also granted a stay if requested to do so by the Government." Bowen v. Kendrick, 483 U.S.

1304, 1304 (1987) (Rehnquist, C.J., in chambers); see Turner Broad. Sys., Inc. v. FCC, 507 U.S. 1301, 1302 (1993) (Rehnquist, J., in chambers) (observing that an Act of Congress is "presumptively constitutional" and, "[a]s such, it 'should remain in effect pending a final decision on the merits by this Court'") (quoting Marshall v. Barlow's, Inc., 429 U.S. 1347, 1348 (1977) (Rehnquist, J., in chambers)).

Far from ignoring the balance of hardships to the parties, the court of appeals merely applied this Court's settled case law. The court of appeals recognized that "Acts of Congress are presumptively constitutional, creating an equity in favor of the government when balancing the hardships in a request for a stay pending appeal." App. 3a. For that proposition, the court of appeals cited Chief Justice Rehnquist's in-chambers opinion in Bowen. Ibid. In other words, the court of appeals simply followed this Court's practice of granting a stay pending appeal when a district court declares an Act of Congress unconstitutional, because the irreparable injury to the government from its inability to enforce a federal statute tips the balance of hardships in the government's favor. Indeed, Log Cabin does not point to a single instance in which this Court has vacated a court of appeals' stay pending appeal when a district court has declared an Act of Congress unconstitutional.

Log Cabin contends that failure to vacate the stay would operate to deprive service members of their constitutional rights, and the "deprivation of constitutional rights is ipso facto irreparable injury." Appl. 12; see Appl. 12-13. But that argument would be available to any plaintiff who successfully challenged the constitutionality of a federal statute in district court. The reason that this Court routinely grants the government's request for a stay pending appeal in such circumstances is that Acts of Congress are "presumptively constitutional," which in turn presumptively tips the balance of hardships in the government's favor. App. 3a. Log Cabin's argument effectively reverses that presumption: in Log Cabin's view, its success in obtaining declaratory and injunctive relief on constitutional grounds militates against a stay. This Court's precedents do not support such a claim.

For largely the same reasons, Log Cabin unfairly faults the court of appeals for holding that "a presumption of constitutionality * * * trump[s] a balancing of the equities," that "[d]eference to military judgment * * * outweigh[s] constitutional rights," or that "an injunction would interfere with the pronouncements of other circuits." Appl. 14, 15, 16 (emphasis omitted). What the court of appeals actually held is that, in the face of decisions from four sister circuits upholding Section 654 against similar constitutional challenges, the district court's

immediate nationwide injunction threatened to undo a longstanding military policy in a way that was at odds with the weight of judicial precedent and that would preclude an orderly transition in policy. The court of appeals thus recognized that important interests counseled in favor of a stay pending that court's consideration of the merits of the government's appeal. App. 5a.

Moreover, although the district court's declaration of unconstitutionality alone would normally be sufficient grounds for a stay pending appeal, the court of appeals recognized that the need for a stay was particularly acute in this context, because a precipitous implementation of the district court's ruling could result in immediate and irreparable harm to the military. See pp. 22-24, infra. Contrary to Log Cabin's assertion (Appl. 15-16), the court of appeals did not ignore service members' constitutional rights. Rather, it found that, on balance and taking into account those putative rights, the hardships still tipped in the government's favor. App. 4a ("These principles do not mean, of course, that the individual rights guaranteed by our Constitution have no place in this calculus, but they do counsel careful consideration before final judgment."). The court of appeals therefore "simply suspend[ed] judicial alteration of the status quo," pending that court's consideration of the government's appeal. Nken v. Holder, 129 S. Ct. 1749, 1758 (2009) (quotation marks omitted).

b. Log Cabin is thus incorrect in asserting (Appl. 9) that the only harm to the government from the district court's injunction is the government's need for an orderly repeal of Section 654. Log Cabin overlooks, as the court of appeals did not, the independent and irreparable harm that flows from striking down an Act of Congress. But to be sure, a stay was appropriate for the additional reason that the district court's injunction is a court-ordered precipitous change in the military's longstanding policy regarding gay and lesbian service members, pursuant to an Act of Congress that has been in force for 17 years and that has been sustained against constitutional challenge by four courts of appeals. The district court's injunction operates immediately and directly on all government personnel throughout the world, without the requisite training and preparation that is essential to the orderly and successful implementation of any repeal; the district court did not simply review and set aside final decisions rendered in military proceedings. The sweeping nature of the injunction constitutes an extraordinary and unwarranted intrusion into internal military affairs, see Schlesinger v. Councilman, 420 U.S. 738, 756-758 (1975), and the court of appeals correctly concluded "that the government's colorable allegations that the lack of an orderly transition in policy will produce immediate harm and precipitous injury are convincing," App. 5a-6a.

Moreover, the injunction would short-circuit the Executive Branch's review process. Log Cabin correctly notes (Appl. 6) that the President supports repeal of Section 654, a position shared by the Secretary of Defense and the Chairman of the Joint Chiefs of Staff. But although the President and the Secretary of Defense have called for legislative repeal of the statute, they also have expressed the considered judgment that repeal should not occur without deliberation, advance planning and training. The Department of Defense Comprehensive Review Working Group, established by the Secretary of Defense in March 2010, is currently undertaking a comprehensive study of the issues implicated by a repeal of Section 654. App., infra, 3a. The Working Group is scheduled to provide its report and plan of action to the Secretary of Defense by December 1, 2010. Id. at 4a.

Log Cabin relies (Appl. 11, 16) heavily on the fact that the President and military leaders have publicly supported repeal of the law. But repeal of an Act of Congress by Congress itself -- followed by an orderly and comprehensive transition as may be provided for by Congress, the President as the Commander-in-Chief, and those under the President's direction -- is wholly different from a judicial invalidation of the Act and a judicial command that operates directly and immediately on military and civilian personnel worldwide. Moreover, Log Cabin ignores that all of those officials have publicly stated that repeal should not occur before

a thorough and deliberate assessment of how best to accomplish a successful transition in policy. App., infra, 2a-3a. Legislative proposals to repeal the statute likewise have recognized the need for careful planning. Id. at 3a.

As the government explained to the court of appeals, the Working Group has visited numerous military installations across the country and overseas, where it has interacted with tens of thousands of service members on this issue. It has also conducted an extensive survey of approximately 400,000 service members. App., infra, 4a. The Working Group's review will result in recommended changes to Department regulations and policies that would be necessary to implement an orderly and successful repeal of the statute. Id. at 4a-5a. The Working Group is also developing guidance to properly train military commanders and service members with respect to any change in policy. Id. at 5a. Without sufficient time for such training and guidance, an immediate court-ordered repeal of the statute would risk disruption to military commanders and service members as they carry out their missions, especially in zones of active combat. Id. at 6a. There is thus nothing "exceptional" in the court of appeals' conclusion that a momentous change in military policy should not occur overnight as the result of a global judicial decree. British Am. Commodity Options Corp., 434 U.S. at 1319 (observing that this Court will

dissolve a stay entered by a court of appeals only "with the greatest of caution" and in "exceptional circumstances").

Indeed, under this Court's precedents, it was entirely appropriate for the court of appeals to defer to the considered judgment of senior military leaders that any change in policy must be done in an orderly and careful manner in order to be successful. See App. 4a ("Courts are ill-suited to second-guess military judgments that bear upon military capability and readiness.") (quoting Able, 155 F.3d at 634); see also Winter v. NRDC, 129 S. Ct. 365, 377 (2008) (Because "complex, subtle, and professional decisions as to the composition * * * of a military force" are "essentially professional military judgments," courts "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.") (quoting Gilligan v. Morgan, 413 U.S. 1, 10 (1973)); Orloff v. Willoughby, 345 U.S. 83, 93 (1953) ("[J]udges are not given the task of running the Army."). The court of appeals properly concluded "that the public interest in ensuring orderly change of this magnitude in the military -- if that is what is to happen -- strongly militates in favor of a stay." App. 6a.

3. Log Cabin does not discuss the worldwide and categorical nature of the district court's injunction, but the breadth of that injunction severely exacerbated the harm that would have resulted without a stay pending appeal.

a. This Court recognized essentially that point, even before the enactment of 10 U.S.C. 654, when it stayed a similar military-wide injunction entered by a district court in a facial constitutional challenge to the prior, more restrictive regulations regarding gays and lesbians in the military. See Meinhold, 510 U.S. at 939 (issuing a stay pending appeal of the portion of an injunction that "grant[ed] relief to persons other than [the named plaintiff]"). A fortiori, such a stay was warranted in this case, which involves the constitutionality of an Act of Congress. Moreover, in Meinhold the Court cited Heckler v. Lopez, 463 U.S. 1328 (1983) (Rehnquist, J., in chambers), which granted a stay pending appeal of an injunction entered by a district court in litigation concerning the payment of Social Security benefits. Id. at 1328-1329. As in Heckler, the district court in this case entered a mandatory injunction that "significantly interfere[d]" with the enforcement of a federal statute and a stay pending appeal was therefore appropriate. Id. at 1331.

The injunction's worldwide scope also unnecessarily interfered with the development of the law in other circuits. This Court has made clear that "the [g]overnment is not in a position identical to that of a private litigant, both because of the geographical breadth of government litigation and also, most importantly, because of the nature of the issues the [g]overnment litigates." United States v. Mendoza, 464 U.S. 154, 159 (1984) (citation

omitted). Had the court of appeals not entered a stay, the scope of the injunction effectively would have "impos[ed] [the district court's] view of the law on all the other circuits," including circuits in which constitutional challenges to the law have been rejected, and it would have precluded consideration of similar issues by other courts. Virginia Soc'y for Human Life, Inc. v. FEC, 263 F.3d 379, 394 (4th Cir. 2001) (relying on Mendoza to limit an injunction in a facial constitutional challenge to a Federal Election Commission regulation).

b. Finally, Log Cabin contends (Appl. 19-21) that this Court should partially lift the court of appeals' stay to enjoin the discharge of any service member pursuant to Section 654. But as the panel majority recognized, that exception would be "inconsistent with the stay itself." App. 6a. Section 654 and its implementing regulations are presumptively constitutional in their entirety, and there is thus no principled basis for leaving in place regulations and policies that the Armed Forces would not be permitted to implement or enforce.

Moreover, the Secretary of Defense has recently ordered that, "effective immediately and until further notice, no military member shall be separated pursuant to [Section] 654 without the personal approval of the Secretary of the Military Department concerned, in coordination with the Under Secretary of Defense for Personnel and Readiness and the General Counsel of the Department of Defense.

These functions may not be delegated." Mem. from the Sec. of Defense (Oct. 21, 2010). In light of the Secretary's directive, discharges of service members may occur only with the approval of officials at the highest level of the Department of Defense. Log Cabin has not sufficiently alleged that any of its members faced an imminent prospect of discharge under the former procedure, let alone under this new procedure.

In any event, a partial stay would only inject further confusion and uncertainty into this context. The panel majority noted that a partial stay "would be subject to the vagaries of the rule of unintended consequences," including that affected service members would be "in a precarious position" because "the government could resume discharges if the district court judgment is reversed." App. 6a. Although Log Cabin mentions (Appl. 10 n.4) that possibility, it does not explain what should happen in its view to gay and lesbian service members who reveal their sexual orientation, if the district court's judgment is reversed and its injunction is lifted. Rather than attempt to answer that difficult question, the court of appeals reasonably decided to stay the district court's injunction in its entirety, pending consideration of the merits of the government's appeal.

That decision does not remotely present the sort of exceptional circumstances that would warrant interference with an interim order of the court of appeals. To the contrary, the court

of appeals' stay comports with this Court's well-settled precedents, permits the continued nationwide operation of an Act of Congress that has governed in the military for 17 years, and preserves the status quo pending the court of appeals' consideration of the merits of this facial challenge to that federal statute. See, e.g., Meinhold, 510 U.S. at 939; Bowen, 483 U.S. at 1305. Accordingly, this Court should deny Log Cabin's application to vacate the stay.

CONCLUSION

The application to vacate the court of appeals' order staying the district court's judgment and permanent injunction should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

NOVEMBER 2010

DECLARATION OF CLIFFORD L. STANLEY

I, Clifford L. Stanley, declare as follows:

1. I am currently Under Secretary of Defense for Personnel and Readiness. I am the senior policy advisor to the Secretary of Defense on recruitment, career development, pay, and benefits for the 1.4 million active-duty military personnel, 1.3 million Guard and Reserve personnel, and 680,000 DoD civilian employees. I am responsible for overseeing the overall state of military readiness. I was nominated for this position by the President on October 15, 2009, and was confirmed by the Senate on February 9, 2010.

2. One of the offices under my authority, direction, and control is the Office of Officer and Enlisted Personnel Management. That office is responsible for most Department of Defense Issuances, including DoD Directives and Instructions, governing personnel policy for the military. The implementation of the "Don't Ask, Don't Tell" statute (DADT), 10 U.S.C. § 654, involves many aspects of such personnel policy. The Department implements § 654 primarily through three DoD Instructions for which I am responsible, and regulates dozens of related issues through other regulations, policies and guidances.

3. Primary responsibility for the policy oversight of the implementation of a repeal of DADT (or compliance with an injunction of similar effect) would reside with the Office of Officer and Enlisted Personnel Management.

4. I am also a member of the Executive Committee of the Comprehensive Review Working Group that is charged with assessing the impact of a repeal of § 654 and, should a repeal occur, developing a plan to support the implementation of repeal. In this capacity, I participate in regular meetings with the co-chairs of the Working Group and other members of the Executive Committee, at which we discuss the Working Group's activities and progress.

5. I served for 33 years in the U.S. Marine Corps and retired as a Major General in 2002.

6. I am aware of the Court's decision in this case that § 654 and the Department's associated regulations violate the First and Fifth Amendments of the Constitution. In this declaration I will not address the merits of the Court's decision. I submit this declaration to make the following point: the Government intends to appeal the Court's decision. During the pendency of that appeal, the military should not be required to suddenly and immediately restructure a major personnel policy that has been in place for years, particularly during a time when the Nation is involved in combat operations overseas. The magnitude of repealing the DADT law and policy is demonstrated by the Department's ongoing efforts to study the implications of repealing DADT, which I outline in detail below.

7. Further, an injunction before the appeal in this case has run its course will place gay and lesbian servicemembers in a position of grave uncertainty. If the Court's decision were later reversed, the military would be faced with the question of whether to discharge any servicemembers who have revealed their sexual orientation in reliance on this Court's decision and injunction. Such an injunction therefore should not be entered before appellate review has been completed.

8. As demonstrated below, in the event DADT is no longer in effect, an injunction with immediate and worldwide effect will have adverse effects on both military readiness and the Department's ability to effect a smooth and lasting transition to a policy that accommodates the presence of openly gay and lesbian servicemembers. The stakes here are so high, and the potential harm so great, that caution is in order.

Ongoing Efforts to Implement the Views of the Legislative Branch and Key Executive Branch Officials

9. The President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff have all announced their support for a repeal of the DADT statute. Nevertheless, while expressing support for repeal, these officials have also

expressed their firm belief that, to be successful, implementation of a repeal of the statute must be done in a comprehensive and orderly manner.

10. The President, who called for repeal of the statute during his 2010 State of the Union address, has said as recently as last month that implementation of repeal must be done in "an orderly way." (See Ex. A.) The Chairman of the Joint Chiefs of Staff testified before the Senate Armed Services Committee on February 2, 2010, that "any implementation plan for a policy permitting gays and lesbians to serve openly in the armed forces must be carefully derived, sufficiently thorough, and thoughtfully executed." (See Ex. B.)

11. In support of the effort to repeal the DADT statute, but also recognizing that a repeal could not be successfully implemented in a precipitous manner, the Secretary of Defense on March 2, 2010, established the Department of Defense Comprehensive Review Working Group and designated Jeh C. Johnson, the Department's General Counsel, and General Carter F. Ham, Commanding General, U.S. Army Europe, as Co-Chairs of the Working Group.

12. The Secretary of Defense's memorandum establishing the Working Group, emphasized that "[t]o be successful [in implementing repeal], we must understand all issues and potential impacts associated with repeal of the law and how to manage implementation [of repeal] in a way that minimizes disruption to a force engaged in combat operations and other demanding military activities around the globe." (See Ex. C.)

13. Congressional proposals to repeal DADT have also recognized the need for careful planning. The House of Representatives has passed, and the Senate Armed Services Committee has approved, a bill that would allow the repeal of the DADT statute. But even that proposed legislation does not provide for the immediate repeal of the statute. Under the proposed legislation, repeal would not take effect until 60 days after a certification by the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff that they have considered the recommendations contained in the Working Group's report; that the Department of

Defense has prepared the necessary policies and regulations to implement repeal; 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.

The Ongoing Efforts of the DoD Comprehensive Review Working Group

14. The Secretary of Defense has directed the Working Group to provide "an assessment of the implications" of repeal and "an implementation plan for any new statutory mandate." The Working Group's report and plan of action are due to the Secretary of Defense no later than December 1, 2010.

15. Thus far, as directed by the Secretary of Defense, the Working Group has made extensive efforts to solicit the views of servicemembers and their families regarding potential issues associated with repeal. The Secretary of Defense has emphasized that he believes that members of the military must be afforded the opportunity to inform us of their concerns, insights, and suggestions if we are to carry out such a change successfully. Among other things, the Working Group has conducted visits to numerous military installations across the country and overseas, where they have interacted with tens of thousands of servicemembers on this issue. The Working Group has also conducted an extensive, professionally developed survey that was distributed to a representative sample of approximately 400,000 servicemembers.

16. An immediate, court-ordered cessation of enforcement of the policy would force the military to implement a change without awaiting the analysis of the data that has been gathered, and without attempting to take account of the results. A court-ordered injunction would thus undermine the credibility and validity of the entire process, and make transition to a new policy far more difficult and more likely to impair unit cohesion, good order, discipline, and military readiness.

17. Additionally, the Working Group is undertaking a comprehensive legal and policy review of the issues implicated by repeal of DADT. The result of

the legal and policy review will be recommended changes to DoD regulations and policies to address the issues associated with repeal and to mitigate any potentially negative impacts repeal may have.

18. The Working Group is also developing tools for leadership to educate and train the force in the event of repeal. The Secretary of Defense has emphasized that "strong, engaged, and informed leadership will be required at every level to properly and effectively implement" such a change. (See Ex. C.)

19. The Working Group is in the midst of its efforts and is on track to provide its report and plan of action to the Secretary of Defense by December 1, 2010. December 1 is by no means, however, the date on which the Department may be prepared to implement a change to DADT in the event the DADT law is repealed or eliminated. Additional steps that must occur after December 1 include review, assessment, and approval of the Working Groups' report and recommendations by the leadership of the Army, Navy, Air Force, and Marines; the Secretary of Defense; and by the Chairman of the Joint Chiefs of Staff. Changing the policy will also require the writing of new policies and regulations by the relevant components within DoD and the Services based on those recommendations; and the conducting of education and training programs for servicemembers and commanders. These items cannot be fully developed for implementation until the Working Group's recommendations are presented to the Secretary of Defense, and the Secretary makes decisions about those recommendations. It is not possible to determine now, prior to the report's completion, precisely how long that process will take, but this entire process will likely take some number of months.

20. As the Secretary of Defense recognized when convening the Working Group, months of planning are necessary before the Department can implement the orderly elimination of DADT without creating risk to the operation of the military in the midst of ongoing conflicts.

The Effect of Immediate Invalidation

21. Requiring the Department to cease all enforcement of DADT, immediately and worldwide, will cause significant disruptions to the force in the short term and, in the long term, would likely undermine the effectiveness of any transition to accepting open service by gays and lesbians in the event the law is repealed or eliminated.

22. In the short term, there will be an immediate need to train and educate the force about the change to DADT and other policies, and to revise dozens of regulations and policies.

23. For the tens of thousands of servicemembers serving in theaters of active conflict, there will be a tension between the requirement that the policy change take effect immediately and the need to avoid interference with ongoing operations. The exigencies of combat and other operations thus may delay the Department's ability to educate the forward-deployed servicemembers about a court-ordered change in policy.

24. This is problematic because education and training will be essential to the implementation of any change in the DADT law and policy. It will be difficult, if not impossible, to provide timely education to forces engaged in combat operations. The Secretary of Defense specifically cited the need to avoid interfering with combat operations when charging the Working Group with developing a plan for implementing repeal of the DADT policy; the same concern applies to the judicial invalidation of the statute.

25. Even for the hundreds of thousands of servicemembers not serving in forward-deployed areas, training and education will be essential to inform servicemembers of what is expected of them in this new environment. These training programs cannot be provided instantaneously.

26. Invalidation of the DADT statute implicates dozens of DoD and Service policies and regulations that cover such disparate issues as housing, benefits, re-accession, military equal opportunity, anti-harassment, standards of

conduct, rights and obligations of the Chaplain corps, and others. Amending these regulations would typically take several months. To change all of the implicated policies and underlying regulations will require a massive undertaking by the Department and cannot be done overnight.

27. The issues described above are not merely hypothetical: they have been repeatedly raised by servicemembers and senior military leaders during the Working Group's engagement of the force.

Training and Education are Critical to Success

28. A number of servicemembers have expressed concerns about, or opposition to, the repeal of DADT and its replacement with a policy that would permit gays and lesbians to serve openly. One of the purposes of the Working Group is to understand these concerns and to develop an implementation approach that adequately addresses them, through changes to policy where necessary and, more importantly, through education and training of the force. An immediate injunction would curtail the Working Group process and would send a very damaging message to our men and women in uniform that their views, concerns, and perspectives do not matter on an issue with a direct impact on their lives. This message would undermine the morale of the force – and not just among those servicemembers who oppose repeal, but of all servicemembers who have informed the Department of their concerns, insights, and suggestions.

29. Overall, an abrupt change - without adequate planning or time to implement a plan - substantially increases the probability of failure or backlash in the early months of this transition, months that will be critical to our long-term success.

30. It is important to keep in mind that thousands of military personnel have enforced the DADT policy for many years. Any change to the policy will require that these personnel receive training and instruction in a number of areas, including: (i) how the policy has changed; (ii) why the policy has changed; (iii) how the change in this policy affects other existing policies; (iv) appropriate

treatment of gay and lesbian servicemembers who reveal their sexual orientation; (v) appropriate treatment of servicemembers who object to serving with servicemembers they know to be gay or lesbian; and (vi) principles to consider when handling other issues that may arise the elimination of the DADT policy. Thus, it is not simply a matter of saying that a particular statute shall no longer be enforced.

31. The need to educate and train the force will require the Department to develop and give to commanders the tools necessary for this education and training. Developing such tools, although already underway, and communicating them effectively, will take time and effort to complete and implement once the Working Group recommendations are analyzed and final decisions are made. Again, this training will be particularly difficult to conduct in forward-deployed areas. Without this education and training, commanders in the field will not have the necessary guidance and will not be able to enforce the new regime in the consistent, even-handed manner that is essential to morale, discipline, and good order. Equally importantly, servicemembers must know what is expected of them in this new environment.

Lingering Uncertainty During Appeal

32. The military also should not be required to restructure military policy and law during the pendency of the Government's appeal. If the Court's judgment is overturned on appeal, and Congress has not since repealed the statute, the Department of Defense will be obligated by statute to reinstate DADT. Removing and then reinstating DADT will be extremely disruptive, as well as unduly costly and time-consuming, particularly at a time when this Nation is involved in combat operations overseas.

33. Enjoining the operation of the statute before any appeal is concluded, moreover, would place gay and lesbian servicemembers in a position of grave uncertainty. If the Court's decision were later reversed, the military would be faced with the question of whether to discharge any servicemembers who have

revealed their sexual orientation in reliance on this Court's decision and injunction. Such an injunction therefore should not be entered before appellate review has been completed.

The Importance of a Careful Transition

34. More challenging than determining the substance of the new policies and regulations, and devising the appropriate training, is that the need to comply with an immediate, worldwide injunction will necessitate devising solutions on-the-fly, rather than doing so after careful planning. The resulting *ad hoc* solutions will not be as effective as those that would come after careful consideration. Because of the difficulty of changing policies a second time, these imperfect *ad hoc* solutions likely will become permanent, potentially jeopardizing the long-term success of the transition.

35. The *ad hoc* implementation of policies and procedures likely would undermine morale, good order and discipline, and unit cohesion, interests cited by Congress in 10 U.S.C. § 654(a)(6). If the Department must devise and implement new policies on an *ad hoc* basis, morale will likely suffer as servicemembers and their families recognize that their responses to the Working Group surveys will be for naught. To proceed without evaluating those concerns, insights, and suggestions would send the damaging message that the concerns of military members do not matter on this issue that directly affects them and their families. Unit cohesion, good order, and discipline could suffer if the Department must implement this change without the time needed to develop education and training for the force.

36. Equally troubling is the potential harm to the long-term goal of a successful transition. If the DADT policy is eventually abolished, the military will only get one chance to implement the change. For a change of this magnitude, the initial stages are extraordinarily important to the long-term success of the project. That is one reason why the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff have emphasized the need for careful planning of this

transition. A poorly implemented transition will not only cause short-term disruption to military operations, but will also jeopardize the long-term success of the transition. Either outcome would irreparably harm our military and the national security of the United States.

Conclusion

37. A stay of the Court's injunction is necessary to permit the Working Group to finish its important work, and to allow the Department of Defense to formulate and implement the necessary policies, leadership guidance, and training to implement a change to DADT in as smooth and orderly fashion as possible, thereby maximizing the likelihood of a successful transition and minimizing any disruption to ongoing military operations.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 13th day of October, 2010.

CLIFFORD L. STANLEY