IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOG CABIN REPUBLICANS, Plaintiff-Appellee/Cross-Appellant, v. UNITED STATES OF AMERICA and ROBERT M. GATES, Secretary of Defense Defendants-Appellants/ Cross-Appellees	)	Nos. 10-56634, 10-56813

REPLY IN SUPPORT OF MOTION TO HOLD APPEAL IN ABEYANCE

In the government's Motion to Hold Appeal in Abeyance, we invoked the Court's broad authority to control cases on its own docket by moving to hold this appeal in abeyance. The government filed this motion as the result of a radical change in the legal landscape – the enactment of legislation establishing an orderly process for repealing the sole statute at issue in this litigation, 10 U.S.C. § 654, entitled "Policy concerning homosexuality in the armed forces." The new statute provides for repeal of § 654 effective 60 days after the President, the Secretary of Defense, and the Chairman of the Joint

Chiefs of Staff all certify that a number of requirements have been met, including that the Department of Defense "has prepared the necessary policies and regulations" to implement repeal, and that repeal "is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces." Don't Ask, Don't Tell Repeal Act of 2010, §§ 2(b)(2)(B), (C), Attachment 1, Abeyance Mtn. Holding this appeal in abeyance is appropriate out of respect for the orderly process mandated by Congress and because when certification occurs no further briefing will be necessary. Indeed, not even Log Cabin can dispute that this case will be moot once certification requirements are met and repeal becomes effective. The motion should be granted.

1. Log Cabin, in opposing the government's abeyance motion, contends that the Court and the parties should ignore Congress's decision to establish an orderly process for repeal of § 654, which, Log Cabin suggests, has no bearing on this case. Instead, Log Cabin speculates that "it is likely that the hearing and this Court's determination of this appeal will take place before repeal is ultimately

effective." Opp. 7.

There is no reason to credit this prediction. Briefing in this case is currently scheduled to conclude on March 8 and this Court denied a motion to expedite the oral argument date, instead indicating that oral argument would be set in the ordinary course. Expedition Order 2 (Attachment 1). In the ordinary course oral argument would likely not be scheduled for some time, and any panel decision, to say nothing of any final *en banc* determination, would likely issue at least months after argument.

The certification process prescribed by Congress is underway, and the President has made clear that the military's "service chiefs . . . are all committed to implementing this change swiftly and efficiently,"[1] and that repeal will happen in "a matter of months" and "[a]bsolutely not years."[2] Log Cabin notes that the Secretary of Defense and the Chairman of the Joint Chiefs of Staff have stated that the certification process will be undertaken carefully and deliberately. Opp. 6. That is

---

[1]http://www.whitehouse.gov/the-press-office/2010/12/22/remarks-president-and-vice-president-signing-don't-ask-don't-tell-repeal-a

[2]http://www.advocate.com/printArticle.aspx?id=169908

true. But in other portions of those very remarks the Secretary of Defense stated that his goal "is to move as quickly but as responsibly as possible," that he will approach the certification process with the view that "it's better to do this sooner rather than later," and that the first two phases of the three-phase process will be complete "within a matter of a very few weeks." Tr. of Jan. 6, 2011 DOD News Briefing at 12 (Attachment 2). Indeed, the Secretary has directed the Undersecretary of Defense for Personnel and Readiness "to accelerate the first two phases of [the certification] process as much as he possibly can so that we can get on with the training process." *Id.*

The Secretary has also said that he "endorse[s] the recommendations of the Comprehensive Review Working Group, which will provide the road map for a successful implementation." Attachment 2, Abeyance Mtn. That Working Group was charged in March 2010 with assessing the impact of repeal of § 654, and in November 2010 issued a comprehensive analysis of the impact of repeal, assessing the risk to overall military effectiveness of repeal of the statute as low once the Department establishes the necessary

implementation policies.[3] The Working Group also created a thorough Support Plan for Implementation, which outlines, in detail, the policies, procedures, and training needed for a successful repeal of § 654.[4] As a result, the government has already undertaken extensive preparations to implement a repeal of § 654. In short, it is unlikely that this appeal will come to a decision before the Department has implemented those policies and the necessary certification has been made.

2. Much of the rest of Log Cabin's opposition is effectively a collateral attack on this Court's decision to stay pending appeal the district court's worldwide permanent injunction precluding enforcement of § 654, Opp. 11-12, a decision that Log Cabin unsuccessfully urged the Supreme Court to vacate, 2010 WL 4539545. In other words, Log Cabin urges this Court to nullify the orderly process of repeal that has been established by Congress in favor of an immediate court-ordered

---

[3]Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell" at 9 (Nov. 30, 2010), available at: www.defense.gov/home/features/2010/0610_gatesdadt/DADTReport_FINAL_20101130(secure-hires).pdf.

[4]Support Plan for Implementation (Nov. 30, 2010), available at: www.defense.gov/home/features/2010/0610_gatesdadt/DADTReport-SPI_FINAL_20101130(secure-hires).pdf.

repeal, to overrule the decision of another motions panel of this Court, and to undermine the Supreme Court's refusal to vacate that decision. Log Cabin cites no authority for that extraordinary step, and there is no merit in Log Cabin's suggestion that the government is attempting "to eat its cake and have it too," Opp. 11, by requesting that this Court hold the appeal in abeyance while the district court's injunction remains stayed pending the appeal. Holding the appeal in abeyance would not terminate the pending appeal, but rather would merely defer its final resolution in deference to the ongoing orderly process for repeal of the sole statute at issue in this case.

Log Cabin argues that while the appeal is pending "current and prospective servicemembers will sustain an ongoing deprivation of their Constitutional rights . . . which is *ipso facto* irreparable harm." Opp. 3-4. But whether § 654 is constitutional is the very question that will be before this Court if this case does not become moot before decision, and in any event this Court granted the government's motion for a stay despite similar arguments of irreparable harm.

The district court entered a permanent worldwide injunction

against enforcement of a duly enacted Act of Congress on the basis of alleged injuries to two of plaintiff's members whose standing to sue is dubious. Gov't Stay Mtn. 6-9. In granting the government's request for a stay of the district court order pending appeal, this Court weighed the equities and concluded that they favor the government, not plaintiff. The Court noted 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" in a case of this kind, Order 3 (Attachment 3), and observed that the immediate, court-ordered repeal of the statute would produce "immediate harm and precipitous injury," Order 5-6. Congress has now provided for an orderly process for repeal of § 654, confirming this Court's concerns about an immediate, chaotic repeal process. There is no basis for Log Cabin's latest request to upend that carefully crafted political compromise.

3. The President signed the Repeal Act on December 22, 2010, and the government filed its abeyance motion on December 29, 2010. Log Cabin filed its opposition on January 10, 2011, and an "amended"

opposition on January 13. The government's opening brief is due on January 24, 2011. In view of that timing, the government respectfully requests a 30-day extension of time within which to file its opening brief and excerpts of record, up to and including February 23, 2011, should the Court decide not to hold this appeal in abeyance in deference to the orderly process for repeal of § 654.

CONCLUSION

For the foregoing reasons, as well as for the reasons stated in the government's motion, this appeal should be held in abeyance. In the alternative, the government respectfully requests a 30-day extension of time within which to file its opening brief and excerpts of record.

Respectfully submitted,

ANTHONY J. STEINMEYER
(202) 514-4825
AUGUST E. FLENTJE
(202) 514-3309
/s/ Henry Whitaker
HENRY C. WHITAKER
(202) 514-3180
Attorneys, Appellate Staff
Civil Division, Room 7256
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

JANUARY 2011

CERTIFICATE OF SERVICE

I certify that on January 14, 2011, 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.

I further certify that the following counsel for appellee is a registered CM/ECF user and that service on him will be accomplished by the appellate CM/ECF system:

Dan Woods
White & Case LLP
633 West Fifth Street, Suite
1900
Los Angeles, CA 90071

/s/ Henry Whitaker
Attorney for the United States