No. 10A465

In the Supreme Court of the United States

LOG CABIN REPUBLICANS,

Applicant,

vs.

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

Respondents.

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

REPLY IN SUPPORT OF APPLICATION TO VACATE ORDER STAYING JUDGMENT AND PERMANENT INJUNCTION

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A. Log Cabin's Application satisfies any standard for vacating the court of appeals' stay of the district court's injunction.

Which is entitled to greater weight in this Court: a district court's judgment holding a statute unconstitutional and enjoining its enforcement, reached after a full trial, the consideration of voluminous evidence presented at that trial, and based on a reasoned decision; or a court of appeals' order staying that injunction pending appeal, entered prior to that court's adjudication on the merits and on a scant ten days' consideration?

That was essentially the situation presented in *Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas*, 448 U.S. 1327 (1980) (Powell, J., in chambers), on which the government's opposition heavily relies, and the procedural posture is even more compelling here, where the district court wrote many detailed, thoughtful opinions supporting its conclusions. In *Certain Named and Unnamed Children,* this Court vacated the court of appeals' stay order because it was reasonable to believe that five Members of the Court might agree with the district court's reasoned decision on a "difficult question of constitutional significance," presenting "novel and important issues" and involving a "pressing national problem"; and because the applicants had convincingly argued that they would suffer irreparable harm if the stay was not vacated, and the district court had explicitly relied[1] on the probable harm to the plaintiffs in denying the state's

[1] As did the district court here, in its lengthy and thorough order denying the government's motion for stay. App. 201a–202a.

motion to stay its injunction. 448 U.S. at 1331-32. This Court should do the same here.

"The power of a Circuit Justice to dissolve a stay is well settled." *Id.* at 1330. A Circuit Justice may

> vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay. A narrower rule would leave the party without any practicable remedy for an interlocutory order of a court of appeals which was ex hypothesi both wrong and irreparably damaging.

Coleman v. PACCAR Inc., 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers); *see also Meredith v. Fair*, 83 S. Ct. 10, 11 (1962) (Black, J., in chambers).

Log Cabin is not, as the opposition (at 2, 17) suggests, asking this Court to "reweigh the harms to the parties" – the court of appeals never weighed those respective harms in the first place. Whether, in this Court, Log Cabin must show (as Log Cabin contends[2]) that the court of appeals ignored the applicable law and therefore abused its discretion in granting a stay, or must show (as the government contends[3]) that failure to vacate the

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[2] *See Nken v. Holder*, ___ U.S. ___, 129 S. Ct. 1749, 1754, 1760-62 (2009) (vacating court of appeals' order denying stay and remanding for application of correct criteria).

[3] *See Certain Named and Unnamed Children, supra,* 448 U.S. at 1331-32.

stay will probably cause it irreparable harm and the Court eventually will grant *certiorari* and agree with the district court's decision, Log Cabin has made an ample showing here that the court of appeals' order must be vacated.

This case is very likely to ultimately come to this Court for decision. Not only is the constitutionality of Don't Ask, Don't Tell in itself an issue of substantial public importance, DADT also implicates more broadly the scope of government regulation of the due process rights recognized in *Lawrence v. Texas*, 539 U.S. 558 (2003). This Court has had few opportunities to further define the contours of the rights recognized in *Lawrence*. The Ninth Circuit undertook that effort in *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008), holding that DADT squarely implicates those rights and, as a result, holding DADT to a higher level of constitutional scrutiny. The scrutiny to which DADT must be subjected post-*Lawrence*, as well as the First Amendment implications of DADT, are both important questions of federal constitutional law that this Court should resolve; but it has not yet had the vehicle to do so.[4] Because this case will present that vehicle, regardless whether the court of appeals reverses the district court, it is likely that the Court would grant *certiorari* here.[5]

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[4] The government declined to petition for a writ of *certiorari* in *Witt*.

[5] The opposition argues (at 12) that this Court would not grant *certiorari* should the court of appeals reverse the district court and uphold the constitutionality of DADT, since reversal would align the Ninth Circuit's position with that of other circuits. Setting aside the fact that such a reversal would be inconsistent with the Ninth Circuit's own decision in *Witt*, the lack of a circuit conflict is not dispositive of the *certiorari* question. A petitioner may also demonstrate that a court of appeals "has decided an important question of federal law that

B. The opposition ignores critical points presented in the Application.

The opposition omits any discussion of several important points made in the Application to show that the court of appeals' stay order was erroneous. These conspicuous omissions compel the conclusion that the government cannot rebut these points.

1. The opposition does not controvert Log Cabin's argument that legislative repeal of DADT is speculative.

The government pretends to this Court that legislative repeal of Don't Ask, Don't Tell is assured and that an orderly, "deliberate" implementation of that repeal – on the military's timetable – must be conducted. The opposition (at 22-24) speaks of "repeal" a dozen times in three pages. But as the Application shows, and as the district court recognized, repeal through the political process – and thus implementation of the "orderly transition" that the government holds out – is far from assured; it is at best contingent, and a growing stream of news reports this week suggests that it is increasingly

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has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

The opposition also argues that because this Court denied *certiorari* in *Cook v. Gates,* 528 F.3d 42 (1st Cir. 2008), *see Pietrangelo v. Gates, infra* this note, it would similarly deny *certiorari* here should the court of appeals reverse the district court. However, the majority of the plaintiffs in *Cook* urged this Court to defer review of their case. Brief for the Cook Respondents at *2-3, *Pietrangelo v. Gates*, 129 S.Ct. 2763 (mem.) (2009) (No. 08-824). They argued that proper consideration by this Court of the constitutionality of DADT should await the development of a factual record at trial. *Id.* This case now has a fully developed factual record, following a two-week court trial with over twenty witnesses and a hundred documentary exhibits.

Finally, the First Circuit's decision in *Cook* expressly disagrees with the Ninth Circuit's decision in *Witt*. The decisions are irreconcilable. Assuming the Ninth Circuit decides this case consistent with its precedent in *Witt*, it is not unlikely that this Court would grant *certiorari* in this case to address the resulting circuit conflict.

unlikely. The court of appeals' order itself recognized that legislative repeal is speculative and uncertain, when it discussed "ensuring orderly change of this magnitude in the military – if that is what is to happen." App. 006a (emphasis added). The opposition does not rebut this point.

Because legislative repeal is dubious, it cannot be relied on to remedy the constitutional harms that servicemembers are sustaining every day. Speculative prospects of repeal are therefore no basis for delaying the implementation of the district court's injunction.

2. The opposition does not analyze or discuss the hardships to current and prospective servicemembers of a stay.

Echoing the silence of the court of appeals' order on this point, the opposition omits any discussion of the hardships to applicant and to servicemembers caused by a stay. Instead it argues (at 19-20) a pure *non sequitur*: that since "Acts of Congress are presumptively constitutional, creating an equity in favor of the government," that equity should be the *only* consideration and by itself "presumptively tip[ ] the balance of hardships in the government's favor." That is not the law; if it were, this Court would never vacate a stay of a judgment and injunction finding a statute unconstitutional, and as, *e.g., Certain Named and Unnamed Children, supra,* shows, such stays are vacated.[6]

[6] State statutes, such as the one in question in *Certain Named and Unnamed Children,* enjoy the same presumption of constitutionality as Acts of Congress. *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944).

3. The opposition exaggerates what the district court's injunction does and does not require.

Finally, the opposition argues that a stay is appropriate because the district court's injunction would effect a "precipitous" change on the military's policies. But the opposition does not address the point made in the Application that the district court's injunction neither requires the military to take any affirmative measures, nor prevents it from taking the steps the government asserts are essential to an "orderly transition." The only immediate change that the injunction requires is that the military cease enforcing an unconstitutional statute. Any consequent internal changes that the military believes it must implement may take place on whatever orderly schedule the military determines will meet its needs, and will not run afoul of the district court's injunction. The district court's order denying stay addressed this in detail. App. 199a. The opposition's silence on this point acknowledges that the injunction does not cause cognizable harm to the government that should be weighed in the balance.[7]

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[7] In this regard, it is noteworthy that the government never raised the implementation specters set out in the Stanley Declaration, which it now argues warrant a stay, until *after* the district court had entered its injunction. That declaration was filed in the district court in connection with the government's unsuccessful application for a stay there, and was resubmitted to the court of appeals and now to this Court in the respective stay proceedings on appeal, but, as the district court pointed out in denying respondents' stay application there, the government never raised any of those issues at trial, despite having the opportunity to do so. App. 198a–199a. The government's belatedness in asserting these supposed harms counsels against a stay of the injunction. *Cf. Stroup v. Wilcox*, 549 U.S. 1501, 1501 (2006) (Roberts, C.J., in chambers) ("a request for extraordinary equitable relief is certainly undermined when the central argument pressed was only mentioned by applicants in passing in the court below"). As for the content of the Stanley Declaration, the Application pointed out its many deficiencies (at 7), but the opposition makes no response.

C. The opposition raises side issues as to which the district court's reasoned opinions are entitled to respect.

Notwithstanding its failure to respond to the specific grounds for the Application discussed above, the opposition raises several points that do not tip the balance in favor of a stay of the injunction. The district court had already addressed these points in its thoughtful orders, and its conclusions should be given weight here. *See Certain Named and Unnamed Children, supra,* 448 U.S. at 1331-32.

Scope of injunction. The opposition asserts (at 2, 26, 29) that *Dep't of Defense v. Meinhold*, 510 U.S. 939 (1993) (O'Connor, J., in chambers), in which a portion of a district court's military-wide injunction was stayed as overbroad, requires denial of Log Cabin's Application here. *Meinhold* does not control this case. *Meinhold* was an as-applied challenge to the military's regulations on homosexual servicemembers that preceded Don't Ask, Don't Tell. The servicemember had been discharged on the basis of his statement that he was gay, and challenged only his specific discharge. *See, on remand, Meinhold v. Dep't of Defense*, 34 F.3d 1469, 1480 (9th Cir. 1994) ("Meinhold sought only to have his discharge voided and to be reinstated").

In contrast to *Meinhold*'s as-applied challenge to military regulations by a single plaintiff, this case is a facial challenge to a statute by an associational plaintiff. The government defended it as such, and put Log Cabin to its proof on that basis. App. 0185a–0187a. At trial, Log Cabin

proved DADT's facial unconstitutionality by presenting seven expert witnesses from a variety of disciplines, and six former servicemembers representing a broad cross section of the military – men and women, officers and enlisted personnel, from a variety of branches of the service. The government presented no witnesses, and no scenario under which DADT operated constitutionally.

In a facial challenge by an associational plaintiff – a challenge analogous to a class action – the relief "necessary to redress the complaining parties," *see Califano v. Yamasaki*, 442 U.S. 682, 702 (1979), will by nature be broader in scope than the relief suitable for a single plaintiff's as-applied challenge. *See also Buchanan v. Evans*, 439 U.S. 1360 (1978) (Brennan, J., in chambers) (denying application to stay allegedly overbroad multi-district school desegregation injunction; extensive systemwide remedy is warranted where the constitutional violations occurred systemwide).

Here, the district court found facial constitutional violations and then, explaining its rationale in detail (App. 0185a–0187a), crafted a remedy appropriate to the broad nature of that finding: as it held, "the nature of the remedy stems from the nature of the challenge." App. 0186a. The scope of the district court's injunction followed the scope of the proof, and is not an added harm to the government that supports a stay.

Standing. The opposition attempts throughout to relitigate here the question of Log Cabin's standing to sue, though the court of appeals did not

rely on this issue in its stay order. The opposition also repeatedly misstates the nature of this case, claiming that Log Cabin brought it "purporting to advance the interests of two individuals" (Opp. at 16) or based its standing on alleged injuries to "two of its members" (*id.* at 1, 5, 13). As discussed *supra*, Log Cabin brought this case under well-established principles of associational standing, for violations of the constitutional rights of all American servicemembers. The government's attempt to depreciate this challenge, and mischaracterize it as if it were a case brought by two individuals whose own claims are of no real moment, is unworthy.

The district court addressed the standing issue in detail in a lengthy interim order[8] as well as in its comprehensive post-trial opinions, *see* App. 014a–025a, 100a–104a, 159a–164a. Its thorough analysis should not be disturbed on summary review in this Court.

Military deference. The opposition argues (at 13-15) that the judiciary should be exceptionally deferential – to the point of nonintervention – to Congressional and military determinations when it comes to military affairs. But this Court has never held that judicial deference to the military is absolute, and it retains its authority as the final arbiter of constitutional rights even in the military context. This is so even in a time of ongoing war, as the Court's recent decisions in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006),

[8] The district court's 27-page order denying the government's motion for summary judgment on the standing issue is Document 170 in the PACER docket below, Central District of California Case No. 2:04-cv-08425.

and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2007), make clear; the opposition does not even address those decisions, nor does it rebut Log Cabin's showing that the highest civilian and military officials have admitted that DADT undermines national security and military capability.

Slowdown on discharges. The government provides no reason that an orderly transition, starting now with a freeze on discharges, cannot occur as a result of judicial action rather than legislative repeal. The government insists that the Pentagon report must be completed before DADT may be ended. But the opposition also references (at 27-28) the Secretary of Defense's recent directive that shifted, and limited, DADT discharge authority to officials at the highest levels of the Defense Department.

That directive is significant to this Application, but not, as the government claims (Opp. at 28), because it somehow requires Log Cabin to prove anew whether its members still face an imminent threat of discharge. It is significant because it shows that enjoining discharges pending appeal will cause no harm to the military. Shifting the discharge authority up the chain of command can only have the effect of reducing the number of discharges under DADT.[9] The directive is inconsistent with the government's

[9] Indeed, the Pentagon recently confirmed that since the Secretary of Defense's October 21, 2010, directive, no discharges under DADT have occurred. Andrew Tighman, No Discharges Yet Under Revamped Policy on Gays, Army Times, Nov. 5, 2010, http://www.armytimes.com/news/2010/11/military-dont-ask-dont-tell-110410w/.

argument here that delaying discharges pending appeal would cause injuries that merit retention of the stay in full.

D. Conclusion.

The district court's judgment and permanent injunction followed a full trial on the merits of the important constitutional issues raised by this case, but the court of appeals' order staying the enforcement of that judgment did not take into account the speculative nature of repeal – the premise of the government's entire argument – and did not take into account the harms that would be suffered by current and prospective members of the armed forces while a stay is in place. The court of appeals failed to analyze the stay application in light of the governing law and the record before it in this case. A routine "application of accepted standards" governing stays pending appeal compels vacation of the stay order.

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