EMERGENCY MOTION UNDER CIRCUIT RULE 27-3

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOG CABIN REPUBLICANS Plaintiff-appellee, v. UNITED STATES, et al., Defendants-appellants.	No. 10-56634 [Civil Action No. 04-cv-08425 C.D. Cal.]

GOVERNMENT'S EMERGENCY MOTION FOR STAY PENDING APPEAL UNDER CIRCUIT RULE 27-3 AND FOR TEMPORARY ADMINISTRATIVE STAY

TONY WEST
Assistant Attorney General

ANDRÉ BIROTTE JR.
United States Attorney

ANTHONY J. STEINMEYER
(202) 514-3388
AUGUST E. FLENTJE
(202) 514-3309
HENRY WHITAKER
(202) 514-3180
Attorneys, Appellate Staff
Civil Division, Room 7256
Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530

CIRCUIT RULE 27-3 CERTIFICATE

(1) **Telephone numbers and addresses of the attorneys for the parties**

a. **Counsel for the Defendants/Appellants**

Anthony J. Steinmeyer (anthony.steinmeyer@usdoj.gov)
(202) 514-3388
August E. Flentje (august.flentje@usdoj.gov)
(202) 514-3309
Henry Whitaker (henry.whitaker@usdoj.gov)
(202) 514-3180
Attorneys, Civil Division, Appellate Staff
Department of Justice
950 Pennsylvania Ave., NW Room 7256
Washington, D.C. 20530

b. **Counsel for Plaintiff/Appellee**

Dan Woods (dwoods@whitecase.com)
(213) 620-7772
Earle Miller (emiller@whitecase.com)
(213) 620-7785
Aaron Kahn (aakahn@whitecase.com)
(213) 620-7751
White & Case LLP
633 West Fifth Street, Suite 1900
Los Angeles, CA 90071-2007

(2) **Facts Showing the Existence and Nature of the Emergency**

As set forth more fully below, on October 12, 2010, the district court entered a permanent injunction which enjoins, among other things, "enforcing or applying the 'Don't Ask, Don't Tell' Act [codified at 10 U.S.C. § 654] and implementing regulations, against any person" in the government. Inj. at 2 (Attachment A). As explained in more detail in our stay motion and the attached declaration, if not stayed

immediately, the district court's order precludes the administration of an Act of Congress and risks causing significant immediate harm to the military and its efforts to be prepared to implement an orderly repeal of the statute.

We respectfully request that the Court enter an administrative stay **by today October 20, 2010**, pending this Court's resolution of the government's motion for a stay pending appeal, which would maintain the status quo that prevailed before the district court's decision while the Court considers the government's stay motion.

(3) **When and How Counsel Notified**

Counsel for plaintiff were notified of this motion by telephone call to Earle Miller on October 18, 2010, and counsel indicated that plaintiff would oppose this motion. This motion is being electronically filed, and in addition a copy of this motion is being sent via electronic mail today to counsel for plaintiff.

(4) **Submission to District Court**

The government requested a stay pending appeal and an administrative stay from the district court in a motion filed on October 14, 2010. That motion was based on the same grounds set forth in this motion. The district court denied the motion on October 19, 2010. (Attachment B).

/s/Henry Whitaker
Henry C. Whitaker

INTRODUCTION AND SUMMARY

The government respectfully seeks an emergency stay pending appeal of the district court's injunction of October 12, 2010 (Attachment A). The district court's order permanently enjoins the government from "enforcing or applying the 'Don't Ask, Don't Tell' Act [codified at 10 U.S.C. § 654] and implementing regulations," which have been in effect since 1993 and set forth requirements respecting the service of gays and lesbians in the military, "against any person." Inj. at 2. The district court's permanent injunction, which extends well beyond the individuals plaintiff purported to represent before the district court and is applicable to any member of the military anywhere in the world, is at odds with basic principles of judicial restraint requiring courts to limit injunctive relief to the parties before the court, and is contrary to decisions of other courts, which have sustained the constitutionality of the statute.[1]

The district court's decision holding that an Act of Congress is invalid on its face and permanently enjoining enforcement of the statute anywhere in the world itself causes the government the kind of irreparable injury that is routinely the basis for stays pending appeal. *See Coalition for Economic Equality* v. *Wilson*, 122 F.3d 718,

---

[1]The Administration does not support § 654 as a matter of policy and strongly believes that Congress should repeal it. The Department of Justice in this case has followed its longstanding practice of defending the constitutionality of federal statutes as long as reasonable arguments can be made in support of their constitutionality.

719 (9th Cir. 1997) ("it is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined"); *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *see also Walters* v. *Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers). Because of this well-recognized harm, "[i]n 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, J., in chambers).

The worldwide injunction also threatens to disrupt the ongoing efforts to fashion and implement policies to effect any repeal of § 654 in an orderly fashion. The President strongly supports repeal of the statute that the district court has found unconstitutional, a position shared by the Secretary of Defense and the Chairman of the Joint Chiefs of Staff. Although the Administration has called for a repeal of the statute, it has made clear that repeal should not occur without needed deliberation, advance planning, and training. To that end, the Secretary of Defense established the Comprehensive Review Working Group, which is currently nearing completion of a comprehensive review of how best to implement a repeal of § 654. The Working Group has visited numerous military installations across the country and overseas, where it has 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. An abrupt, court-ordered end to the statute would pretermit the Working Group's efforts to ensure that the military completes development of the necessary policies and regulations for a successful and orderly implementation of any repeal of § 654. The significant impairment of the Department's efforts to devise an orderly end to the statute would cause irreparable harm.

We respectfully request that the Court stay the district court's order pending appeal and enter an immediate administrative stay while it considers whether to grant a stay pending disposition of the appeal. The government attempted to obtain this relief from the district court, which the court declined to grant. *See* Attachment B, Order denying government's motion for emergency stay.

STATEMENT

A. Title 10 U.S.C. § 654 provides for separation from the military if a member of the armed forces has (1) "engaged in, attempted to engage in, or solicited another to engage in a homosexual act"; (2) "stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding . . . that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts"; or (3) "married or attempted to marry a person known to be of the same biological sex." 10 U.S.C. § 654(b)(1)-(3).

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. 1332.14 Encl. 3 ¶8.a.1; DOD Ins. 1332.30 Encl. 2 ¶3.

B. Plaintiff Log Cabin Republicans is a non-profit membership organization founded in 1977. Plaintiff identifies its mission as "to work within the Republican Party to advocate equal rights for all Americans, including gays and lesbians." Mission Statement, *available at* http://online.logcabin.org/about/mission.html. Log Cabin Republicans brought this suit in 2004 claiming that § 654 and its implementing regulations violate substantive due process, equal protection, and the First Amendment. The district court denied the United States' motion to dismiss the suit and motion for summary judgment.

After holding a bench trial, the district court issued an opinion holding that the statute is unconstitutional on its face. As a threshold matter, the district court ruled that Log Cabin Republicans had demonstrated representational standing to challenge the statute on the basis of injuries the statute allegedly caused to two individuals that Log Cabin Republicans claimed as members. Op. 2-13 (Attachment C).

The district court then applied "heightened" scrutiny to plaintiff's substantive due process constitutional challenge, holding that the government must demonstrate that the statute "'advance[s] an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that

interest.'" Op. at 48 (quoting *Witt* v. *Department of Air Force*, 527 F.3d 806, 819 (9th Cir. 2008)). The court acknowledged the "important governmental interest" in military readiness and unit cohesion, *id.*, but held the statute unconstitutional because it found, based on evidence submitted at trial rather than evidence before Congress, that the statute "adversely affects the Government's interests in military readiness and unit cohesion." Op. at 56; *see* Op. at 48-65. The district court also held the statute facially unconstitutional under the First Amendment, concluding that it was a content-based restriction on speech because it permits discharge based on an admission that an individual is gay or lesbian. Op. at 79-80.

The court then permanently enjoined the United States and the Secretary of Defense, as well as their agents, servants, officers, employees, attorneys, and all persons acting in participation or concert with them or under their direction or command, "from enforcing or applying" § 654 "and implementing regulations, against any person under their jurisdiction or command." Inj. at 2. The court also ordered the government "immediately to suspend and discontinue any investigation, or discharge, separation, or other proceeding, that may have been commenced under the" statute and its implementing regulations. *Id.*

ARGUMENT

This Court considers four factors in determining whether to grant a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is

likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Golden Gate Restaurant Ass'n* v. *City and County of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008) (quoting *Hilton* v. *Braunskill*, 481 U.S. 770, 776 (1987)). The Court has further explained the relationship between these factors by grouping them into "'two interrelated legal tests' that 'represent the outer reaches of a single continuum.'" *Id.* (quoting *Lopez* v. *Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983)). "'At one end of the continuum, the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury. . . . At the other end of the continuum, the moving party must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor.'" *Id.* (quoting *Lopez*, 713 F.2d at 1435). A stay is required under either formulation.

I. The District Court's Worldwide Injunction Should Be Reversed

The district court has declared 10 U.S.C. § 654 unconstitutional and entered a permanent injunction immediately preventing the government from enforcing the statute against any servicemember anywhere in the world. That extraordinary decision should be reversed on several independent grounds.

A. The district court erred at the threshold in concluding that Log Cabin Republicans has standing. Log Cabin claimed no injury to itself, but instead

attempted to establish standing based on alleged injuries to two of its members, which is a basis for representational standing by an organization only if those members "would otherwise have standing to sue in their own right." *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

1. There was no dispute that the one named member of the organization that Log Cabin offered in support of its standing to bring suit – John Nicholson, a former member of the military who was discharged under the statute – admitted that he was not a member of the Log Cabin Republicans when the organization commenced this lawsuit. Op. at 5. That should have been the end of the matter, because a plaintiff must have standing at all times during the litigation, including when the lawsuit was commenced. *See*, *e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Serv.*, 528 U.S. 167, 180 (2000); *Wilderness Society* v. *Rey*, 2010 WL 3665713, at *5 (9th Cir. Sept. 22, 2010) ("The existence of federal jurisdiction ordinarily depends on the facts as they exist *when the complaint is filed*"(emphasis added)); *Schreiber Foods, Inc.* v. *Beatrice Cheese, Inc.*, 402 F.3d 1198, 1202 n.3 (Fed. Cir. 2005).

The district court held that Log Cabin had standing because Nicholson became an "honorary member" of the organization while the litigation was pending. Op. at 7. But even if plaintiff's standing could be established by events occurring after the filing of the complaint, Log Cabin's membership is limited to dues-paying members who are Republicans. *See* dkt. 160 Ex. 8, at 2; 144 Ex. A, at 1-2. Nicholson paid no

dues to the organization during the period he claimed membership, *see* Op. at 5; Nicholson Dep. at 9:14-10:7, Mar. 15, 2010, Ex. 2, and admitted that he was not a Republican, Trial Tr. vol. 1, 1219, July 21, 2010.

2. The other person Log Cabin Republicans offered to establish standing was an anonymous individual currently serving in the military, "John Doe." Doe submitted a two-page declaration averring that he was gay and feared that he would be discharged under the statute. *See* Trial Ex. 38, at 2. Doe's declaration states that he "fear[s] that challenging the constitutionality of the" statute "will subject [him] to investigation and discharge pursuant to the" statute, Trial Ex. 38, at 2, but the declaration states no plan to violate the statute and does not suggest that Doe has been threatened with discharge. *See Stormans, Inc.* v. *Selecky*, 586 F.3d 1109, 1122 (9th Cir. 2009). Accordingly, Doe has not demonstrated the injury necessary to establish standing for a preenforcement challenge, especially in the military context. *See Schlesinger* v. *Councilman*, 420 U.S. 738, 756-58 (1975).

In any event, the only evidence plaintiff offered in support of Doe's standing was (1) a conclusory, two-page declaration submitted during the litigation representing that he is currently a member of the Log Cabin Republicans, Trial Ex. 38, and (2) the testimony of a member of its Board of Directors and former counsel to plaintiff in this very case – Martin Meekins – stating that Doe had been a member since September 2004 (the month immediately prior to the filing of this lawsuit). *See*

Op. at 9-10. But there was no evidence that Doe was a Republican, and the evidence showed that Doe had failed to keep up his membership dues. *See* Op. at 11.

B. The government has also shown a likelihood of success in its argument that the district court erred in ruling § 654 unconstitutional on its face.

1. 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)); *see Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973) (the "composition . . . of a military force [is] essentially [a] professional military judgment[], subject always to civilian control of the Legislative and Executive Branches"). 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 the statute against the same kind of facial constitutional challenge at issue in this case, the "detailed legislative record" that Congress assembled in enacting § 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* v. *Gates*, 528 F.3d 42, 60 (1st Cir. 2008). That conclusion is entitled to judicial deference.

2. Rather than defer to Congress's judgment, the district court applied a heightened form of scrutiny based on this Court's decision in *Witt* v. *Department of Air Force*, 527 F.3d 806 (9th Cir. 2008). In doing so, the district court conflated as-applied and facial constitutional analysis. Log Cabin Republicans claims that the Act is facially unconstitutional, and "[a] plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications," *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)). In contrast, an as-applied challenge involves showing that the statute has been misapplied to the particular plaintiff.

Witt refused to defer to Congress's enactment based on the claim that the statute was unconstitutionally *applied* to the plaintiff in that case. *See* 527 F.3d at 819-20 & n.9. In so holding, *Witt* overruled in part the Court's prior decision in *Beller* v. *Middendorf*, 632 F.2d 788 (9th Cir. 1980) (Kennedy, J.). In *Beller*, the Court upheld prior, more restrictive DOD regulations respecting gay and lesbian servicemembers, even assuming, without deciding, that heightened scrutiny applied to such restrictions. *Witt* disapproved *Beller* insofar as the Court in that case refused to engage in as-applied individualized determinations because of "the relative impracticality at th[at] time of achieving the Government's goals by regulations which turn more precisely on the facts of an individual case." *Id.* at 820 (quoting *Beller*, 632

F.2d at 810). *Witt* did not, however, question *Beller*'s holding that the regulations at issue on their face satisfied heightened scrutiny in light of "the importance of the government interests [they] furthered" and the great deference owed to military judgments in this context. *Beller*, 632 F.2d at 810. *Witt* remanded for the district court to determine whether the statute had been validly applied to the plaintiff. *Id.* at 821. Such a remand makes no sense if the Act is unconstitutional on its face. The district court's decision is thus inconsistent with controlling precedent, as well as with numerous appellate decisions upholding various applications of the statute.[2]

3. The district court's conclusion that the statute violates the First Amendment likewise should be reversed. This Court has held that § 654 does not violate the First Amendment because it provides for "discharge for . . . conduct and not for speech." *Holmes* v. *Cal. Army Nat'l Guard*, 124 F.3d 1126, 1136 (9th Cir. 1997); *see also Philips* v. *Perry*, 106 F.3d 1420, 1429-30 (9th Cir. 1997). As this Court reasoned in *Philips* and *Holmes*, contrary to the district court's conclusion, Op. at 79-80, the statute is not a "content-based" regulation of speech. Rather, in the statute Congress created a rebuttable presumption that a servicemember may be discharged from military service

[2] *See Holmes* v. *Cal. Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1997); *Philips* v. *Perry*, 106 F.3d 1420 (9th Cir. 1997); *Cook* v. *Gates*, 528 F.3d 42 (1st Cir. 2008); *Able* v. *United States*, 155 F.3d 628, 631-36 (2d Cir. 1998); *Richenberg* v. *Perry*, 97 F.3d 256, 260-62 (8th Cir. 1996); *Thomasson* v. *Perry*, 80 F.3d 915, 927-31, 934 (4th Cir. 1996) (en banc); *see also Steffan* v. *Perry*, 41 F.3d 677, 692 (D.C. Cir. 1994) (en banc) (upholding prior regulations).

because he or she is likely to engage in conduct proscribed by the statute. *See* 10 U.S.C. § 654(b)(2). Even under constitutional principles applicable outside the military context, "[t]he First Amendment . . . does not prohibit the evidentiary use of speech to establish . . . motive or intent." *Wisconsin* v. *Mitchell*, 508 U.S. 476, 489 (1993). A regulation that uses speech in this way is content-neutral because it is justified without reference to content, *see Hill* v. *Colorado*, 530 U.S. 703, 719-20 (2000), and that is what the statute does here. *See Philips*, 106 F.3d at 1430; *Holmes*, 124 F.3d at 1136.

The district court suggested that the statute might sweep more broadly, Op. at 77, and stated that the statute could, for example, prevent servicemembers from "discussing their personal lives or comfortably socializing off duty," Op. at 82. But even if the statute were applied to such speech, such hypothetical applications would render a content-neutral statute unconstitutional under the First Amendment only if the statute were overbroad. *See*, *e.g.*, *United States* v. *Williams*, 128 S. Ct. 1830, 1838 (2008). The district court did not invoke the overbreadth doctrine, and the statute does not infringe on protected speech to a "substantial" degree "relative to the statute's plainly legitimate sweep." *Williams*, 128 S. Ct. at 1838.

C. Finally, even though this case is not a class action, the district court erred in awarding what is in essence classwide relief – enjoining application of the statute to any member of the military anywhere in the world – in this case brought by a single organizational plaintiff purporting to advance the interests of two individuals.

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 also 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) (noting that "neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs"); *Zepeda* v. *INS*, 753 F.2d 719, 727 (9th Cir. 1983) ("A federal court . . . may not attempt to determine the rights of parties not before the court."); *Nat'l Ctr. for Immigration Rights* v. *INS*, 743 F.2d 1365, 1371-72 (9th Cir. 1984). The Supreme Court acted in accordance with this principle by staying an indistinguishable militarywide injunction entered by a district court in a facial constitutional challenge to the prior, more restrictive military regulations regarding gays and lesbians. *See Dep't of Defense* v. *Meinhold*, 510 U.S. 939 (1993) (issuing a stay pending appeal of the portion of an injunction that "grant[ed] relief to persons other than [the named plaintiff]"). This Court subsequently reversed the district court's decision to enter a militarywide injunction because the plaintiff was challenging his own specific discharge, *see Meinhold* v. *Dep't of Defense*, 34 F.3d 1469, 1480 (9th Cir. 1994), and there is no reason for a different result here.

The district court's worldwide injunction also inappropriately interferes with the development of the law in other circuits. The Supreme Court has made clear that "the Government 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, the nature of the issues the Government litigates." *United States* v. *Mendoza*, 464 U.S. 154, 159 (1984). This Court has held, moreover, that "[p]rinciples of comity" prevent a district court from issuing an injunction that "would cause substantial conflict with the established judicial pronouncements" of a sister circuit. *United States* v. *AMC Entm't, Inc.*, 549 F.3d 760, 773 (9th Cir. 2008).[3] If the district court's injunction is not stayed, it effectively would overrule the decisions of other circuits that have upheld § 654, and preclude consideration of similar issues by other courts. *See Va. Society for Human Life, Inc.* v. *Fed. Election Comm'n*, 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).

The district court recognized that its injunction would prevent the government "from defending the constitutionality of the" statute, Inj. Order 9 (Attachment D), but contended that these principles were inapplicable because Log Cabin challenged the statute on its face rather than as applied, *id.* at 4, 9. The district court cited no

[3]Although the government advanced a different view in *AMC*, the decision remains binding law.

authority for the proposition that the plaintiff's legal theory changes the permissible scope of the relief and that proposition is not correct. *See*, *e.g.*, *Va. Society*, 263 F.3d at 394 (narrowing nationwide injunction to the plaintiff in facial constitutional challenge); *Zepeda*, 753 F.2d at 727 (same); *Nat'l Ctr. for Immigration Rights*, 743 F.2d at 1371-72 (same). A criminal defendant, for example, who successfully claims that the statute he is being prosecuted under is facially unconstitutional gets his conviction reversed – not an order preventing the government from prosecuting anyone under the statute. Contrary to the district court's apparent view, Inj. Order at 4-5, this is not a case in which granting relief to nonparties is necessary to afford the plaintiff complete relief. *See Bresgal* v. *Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987) (upholding an injunction extending relief to nonparties because the injunction could not be tailored to apply only to the parties). Here – assuming (contrary to our submission) that some form of injunction was permissible – the injunction should have been limited to any individuals that Log Cabin properly represented.

II. The Balance Of Harms Warrants A Stay Pending Appeal

The balance of harms also favors a stay pending appeal even apart from the legal flaws in the district court's worldwide injunction.

1. Given the presumptive constitutional validity of an Act of Congress, the court's invalidation of a statute itself causes the government the kind of irreparable injury that is routinely recognized as a basis for a stay pending appeal. *See Coalition for*

Economic Equality v. *Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("it is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined"); *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *see also Walters* v. *Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers). Because of this well-recognized harm, in virtually all cases in which a single district judge declares an Act of Congress unconstitutional, courts appropriately grant a stay if requested to do so by the government. *See Bowen* v. *Kendrick*, 483 U.S. 1304, 1304 (1987) (Rehnquist, J., in chambers). Because an Act of Congress is deemed to be "in itself a declaration of public interest and policy which should be persuasive," *Virginian Ry. Co.* v. *Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937), ending "Don't Ask, Don't Tell" in this manner is itself irreparable harm. In denying the government a stay, the district court acknowledged these authorities, Stay Order at 5, 6, but did not explain why they are inapplicable.

2. A stay is also appropriate because the district court's decision is a court-ordered precipitous change in the military's longstanding policy respecting gays and lesbians, which has been mandated by Act of Congress for more than 16 years. That injunction operates imminently and directly on all government personnel throughout the world; the court did not simply review and set aside final decisions rendered in military proceedings. The sweeping injunction therefore constitutes an extraordinary

and unwarranted intrusion into military affairs. *See Councilman*, 420 U.S. at 756-58.

Moreover, the injunction would short-circuit the comprehensive Defense Department review process that is nearing completion. 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 § 654. Decl. of Clifford L. Stanley, Ex. C (Attachment E). That process is nearing completion and is based on the views of the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff, all of whom support repeal of the law, and have concluded that repeal should not occur before a thorough and deliberate assessment of how best to accomplish a successful transition in policy. *See* Stanley Decl. ¶¶ 9-10, 12. Congressional proposals to repeal the statute also have recognized the need for careful planning. *Id.* ¶ 13. Proposed bills to repeal § 654 have provided that repeal would not take place until after the Department of Defense has prepared the necessary policies and regulations to implement repeal. *Id.* The Court should defer to the considered judgment of Congress and the most senior leaders of the military that a repeal of § 654 and its implementing regulations should be done in an orderly manner to be successful, rather than result from an immediate court-ordered cessation of the statutory policy. *See Orloff* v. *Willoughby*, 345 U.S. 83, 93 (1953) ("[J]udges are not given the task of running the Army."); *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973).

The Working Group has visited numerous military installations across the country and overseas, where it has interacted with tens of thousands of servicemembers on this issue. It has also conducted an extensive, professionally developed survey that was distributed to a representative sample of approximately 400,000 servicemembers. Stanley Decl. ¶ 15. The Working Group's review will result in recommended changes to Department regulations, policies, and guidance that would be necessary to implement an orderly repeal of the statute. *Id.* ¶ 17. The Working Group is also developing tools for leadership to educate and train the force – a vital element of a successful repeal. *Id.* ¶ 18. While it is not presently known, prior to that review's completion, how quickly an efficient, orderly implementation of repeal will take, proper implementation of "Don't Ask, Don't Tell's" repeal cannot occur overnight.

Section 654 implicates dozens of Department and Service policies and regulations that cover such disparate issues as benefits, re-accession, military equal opportunity, anti-harassment, and others. *Id.* ¶ 26. Amending these regulations would typically take several months, because of the need to notify and seek input from all affected to ensure that changes do not inadvertently result in unanticipated negative effects on the force. *Id.* Properly implementing any change in statutory policy would thus be a massive undertaking by the Department and the military. And if the district court's judgment is reversed on appeal, the Department and the military will have to

make another major policy change – creating further disruption and confusion.

Effectively developing proper training and guidance with respect to a change in policy will take time and effort. *Id.* ¶ 31. The district court's injunction does not permit sufficient time for such training to occur, especially for commanders and servicemembers serving in active combat. *Id.* Implementing an immediate change to this longstanding statutory policy without providing proper training and guidance would be disruptive to military commanders and to servicemembers as they carry out their mission and military responsibilities, especially in active combat. *Id.*

In denying the government a stay, the district court cited "the evidence at trial show[ing] that" § 654 "harms military readiness and unit cohesion." Stay Order 6; *see also* Stay Order at 3. But the harms that warrant a stay here flow from the precipitous, court-ordered repeal of the statute that the district court's injunction represents. The district court cited nothing that would warrant second-guessing the considered judgment of military leaders that any repeal of the statute must proceed in a comprehensive and orderly manner, Stanley Decl. ¶ 9, rather than by judicial decree.

3. The worldwide, categorical injunction entered by the district court exacerbates the harm that would result without a stay. As noted above, the breadth of the injunction interferes with litigation in other circuits based on only a single adverse district court decision. *See Mendoza*, 464 U.S. at 160. If not stayed, the district court's injunction effectively overrules the decisions of other circuits that have upheld § 654,

and also precludes consideration of similar issues in other courts that have not addressed the issue, "in effect . . . imposing [the district court's] view of the law on all the other circuits." *Va. Society*, 263 F.3d at 394.

4. These harms outweigh the harms to any individuals Log Cabin could properly represent if the district court's sweeping injunction against a duly enacted Act of Congress is stayed pending appeal. A stay while this case is resolved would "simply suspend[] judicial alteration of the status quo," *Nken* v. *Holder*, 129 S. Ct. 1749, 1758 (2009) (quotation marks omitted), that has prevailed in the military since 1993. Indeed, a stay pending appeal would obviate the confusion and uncertainty that might be caused by temporary implementation of the district court's injunction, with the looming possibility that the statutory policy could be reinstated on appeal. Enjoining the operation of the statute before the appeal is concluded would create tremendous uncertainty about the status of servicemembers who may reveal their sexual orientation in reliance on the district court's decision and injunction.

CONCLUSION

For the foregoing reasons, the Court should stay the district court's order pending resolution of the government's appeal and should grant an immediate administrative stay pending this Court's decision on the government's motion for a stay pending appeal.

Respectfully submitted,

TONY WEST
Assistant Attorney General

ANDRÉ BIROTTE JR.
United States Attorney

ANTHONY J. STEINMEYER
(202) 514-3388
AUGUST E. FLENTJE
(202) 514-3309
/s/ Henry Whitaker
HENRY WHITAKER
(202) 514-3180
Attorneys, Appellate Staff
Civil Division, Room 7256
Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530

OCTOBER 2010

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing emergency stay motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on October 20, 2010.

I certify as well that on that date I caused a copy of this emergency stay motion to be served on the following counsel registered to receive electronic service. I also caused a copy to be served on counsel via electronic mail.

Dan Woods (dwoods@whitecase.com)
(213) 620-7772
Earle Miller (emiller@whitecase.com)
(213) 620-7785
Aaron Kahn (aakahn@whitecase.com)
(213) 620-7751
White & Case LLP
633 West Fifth Street, Suite 1900
Los Angeles, CA 90071-2007

/s/ Henry Whitaker
Henry C. Whitaker