

No. 10-56634

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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LOG CABIN REPUBLICANS,

*Plaintiff-Appellees,*

v.

UNITED STATES OF AMERICA; and ROBERT M. GATES, Secretary of  
Defense,

*Defendant-Appellants.*

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On Appeal from the United States District Court  
for the Central District of California  
Case No. 2:04-cv-08425-VAP-E  
The Honorable Virginia A. Phillips, District Judge

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**BRIEF OF *AMICUS CURIAE* LAMBDA LEGAL DEFENSE AND  
EDUCATION FUND, INC. IN SUPPORT OF APPELLEES' OPPOSITION  
TO A STAY PENDING APPEAL**

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**FED. R. APP. P. 26.1 CORPORATE DISCLOSURE STATEMENT**

Pursuant to the Federal Rules of Appellate Procedure, Lambda Legal Defense and Education Fund, Inc. declares the following:

Lambda Legal Defense and Education Fund, Inc. is a not-for-profit organization organized and incorporated under the laws of New York with no parent company. No publicly held corporation owns 10% or more of its stock.

Executed this 25th day of October, 2010.

/s Peter Renn  
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## TABLE OF CONTENTS

|  |     |
|--|-----|
| TABLE OF CONTENTS.....   | ii  |
| TABLE OF AUTHORITIES .....   | iii |
| INTEREST OF <i>AMICUS CURIAE</i> .....   | 1   |
| ARGUMENT .....   | 1   |
| I. APPELLANTS CANNOT SATISFY THE REQUIREMENTS FOR A<br>STAY. ....  | 2   |
| II. A STAY PENDING APPEAL WOULD CAUSE SUBSTANTIAL AND<br>IRREPARABLE HARM TO LESBIAN, GAY, AND BISEXUAL<br>INDIVIDUALS. .... | 3   |
| A. Even Absent Discharge, “Don’t Ask, Don’t Tell” Inflicts Lasting<br>Psychological Injuries On Those Subject To It. ....    | 3   |
| B. “Don’t Ask, Don’t Tell” Also Harms Those Outside The Military. ....   | 5   |
| C. Lesbian, Gay, And Bisexual Youth Are Particularly Vulnerable To The<br>Harms Caused By “Don’t Ask, Don’t Tell.” ....      | 8   |
| CONCLUSION .....   | 10  |
| CERTIFICATE OF SERVICE .....   | 11  |

**TABLE OF AUTHORITIES**

**CASES**

*Berg v. Claytor*, 591 F.2d 849 (D.C. Cir. 1978) .....1

*Cammermeyer v. Perry*, 97 F.3d 1235 (9th Cir. 1996) .....1

*Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135 (C.D. Cal. 2000).....10

*Lawrence v. Texas*, 539 U.S. 558 (2003) .....1, 5

*Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) .....6, 7

*Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1992) .....1

*Romer v. Evans*, 517 U.S. 620 (1996) .....1

*Stormans Inc. v. Selecky*, 526 F.3d 406 (9th Cir. 2008).....2

*Witt v. U.S. Dep’t of the Air Force*, 548 F.3d 1264 (9th Cir. 2008).....1

**STATUTES**

10 U.S.C. § 654(b) .....5

**OTHER AUTHORITIES**

Aaron Belkin, “*Don’t Ask, Don’t Tell*” *Does the Gay Ban Undermine the Military’s Reputation?*, 34(2) *Armed Forces & Soc’y* 276 (2008).....8

Susan Cochran, J. Greer Sullivan, & Vickie Mays, *Prevalence of Mental Disorders, Psychological Distress, and Mental Health Services Use Among Lesbian, Gay, and Bisexual Adults in the United States*, 71(1) *J. of Consulting and Clinical Psychology* 53 (2003) .....7

Steve Cole, Margaret Kemeny, Shelley Taylor, & Barbara Visscher, *Elevated Physical Health Risk Among Gay Men Who Conceal Their Homosexual Identity*, 15(4) *Health Psychology* 243 (1996) .....4

Gregory M. Herek, *Hate Crimes Against Lesbians and Gay Men*, 44 *Am. Psychologist* 948, 949 (1989) .....7

Gregory Herek, *Hate Crimes and Stigma-Related Experiences Among Sexual Minority Adults in the United States*, 24(1) *J. of Interpersonal Violence* 54 (2009).....7

Gregory Herek, *Sexual Stigma and Sexual Prejudice in the United States: A Conceptual Framework*, in *Contemporary Perspectives on Lesbian, Gay & Bisexual Identities: The 54th Nebraska Symposium on Motivation* 65 (Debra Hope ed., 2009) .....4

Gregory Herek, Regina Chopp, & Darryl Strohl, *Sexual Stigma: Putting Sexual Minority Health Issues in Context*, in *The Health of Sexual Minorities: Public Health Perspectives on Lesbian, Gay, Bisexual, and Transgender Populations* 171 (Ilan Meyer & Mary Northridge, eds. 2007) .....6

Margaret Kemeny, Shelley Taylor, & Barbara Visscher, *Elevated Physical Health Risk Among Gay Men Who Conceal Their Homosexual Identity*, 15(4) *Health Psychology* 243 (1996).....4

Joseph Kosciw, Emily Gretak, Elizabeth Diaz, & Mark Bartkiewicz, *The 2009 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation’s Schools* 26 (2010).....9

Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61 *Ohio St. L.J.* 867 (2000) .7

Vickie Mays & Susan Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 91(11) *Am. J. of Public Health* 1869 (2001).....7

Ilan Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129(5) *Psychological Bulletin* 674 (2007) .....4, 7

Jessica Morris, Craig Waldo, & Esther Rothblum, *A Model of Predictors and Outcomes of Outness Among Lesbian and Bisexual Women*, 71(1) *Am. J. of Orthopsychiatry* 61 (2001) .....4

Randy Shilts, *Conduct Unbecoming: Gays & Lesbians in the U.S. Military* 631 (St. Martin’s Griffin, 2005) .....5

Laura Smart & Daniel Wegner, *The Hidden Costs of Hidden Stigma*, in *The Social Psychology of Stigma* 220 (Todd Heatherton, Robert Kleck, Michelle Hebl, & Jay Hull eds., 2000) .....5

## **INTEREST OF AMICUS CURIAE**

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) is the nation’s oldest and largest nonprofit legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and people with HIV. Lambda Legal has been involved for decades in challenges to the military’s discriminatory treatment of lesbian, gay, and bisexual (“LGB”) service members and violation of their rights of due process and freedom of speech, including *Witt v. U.S. Dep’t of the Air Force*, 548 F.3d 1264 (9th Cir. 2008) (*amicus*); *Cammermeyer v. Perry*, 97 F.3d 1235 (9th Cir. 1996) (counsel); *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1992) (*amicus*); and *Berg v. Claytor*, 591 F.2d 849 (D.C. Cir. 1978) (counsel). Lambda Legal also was counsel in *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996). Based on its extensive work on behalf of LGB adults and young people, Lambda Legal is uniquely qualified to assist the Court in the instant case. All parties consent to Lambda Legal filing this brief in opposition to a stay pending appeal.

## **ARGUMENT**

Granting a stay pending appeal – and thereby allowing the military to continue to discharge LGB service members pursuant to the “Don’t Ask, Don’t Tell” (DADT) law as the appeal proceeds – would cause irreparable and substantial harm both to members of the military and to civilians and would not be in the public interest. Not

only would military readiness be impaired and the careers of potentially hundreds of service members destroyed, but ongoing enforcement of DADT also would irreparably injure the psychological and physical well-being of thousands of LGB service members and millions of other LGB people, including youth. For LGB service members, DADT places an impossible price on their continued service: it requires them to live a lie. In order to be successful, the lie must be carefully constructed and maintained – an unending process that inflicts substantial mental, emotional, and physical distress. For the public at large, DADT places the government’s imprimatur on discrimination, encouraging individuals to act on anti-LGB bias as well as stigmatizing LGB adults and youth and communicating to them that they are unworthy. Because a stay pending appeal would allow such harms to continue unabated, Appellants’ request for a stay should be denied.

**I. APPELLANTS CANNOT SATISFY THE REQUIREMENTS FOR A STAY.**

A party seeking a stay bears the burden of proving that (1) the party is likely to succeed on the merits, (2) the party would be irreparably injured absent a stay, (3) a stay would not substantially injure other parties interested in the proceeding, and (4) a stay would benefit the public interest. *Stormans Inc. v. Selecky*, 526 F.3d 406, 408 (9th Cir. 2008) (denying stay even assuming that district court erred in resolving constitutional claims because stay applicants could not show irreparable injury to themselves). Although Appellants cannot satisfy any of these requirements, *amicus*



focuses herein on reasons, in addition to the harms on military readiness and to those discharged discussed in the district court's opinion and Appellees' brief, why the third and fourth prongs of the test for grant of a stay cannot be met in this case.

**II. A STAY PENDING APPEAL WOULD CAUSE SUBSTANTIAL AND IRREPARABLE HARM TO LESBIAN, GAY, AND BISEXUAL INDIVIDUALS.**

**A. Even Absent Discharge, "Don't Ask, Don't Tell" Inflicts Lasting Psychological Injuries On Those Subject To It.**

Each day that DADT remains in effect, it exacts an intolerably high cost upon the mental and physical health of LGB service members. These service members must remain on constant high alert, self-policing every word, gesture, and glance that could arouse suspicion regarding their sexual orientation. Not even private correspondence with a family member or routine conversations with other service members about off-duty activities are safe from DADT's "overreaching grasp." Amended & Final Memorandum Order (Dist. Ct. Dkt. #250) at 14. Indeed, LGB service members must not only conceal any indication of their sexual orientation but often must affirmatively lie (such as by changing the names and genders of their partners when discussing holiday plans) or engage in conduct they find abhorrent (such as tolerating the unwanted advances of a heterosexual service member) in order to maintain the pretense of heterosexuality and not be subjected to intrusive investigations scrutinizing the most intimate aspects of their private lives and the potential termination of their military careers, no matter how long or distinguished.

For anyone who has never been forced to hide who they are, it is difficult to appreciate the Herculean nature of the task that DADT demands; but the proven harms caused by the concealment of one's sexual orientation give some indication of the toll it takes. These harms include severe mental distress, social isolation, anxiety, depression, suicidal ideation, and compromised immune system functioning, which are not inflicted when one is free to disclose one's sexual orientation.<sup>1</sup> That the harms of non-disclosure have been documented among LGB people outside the military – where discrimination is not typically mandated by the government –

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<sup>1</sup> See, e.g., Ilan Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129(5) *Psychological Bulletin* 674 (2007) (describing how concealment of one's homosexuality causes stress, anxiety, and social isolation and impairs immune system functioning); Steve Cole, Margaret Kemeny, Shelley Taylor, & Barbara Visscher, *Elevated Physical Health Risk Among Gay Men Who Conceal Their Homosexual Identity*, 15(4) *Health Psychology* 243 (1996) (finding that gay men who concealed their sexual orientation experienced a higher incidence of cancer, pneumonia, and bronchitis); Gregory Herek, *Sexual Stigma and Sexual Prejudice in the United States: A Conceptual Framework*, in *Contemporary Perspectives on Lesbian, Gay & Bisexual Identities: The 54th Nebraska Symposium on Motivation* 65 (Debra Hope ed., 2009) (explaining that concealment of sexual orientation has been linked to psychological distress and health problems, whereas being "out" has been linked to positive psychological and physical outcomes). See also Jessica Morris, Craig Waldo, & Esther Rothblum, *A Model of Predictors and Outcomes of Outness Among Lesbian and Bisexual Women*, 71(1) *Am. J. of Orthopsychiatry* 61 (2001) (finding that one's "outness" predicted lower psychological distress and suicidality).

speaks volumes of the harms suffered by LGB service members so long as DADT continues to be enforced.<sup>2</sup>

The inner experience of one who is saddled with a concealed stigma has been described as a “private hell.”<sup>3</sup> That is particularly true for LGB service members who can be punished for engaging in the very conduct that the Supreme Court has held is constitutionally protected. *See Lawrence v. Texas*, 539 U.S. 558, 567 (2003). These individuals cannot even find temporary refuge in the arms of their loved ones, without risking discharge based on an argument that they have engaged in a “homosexual act.” *See* 10 U.S.C. § 654(b). For those who have devoted their lives to the betterment of this country despite personal danger, and who continue to do so every day, the constant threat of discharge can be devastating. Indeed, one female corporal committed suicide following an investigation into her sexual orientation.<sup>4</sup>

**B. “Don’t Ask, Don’t Tell” Also Harms Those Outside The Military.**

The harms of DADT are not confined to the military. DADT is nothing short of a public pronouncement by the federal government that discrimination against

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<sup>2</sup> A constant preoccupation with hiding also consumes significant cognitive resources, which a service member could otherwise devote to the discharge of military duties. *See* Laura Smart & Daniel Wegner, *The Hidden Costs of Hidden Stigma*, in *The Social Psychology of Stigma* 220 (Todd Heatherton, Robert Kleck, Michelle Hebl, & Jay Hull eds., 2000).

<sup>3</sup> *Ibid.* at 229.

<sup>4</sup> Randy Shilts, *Conduct Unbecoming: Gays & Lesbians in the U.S. Military* 631 (St. Martin’s Griffin, 2005).

LGB people is acceptable, that LGB people are inferior to heterosexual people, and that being lesbian, gay, or bisexual is a shameful trait that ought to be concealed. Indeed, the government has made clear that, in the hierarchy of desirability, convicted felons and former drug abusers – who can obtain “moral waivers” that permit them to serve in the military – outrank LGB service members, no matter how sterling the military records of the latter.

By force of law, DADT brands LGB people with a badge of inferiority simply because of who they are. “Laws are perhaps the strongest of social structures that uphold and enforce stigma.”<sup>5</sup> Laws that advantage one group over another send a powerful message to society about the relative value of individuals in each group – by design.<sup>6</sup> It should therefore come as no surprise when that message is echoed back through the manifold displays of private antigay prejudice that LGB people encounter on a daily basis. The reason that government action affects private

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<sup>5</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 974 (N.D. Cal. 2010) (quoting expert testimony of social epidemiologist).

<sup>6</sup> See Gregory Herek, Regina Chopp, & Darryl Strohl, *Sexual Stigma: Putting Sexual Minority Health Issues in Context*, in *The Health of Sexual Minorities: Public Health Perspectives on Lesbian, Gay, Bisexual, and Transgender Populations* 171, 181 (Ilan Meyer & Mary Northridge, eds. 2007) (“[T]he legal system is an important institution through which stigma is expressed and reinforced. . . . [L]aws that advantage one group over another also send a message to society about the relative status of the ingroup and the outgroup”).

behavior is clear: “laws send cultural messages; they *give permission*.”<sup>7</sup> The hate crimes experienced by one of out every five lesbian and gay adults do not randomly spring into existence; they incubate in a climate of intolerance created and maintained by the government.<sup>8</sup>

The stigmatization of LGB people eats away at their mental and physical well-being. On average, gay people evidence higher rates of depression, panic attacks, psychological distress, and/or generalized anxiety disorder, which are precipitated and aggravated by stigma and discrimination.<sup>9</sup> Every day that DADT remains in

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<sup>7</sup> See Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61 Ohio St. L.J. 867, 879 (2000) (emphasis in original); see also *Perry*, 704 F. Supp. 2d at 974 (expert testimony that “[s]tructural stigma . . . gives a level of permission to denigrate or attack particular groups, or those who are perceived to be members of certain groups in society”) & 979 (expert testimony that antigay discrimination by the government “sends a strong message about the values of the state,” which in turn encourages private prejudice).

<sup>8</sup> See, e.g., Gregory Herek, *Hate Crimes and Stigma-Related Experiences Among Sexual Minority Adults in the United States*, 24(1) J. of Interpersonal Violence 54 (2009); Gregory M. Herek, *Hate Crimes Against Lesbians and Gay Men*, 44 Am. Psychologist 948, 949 (1989) (noting that antigay hate crimes are a “logical outgrowth” of a pervasive norm of intolerance fostered by the government); Meyer, *supra* note 1, at 680 (noting that abuses against lesbians and gay men are “sanctioned by governments and societies through formal mechanisms such as discriminatory laws and informal mechanisms, including prejudice”).

<sup>9</sup> See, e.g., Susan Cochran, J. Greer Sullivan, & Vickie Mays, *Prevalence of Mental Disorders, Psychological Distress, and Mental Health Services Use Among Lesbian, Gay, and Bisexual Adults in the United States*, 71(1) J. of Consulting and Clinical Psychology 53 (2003); Vickie Mays & Susan Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults*

effect, LGB people are told by their government that there is something wrong with them. They are told that, if they want to participate in civic life like everyone else, the price of admission is to hide who they are – even though heterosexual people are permitted to “flaunt” their sexual orientation by entering into marriages and mentioning their spouses (both dischargeable acts for LGB service members). With each day that DADT continues unabated, the government robs LGB people of their dignity to co-exist as full and equal citizens under the law, which no amount of money can restore.

**C. Lesbian, Gay, And Bisexual Youth Are Particularly Vulnerable To The Harms Caused By “Don’t Ask, Don’t Tell.”**

The injuries caused by the government’s stigmatization of LGB people through DADT are especially acute for youth, who hear the government’s message of discrimination perhaps mostly loudly. For many young people, the military represents not only an opportunity to serve their country but a promising career path – complete with income, health and life insurance, tuition assistance, pension rights, and veterans’ benefits. The military recognizes as much: they spend upwards of half a billion dollars a year in advertising alone to tout these benefits and recruit young people.<sup>10</sup> But regardless of whether young people ultimately join the military or even

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*in the United States*, 91(11) *Am. J. of Public Health* 1869, 1874 (2001) (“discrimination has harmful mental health effects for sexual minorities”).

<sup>10</sup> See Aaron Belkin, “*Don’t Ask, Don’t Tell*” *Does the Gay Ban Undermine the Military’s Reputation?*, 34(2) *Armed Forces & Soc’y* 276 (2008).

seriously contemplate doing so, the message of DADT rings clearly in their ears: it is perfectly acceptable to treat LGB people worse than others.

This message injures both gay and heterosexual youth. Heterosexual youth are at a formative stage in life when their beliefs about the relative value and worth of LGB people will take root – beliefs which may persist for a lifetime. It does heterosexual youth a grave disservice for the government to inculcate discriminatory values. Yet, DADT does precisely that: it teaches heterosexual youth that LGB people are not their co-equals deserving of equal treatment and respect. Indeed, it does so by the most persuasive means possible: by example.

The harms to LGB youth are even starker. To begin, LGB youth must contend with a daily message from their government that they are undeserving of equal treatment. The injury from being branded as a second-class citizen can have damaging consequences on the psyche of LGB youth, which can outlast any physical wound. But the damage does not end there. These youth must also contend with staggering amounts of antigay violence and harassment: nine out of every ten lesbian and gay youth are verbally or physically harassed because of their sexual orientation.<sup>11</sup> A disproportionate number of gay youth also commit suicide each year

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<sup>11</sup> Joseph Kosciw, Emily Greta, Elizabeth Diaz, & Mark Bartkiewicz, *The 2009 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools* 26 (2010) (reporting that 84.6%

– as evidenced by the surge of recently-reported suicides<sup>12</sup> – because they are simultaneously unable to cope with harassment they face and unable to change their sexual orientation to escape it. The government cannot plausibly claim that its actions are unrelated to such tragedies and abuses, so long as it remains the nation’s leading model for open discrimination against LGB people.

### CONCLUSION

For all the reasons stated above, Lambda Legal respectfully requests that the Court deny a stay pending appeal.

DATED: October 25, 2010

Respectfully submitted,

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of lesbian and gay students had been verbally harassed because of their sexual orientation and 40.1% had been physically harassed).

<sup>12</sup> These tragedies include the suicides of Seth Walsh, 13, Asher Brown, 13, Billy Lucas, 15, Justin Aaberg, 15, Tyler Clementi, 18, Raymond Chase, 19, Corey Jackson, 19, and Zach Harrington, 19. In light of the disproportionate number of lesbian and gay youth who take their own lives each year, courts have recognized that the reduction of antigay bias “may involve the protection of life itself.” *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1151 (C.D. Cal. 2000).



## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 25, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s Sklar K. Toy