Nos. 10-56634, 10-56813

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOG CABIN REPUBLICANS,

Plaintiff-Appellee/Cross-Appellant,

v.

UNITED STATES OF AMERICA et al.,

Defendants-Appellants/Cross-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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STATEMENT OF JURISDICTION

Plaintiff Log Cabin Republicans brought this facial constitutional challenge to 10 U.S.C. § 654, the federal statute respecting homosexual conduct in the military, and its implementing regulations. Plaintiff invoked the district court's jurisdiction under 28 U.S.C. § 1331. The district court ruled that § 654 and its implementing regulations were unconstitutional on their face, and on October 12, 2010, entered a final judgment permanently enjoining the government from applying those provisions to any individual anywhere in the world. ER 2. On October 14, 2010, the government filed a timely notice of appeal. ER 312. On November 18, 2010, plaintiff filed a timely cross-appeal. ER 295. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The district court declared 10 U.S.C. § 654, the statute entitled "Policy concerning homosexuality in the armed forces," unconstitutional and entered a worldwide injunction prohibiting the government from enforcing the statute against any individual anywhere in the world. Congress has now established an orderly process for repeal of § 654. Given that congressional action, the issues on appeal at this point in

time are:

1. Whether plaintiff, which asserts standing solely based on alleged injuries to an unnamed individual and to an individual provided "honorary membership" in the organization, has organizational standing to bring this lawsuit.

2. Whether Congress lacked the constitutional authority to establish an orderly process for repeal of § 654, while keeping the former statute in place and maintaining the status quo during the transition in policy.

3. Whether the district court exceeded its remedial authority in enjoining the federal government from applying a federal statute and its implementing regulations to any individual anywhere in the world.

STATEMENT OF THE CASE

Plaintiff in this case brought a facial constitutional challenge to 10 U.S.C. § 654 and its implementing regulations, claiming that those provisions violated principles of substantive due process, equal protection, and the First Amendment. ER 343-345. The district court (Schiavelli, J.) initially dismissed the action for lack of standing, but

gave plaintiff an opportunity to replead. ER 330. The case was reassigned to another district judge (Phillips, J.), ER 313, who denied the government's motion to dismiss the amended complaint for lack of standing, refused to dismiss plaintiff's substantive due process and First Amendment claims, but agreed to dismiss plaintiff's equal protection claim under binding Ninth Circuit precedent, ER 294.

The district court then rejected both the government's request to certify for interlocutory appeal its order denying the government's motion to dismiss, ER 262, and the government's contention that discovery was inappropriate in the context of a facial constitutional challenge presenting a purely legal question, ER 268-270. Instead, the district court permitted plaintiff to conduct extensive discovery. After denying the government's motion for summary judgment, ER 226, 252-253, the district court conducted a bench trial. The district court invalidated the statute and its implementing regulations on their face, and fashioned a worldwide, permanent injunction enjoining the federal government from applying the statute to any individual. ER 2, 104.

The government appealed, and sought a stay pending appeal of

the district court's injunction, which the district court denied. ER 306, 312. This Court stayed the district court's injunction pending appeal. ER 298. Plaintiff applied to the Supreme Court to vacate this stay, but the Court denied the application. ER 297. Plaintiff subsequently filed a cross-appeal. ER 295.

STATEMENT OF THE FACTS

I. Statutory And Regulatory Background

A. Prior to 1993, no federal statute explicitly governed homosexual conduct in the military. Department of Defense regulations provided that "homosexuality is incompatible with military service," and generally banned homosexual conduct in the military. DOD Directive 1332.14.H.1.a, 32 C.F.R. Pt. 41, App. A (1991) (superseded).

The inauguration of President Clinton in 1993 triggered a broad reassessment of that policy. The Department of Defense, at Congress's request, convened a Military Working Group to study the issue of homosexuality in the military. *See* S. Rep. No. 103-112, at 268 (1993). Both Houses of Congress held extensive hearings on the topic, at which

congressional leaders heard testimony from scholars, sociologists, military leaders, as well as various advocacy groups.[1]

Those deliberations resulted in changes to military policy. The Department of Defense's Working Group concluded, and the Secretary of Defense concurred, that sexual orientation in the military should be considered a personal and private matter, and that the military no longer should, as a general matter, inquire into the sexual orientation of potential or current Service members. *See* Mem. from the Secretary of Defense, *Policy on Homosexual Conduct in the Armed Forces* (July 19, 1993); Mem. for the Sec. of Defense, *Recommended DoD Homosexual Policy Outline* 13 (June 8, 1993). At the same time, the Secretary agreed with the Working Group's recommendation that the longstanding ban on homosexual conduct in the military should be retained.

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[1] *See Policy Concerning Homosexuality in the Armed Forces*: *Hearings Before the S. Comm. on Armed Servs.,* 103d Cong. (1993); *Assessment of the Plan to Lift the Ban on Homosexuals in the Military*: *Hearings Before the Military Forces and Personnel Subcomm. of the H. Armed Servs. Comm.*, 103d Cong. (1993); *Policy Implications of Lifting the Ban on Homosexuals in the Military*: *Hearings Before the H. Comm. on Armed Servs.*, 103d Cong. (1993).

After reviewing the Secretary of Defense's findings and recommendations and the evidence presented before it, Congress codified this policy in 10 U.S.C. § 654. Section 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).

Congress accompanied this provision with legislative findings. Congress found, for example, that "military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society." *Id.* § 654(a)(8)(B). Congress also observed that "[t]he prohibition against homosexual conduct is a longstanding element of

military law that," Congress concluded at the time, "continues to be necessary in the unique circumstances of military service." *Id.* § 654(a)(13). Congress justified the prohibition based on its determination 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 of negatively affecting military capability. *Id.* § 654(a)(15).

Military regulations implementing § 654 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. Regulations also provide that "[c]ommanders or appointed inquiry officials shall not ask, and Service members shall not be required to reveal, whether a Service member is a heterosexual, a homosexual, or a bisexual" unless a formal investigation has been initiated. DOD Ins. 1332.14 Encl. 5 ¶3.c; DOD Ins. 1332.30 Encl. 8 ¶3.c.

Military regulations, as revised in March 2010, restrict the

circumstances in which formal investigations may occur. An investigation may be initiated of a person only upon receipt of "credible information," which generally means either information received by a senior individual within the person's chain of command, or a statement under oath by a "reliable person" that the person engaged in homosexual conduct. *See* DOD Ins. 1332.14 Encl. 5 ¶2.a, d; DOD Ins. 1332.30 Encl. 8 ¶2.a, d. An individual "with a motive to seek revenge against" a person, or with a motive "to cause personal or professional harm to persons suspected of being homosexual generally" may not be a reliable person within the meaning of the regulations. DOD Ins. 1332.14 Encl. 5 ¶2.e.2; DOD Ins. 1332.30 Encl. 8 ¶2.e.2. Information subject to a legal privilege, provided to a medical professional, or obtained during a personnel security investigation, "shall not be considered evidence of or be used for purposes of fact-finding inquiries or separation proceedings regarding homosexual conduct" without the person's consent. DOD Ins. 1332.14 Encl. 5 ¶2.f; DOD Ins. 1332.30 Encl. 8 ¶2.f.

B. President Obama when he took office renewed the political

debate surrounding the appropriate policy toward homosexual conduct in the military, making clear that his administration would support repeal of § 654 through the political process. To that end, the Secretary of Defense in March 2010 established the Department of Defense Comprehensive Review Working Group, which the Secretary tasked with both assessing the impact of a repeal of § 654 and recommending policy changes that repeal would necessitate. CRWG Rpt. 29.[2]

The Working Group solicited the views of hundreds of thousands of members of the military on the effects associated with a repeal of § 654. It conducted a large scale, professionally developed survey of both Service members and their families that generated 115,052 responses from Service members and 44,266 responses from spouses, and created an online in-box permitting Service members and their families to express their views anonymously. CRWG Rpt. 36-39. The Working Group consulted military scholars and historians, various outside advocacy groups, and both foreign and domestic military organizations. CRWG Rpt. 39-42. And it commissioned the RAND

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[2] The Working Group Report is available at http://www.defense.gov/home/features/2010/0610_gatesdadt/.

Corporation to provide additional supporting research and analysis respecting a repeal of § 654. CRWG Rpt. 43-44.

The Working Group issued a Report on November 30, 2010, summarizing the results of its comprehensive study and recommended changes to military policy. It concluded that "repeal can be implemented now, provided that it is done in a manner that minimizes the burden on leaders in deployed areas" in accordance with the Working Group's accompanying implementation plan. CRWG Rpt. 127; *see* CRWG Rpt. 10. The Working Group noted that while its large-scale survey revealed that the large majority of Service members did not express negative views about the effects of repealing § 654, the survey also "reveal[ed] a significant minority," particularly among combat units and Service members with combat experience, "who expressed in some form and to some degree negative views or concerns about the impact of a repeal" of § 654. CRWG Rpt. 121; *see* CRWG Rpt. 65, 74. The Working Group stated that "[a]ny personnel policy change for which a group that size predicts negative consequences must be approached with caution." CRWG Rpt. 121. The Working Group's

ultimate conclusion, however, was that "the risk of repeal of [§ 654] to overall military effectiveness is low" and that "while a repeal of [the statute] will likely, in the short term, bring about some limited and isolated disruption . . ., we do not believe this disruption will be widespread or long-lasting" and "can be adequately addressed by the recommendations" that the Working Group proposed for implementing any repeal. CRWG Rpt. 119.[3]

That assessment "depend[ed] upon the recommendations provided" for changing military policy in light of repeal. CRWG Rpt. 10. "[S]uccessful implementation of a repeal of" the statute, the Report noted in particular, "requires strong leadership, a clear message, and proactive training and education." CRWG Rpt. 132. Accordingly, the Working Group accompanied its report with a Support Plan for Implementation – a comprehensive framework for carrying out the necessary training and preparation associated with repeal of the

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[3] The Working Group observed that its recommendations were "based on conditions we observe in today's U.S. military" and that "[n]othing in this report should be construed as doubt by us about the wisdom of enacting 10 U.S.C. § 654 in 1993, given circumstances that existed then." CRWG Rpt. 3 n.2.

statute.[4]

The following month Congress enacted an orderly process for repealing § 654. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010). Congress provided that repeal of § 654 would become effective 60 days after: (1) the Secretary of Defense has received the Comprehensive Working Group's report, and (2) the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff all certify that they have considered the Working Group's recommendations, and have prepared the necessary policies and regulations to implement repeal consistent with military readiness, military effectiveness, unit cohesion, and both recruiting and retention in the Armed Forces. *Id.* § 2(b), 124 Stat. at 3516. Congress also provided, however, that § 654 would remain in effect in the interim until repeal occurs. *Id.* § 2(c), 124 Stat. at 3516.

The repeal process is well under way. Following enactment of the Repeal Act, both the President and the Secretary of Defense made clear that the military's "service chiefs . . . are all committed to

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[4] The Support Plan for Implementation is available at http://www.defense.gov/home/features/2010/0610_gatesdadt/.

implementing this change swiftly and efficiently,"[5] and that repeal will happen in "a matter of months" and "[a]bsolutely not years."[6] *See also* President's State of the Union Speech 2011 (stating that repeal will occur "this year").[7] In January, the Secretary of Defense stated that his goal "is to move as quickly but as responsibly as possible," and that he will approach the certification process with the view that it is "better to do this sooner rather than later."[8] The Secretary outlined a three-phase implementation process: first, preparation of the necessary policies; second, the creation of training materials; and finally, training of the force. *Id.* At this time, training of the force has begun. The Secretary has received and approved the repeal implementation plan, and training materials have been prepared and provided to the service. The military is now training the force in the final stage of the

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

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

[7] http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address

[8] Tr. of Jan. 6, 2011 DOD News Briefing, http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4747.

implementation process.

II. This Litigation

Plaintiff is an advocacy organization with a mission of "advanc[ing] the legislative and policymaking interest of the American gay and lesbian community within the Republican Party." ER 349. Plaintiff in 2004 brought this suit challenging 10 U.S.C. § 654 on its face as violating due process, equal protection, and the First Amendment. ER 484.

The first district judge assigned to this case dismissed plaintiff's complaint for lack of standing because plaintiff had not established that any of its members had suffered a concrete injury sufficient to confer associational standing on plaintiff. ER 320-328. The court also ruled that plaintiff could not proceed on the basis of injuries to anonymous members of its organization, noting that numerous other plaintiffs had brought constitutional challenges to § 654 without proceeding anonymously. ER 329. The court thus instructed plaintiff to "identify, by name, at least one of its members injured by the subject policy if it wishes to proceed with this action." ER 330.

Plaintiff filed an amended complaint and the case was reassigned to a different district court judge. ER 313, 332. That district court denied the government's motion to dismiss plaintiff's amended complaint for lack of standing. ER 281-284. The new judge also denied the government's motion to dismiss plaintiff's due process and First Amendment claims. ER 284-288, 290-294. In denying the motion the district court concluded that the deferential rational-basis constitutional standard of review governed plaintiff's due process claims, and agreed that this Court's precedents had rejected due process challenges to § 654 under that standard. ER 285-287 & n.5. The district court nonetheless declined to dismiss the due process claim because it concluded that the Supreme Court's decision in *Lawrence* v. *Texas*, 539 U.S. 558 (2003), had implicitly overruled this Court's precedents upholding § 654. ER 287-288. *Lawrence* held that a state law that criminalized homosexual sodomy between consenting civilian adults violated due process. 539 U.S. at 578. With respect to the First Amendment, the district court recognized that this Court has rejected First Amendment challenges to § 654. ER 291. The court declined to

apply those precedents to dismiss plaintiff's First Amendment claim because it found that those decisions "did not rule" on whether § 654 could be applied to "discharging service members for speech alone." ER 293. The Court, however, did agree that plaintiff's equal-protection claim was squarely foreclosed by this Court's decision in *Witt* v. *Department of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008), and thus dismissed that claim. ER 288-290.

The district court denied both the government's request to limit discovery in light of the purely legal nature of plaintiff's facial constitutional challenge and the government's request to certify for interlocutory appeal the court's order denying the government's motion to dismiss. ER 262, 268-270. The district court permitted plaintiff to develop extensive discovery, which resulted in the production of approximately 60,000 pages of documents and the deposition of fourteen witnesses.

Discovery revealed that the one named individual identified to support Log Cabin's standing – Alexander Nicholson, the founder and director of Servicemembers United, another gay and lesbian advocacy

group, ER 460, 466-467 – was not a member of the Log Cabin Republicans at the time Log Cabin commenced this lawsuit. Based on these and other facts, the district court issued a tentative ruling granting summary judgment to the government on the ground that plaintiff lacked standing. ER 260-261. The district court later reversed course, however, and ruled that plaintiff had standing. ER 250-252.

On the eve of trial, and long after the close of discovery, the district court also changed its mind about the constitutional standard of review applicable to this action. In *Witt*, this Court ruled that heightened constitutional scrutiny governed an as-applied constitutional challenge to § 654. *See* 527 F.3d at 820-21. When the district court denied the government's motion to dismiss, it had recognized that *Witt*'s heightened-scrutiny standard was "clearly limit[ed] . . . to such challenges" and that such scrutiny did not apply to a facial challenge as in this case. ER 286-287. When trial arrived, however, the court announced that it would apply the heightened-scrutiny standard developed in *Witt* for an as-applied challenge to the question in this case of whether § 654 is unconstitutional on its face.

ER 212.

At trial the district court heard testimony from expert witnesses and former members of the military discharged under § 654 that plaintiff presented. *See* ER 39-64, 75-84. Consistent with its position that neither discovery nor the presentation of evidence was appropriate in the facial constitutional challenge at issue, the government relied on Congress's extensive legislative investigations and findings that accompanied the enactment of § 654. ER 67-68.

The district court concluded, on the basis of evidence plaintiff had presented at trial rather than the full legislative record before Congress, that § 654 "does not significantly advance the Government's interests in military readiness or unit cohesion." ER 75. The district court rejected the government's contention that it should carefully tailor any remedy to the alleged violation in this case brought on the basis of injuries to one identified former Service member and one anonymous Service member. ER 7-15. Instead, the district court permanently and immediately enjoined the government from applying § 654 and its implementing regulations to any individual anywhere in

the world. ER 2, 17-18.

The government took an immediate appeal. ER 312. The district court denied the government's emergency request to stay that injunction pending appeal to this Court. ER 306. This Court granted the government's emergency motion to stay pending appeal the district court's worldwide injunction, and the Supreme Court denied plaintiff's application to vacate this Court's stay. ER 297, 298.

SUMMARY OF ARGUMENT

This is an appeal from a district court judgment holding unconstitutional on its face the 1993 statutory policy respecting homosexuality in the armed forces, 10 U.S.C. § 654. The district court entered a worldwide, forward-looking injunction against the government's enforcement of § 654 and its implementing regulations. Congress has now enacted an orderly process to repeal § 654, and repeal is expected to become final later this year. The government believes the pendency of this repeal process warrants withholding further proceedings and decision in this matter until the process is complete. But should the Court decide this case before it becomes

moot, the judgment of the district court should be reversed because: plaintiff lacks standing; Congress acted constitutionally when it established an orderly process to repeal § 654 and maintained the status quo during the transition in policy; and the district court exceeded its remedial authority in enjoining the federal government from applying a federal statute to individuals throughout the world who are not parties to the case.

I. Plaintiff Log Cabin Republicans lacks standing to bring this facial constitutional challenge to § 654. Plaintiff is a gay and lesbian advocacy organization and does not here allege injury to itself, but instead asserts "organizational standing" based on injuries to two gay individuals who, plaintiff contends, are Log Cabin members and have standing to bring this lawsuit in their own right. But the first of those individuals, J. Alexander Nicholson, is no longer serving in the Armed Forces. Mr. Nicholson thus lacks standing to bring this action for prospective injunctive relief against enforcement of § 654, especially now that Congress has provided for repeal of § 654, after which Mr. Nicholson and other gays and lesbians will be free to reapply to the

force. In any event, there was no dispute that Mr. Nicholson, who admitted he was not a Republican as required for membership under plaintiff's bylaws and articles of incorporation, was not a Log Cabin Republican member when plaintiff commenced this action; and Log Cabin's belated, *post hoc* attempt to confer "honorary membership" on Mr. Nicholson was insufficient to cure that fatal defect in plaintiff's standing.

Nor did plaintiff show standing based on alleged injuries to John Doe, an unnamed individual supposedly still serving in the military. Plaintiff presented no evidence that Doe has ever in his many years of service been subject to any concrete threat of being discharged or investigated under § 654, let alone subject to such a threat after Congress enacted a process for repeal of the statute. Plaintiff likewise failed to show that Doe was a *bona fide* Log Cabin member at all relevant times. Plaintiff thus may not sue on his behalf.

II. After the district court enjoined enforcement of § 654, Congress enacted a statute providing for repeal of § 654 effective 60 days after the President, the Secretary of Defense, and the Chairman of

the Joint Chiefs of Staff certify that the military has made the necessary preparations. At the same time, Congress left the former statutory policy set forth in § 654 in place as an interim measure until repeal is complete.

This case is thus now in a different posture than when it was at the time of the entry of the injunction now under review. The district court exercised its equitable authority to enjoin enforcement of a federal statute, but that statute is now undergoing a repeal process subject to a more recent law duly enacted by Congress and signed by the President. Should the Court conclude that plaintiff has standing, the question now thus would be whether Congress constitutionally maintained the status quo by leaving § 654 in effect while the Department prepares for the repeal of § 654, which is expected to occur later this year. In view of the disruption that an abrupt and immediate end to § 654 would cause, and that this Court acknowledged when it granted the government's motion to stay the district court's injunction, enacting this orderly process was well within Congress's considerable constitutional authority in crafting legislation concerning military

affairs.

In any event, Congress's enactment of a new statute to repeal the earlier statute that is the focus of the injunction undermines the district court's decision to end § 654 immediately by court order, without a transition period. Even if § 654 were unconstitutional standing alone before enactment of the repeal statute, it would be appropriate for the court to adopt some form of this orderly process as a remedy, and vacate the district court's worldwide, permanent, and immediate injunction against enforcement.

III. The district court exceeded its remedial authority by entering an injunction in this case precluding the government from enforcing § 654 against any individual anywhere in the world. This case was brought on the basis of alleged injuries to two individuals and is not a class action. Unless it is granting relief to a duly certified class, a court should not enjoin the government from enforcing federal statutes against nonparties, particularly because the government is not estopped from relitigating the same issue in other courts. Any other rule would permit the constitutional judgment of a single district court

effectively to preclude the government from defending the constitutionality of a federal statute in any other court.

ARGUMENT

Plaintiff brought a facial challenge to the constitutionality of the government's former statutory policy respecting homosexuals in the military, 10 U.S.C. § 654. The district court entered an immediate, worldwide injunction prohibiting the government from enforcing that statutory policy against any individual anywhere in the world. Recognizing the disruption that would be caused by that immediate injunction, this Court stayed the injunction pending appeal.

Congress has now provided for an orderly process to repeal § 654. After the district court issued its injunction, Congress enacted the Don't Ask, Don't Tell Repeal Act of 2010. Pub. L. No. 111-321, 124 Stat. 3515 (2010). The Repeal Act does not abrogate § 654 immediately, but rather makes repeal effective 60 days after: (1) the Secretary of Defense has received the Comprehensive Working Group's report, and (2) the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff all certify that they have

considered the Working Group's recommendations, and have prepared the necessary policies and regulations to implement repeal consistent with military readiness, military effectiveness, unit cohesion, and both recruiting and retention in the Armed Forces. *Id.* § 2(b), 124 Stat. at 3516. To facilitate an orderly transition in policy, Congress provided that the former statutory policy would remain in effect until the effective date of repeal. *Id.* § 2(c), 124 Stat. at 3516.

The process of repealing § 654 is well under way. Both the President and the Secretary of Defense have made clear that repeal will occur swiftly, and will be complete later this year. *Supra* p.13. The Secretary of Defense, moreover, has made clear that he endorses the recommendations of the Comprehensive Working Group's report, which concluded that the risk to military readiness of repeal is low after the Department has adopted the necessary policies and procedures to implement the new policy. Mem. for Secretaries of the Military Departments from Robert M. Gates (Dec. 22, 2010).[9]

This case will become moot upon the effective date of the repeal of

[9] This memorandum was attachment 3 to the Abeyance Motion the government filed in this Court on December 29, 2010.

§ 654, rendering any judicial disposition unnecessary. That date is swiftly approaching. As a result, the Court should withhold further proceedings and decision in this matter, both out of the respect owed to the orderly repeal process undertaken by the political branches and in furtherance of the policy favoring avoidance of deciding constitutional questions unnecessarily.

The government previously moved to hold this case in abeyance pending completion of the certification process established by Congress for repeal of § 654. A motions panel of this Court denied that motion. The government continues to believe that holding this case in abeyance would be appropriate, and the denial of the earlier motion is not binding on any panel that may be assigned this case for review on the merits. *See*, *e.g.*, *United States* v. *Robertson*, 52 F.3d 789, 791 (9th Cir. 1994). But should the Court press forward with this case, the judgment of the district court should be reversed for the reasons stated below.

I. Plaintiff Lacks Standing.

To bring this facial constitutional challenge, plaintiff has the burden of demonstrating that it has standing, which requires plaintiff

to "show that [it] is under threat of suffering 'injury in fact' that is concrete and particularized . . . actual and imminent, not conjectural or hypothetical"; that such injury is "fairly traceable to the challenged action of the defendant"; and that "a favorable judicial decision will prevent or redress" that injury. *Summers* v. *Earth Island Institute*, 129 S. Ct. 1142, 1149 (2009).

Plaintiff is a gay and lesbian advocacy organization. Plaintiff claims no injury to itself, but instead asserts "organizational standing" on the basis of injuries that two individuals allegedly sustained. A "voluntary membership organization" such as plaintiff, *see* ER 350, may vicariously assert the injuries of those of its "members" who "would otherwise have standing to sue in their own right." *Hunt* v. *Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977) (citing *Warth* v. *Seldin*, 422 U.S. 490, 515 (1975)). But here such standing is lacking because neither putative member of the organization offered by plaintiff would have had standing to bring this action in his own right, especially now that Congress has provided for repeal of the statute.

A. J. Alexander Nicholson

The first individual offered to establish standing was J. Alexander Nicholson, a former member of the military, and founder and executive director of Servicemembers United, a gay and lesbian advocacy organization that advocated repeal of § 654. ER 460, 466-467. For several reasons, plaintiff failed to establish that Mr. Nicholson would have had standing had he himself brought this suit.

First, Mr. Nicholson was discharged from the military under § 654 in March 2002, ER 461-462, well before plaintiff filed this action in October 2004 seeking a declaratory judgment and an injunction against enforcement of § 654, ER 484. He thus has no continuing prospective interest in precluding future enforcement of § 654, or in obtaining a declaratory judgment that it is unconstitutional, and hence would lack standing to bring this action in his own right. *See Summers*, 129 S. Ct. at 1150-51 (denying standing to organization based on an individual who asserted "past injury rather than imminent future injury"); *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 111 (1983) (plaintiff asserting past injury lacked standing to seek prospective

relief). Although Mr. Nicholson asserted an intention to "return" to the military if § 654 were invalidated, ER 470, "[s]uch 'some day' intentions – without any description of concrete plans . . . do not support a finding of the 'actual or imminent' injury that [the Supreme Court's] cases require." *Summers*, 129 S. Ct. at 1151 (internal quotation marks omitted); *see Wilderness Society, Inc.* v. *Rey*, 622 F.3d 1251, 1256 (9th Cir. 2010). And Mr. Nicholson's lack of a cognizable stake in this case is particularly apparent given that Mr. Nicholson independent of this suit may reapply to the military after repeal of § 654. *See* Mem. for Secretaries of the Military Departments from Clifford L. Stanley Attach. 1, at 2 (Jan. 28, 2011) (upon repeal, "former Service members who were discharged solely under 10 U.S.C. § 654 and its implementing regulations may apply to re-enter the Armed Forces. . . . They will be processed as any other re-accession applicant under Service policies.").[10]

Second, Mr. Nicholson was not at any relevant time a *bona fide* member of the plaintiff organization, and certainly was not a member in October 2004 when plaintiff commenced this lawsuit. "It has long

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[10] http://www.stripes.com/polopoly_fs/1.133139.1296240875!/menu/standard/file/DADTrepeal.pdf.

been the case that 'the jurisdiction of the court depends upon the state of things at the time of the action brought.'" *Grupo Dataflux* v. *Atlas Global Group, L.P.*, 541 U.S. 567, 570 (2004) (quoting *Mollan* v. *Torrance*, 9 Wheat. 537, 539 (1824)); *see Rey*, 622 F.3d at 1257 (quoting *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 830 (1989)). In *Rey*, for example, this Court denied an organization standing on the basis of an alleged injury suffered by an individual only *after* the filing of the complaint. *See* 622 F.3d at 1257. As the district court initially concluded in its tentative order, ER 260-261, those principles foreclose plaintiff's ability to assert standing based on Mr. Nicholson, for there was no dispute that Mr. Nicholson became a member of plaintiff, at the earliest, in April 2006, ER 470, well after the October 2004 commencement of this action, ER 484. In particular, plaintiff contended, and the district court agreed, that Mr. Nicholson became an "honorary member" of the Log Cabin Republicans on April 28, 2006 – the very same day that plaintiff filed its Amended Complaint after the district court had dismissed plaintiff's initial complaint on the ground that plaintiff had failed to identify any specific member injured by

§ 654 and thus lacked standing. ER 23-25, 469-471, 486.

The district court nonetheless held that plaintiff could vicariously assert Mr. Nicholson's alleged injury as a basis for its own standing because his "honorary membership" became effective the same day plaintiff filed its first amended, and currently operative, complaint. ER 23-25, 230-231, 239-242. An amended complaint, however, does not change the time of the commencement of the action, Fed. R. Civ. P. 3, and as a general rule the amended complaint relates back to the filing of the original complaint for litigation purposes, *id.* 15(c). As a result, "[t]he initial standing of the *original* plaintiff is assessed at the time of the *original* complaint, even if the complaint is later amended."[11] The Judicial Code expressly permits "[d]efective allegations of jurisdiction" to be "amended, upon terms, in the trial or appellate courts," 28 U.S.C. § 1653, but this provision permits a plaintiff only to amend the

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[11] *Schreiber Foods, Inc.* v. *Beatrice Cheese, Inc.*, 402 F.3d 1198, 1202 n.3 (Fed. Cir. 2005) (emphasis added); *see Perry* v. *Village of Arlington Heights*, 186 F.3d 826, 830 (7th Cir. 1999) ("[b]ecause standing goes to the jurisdiction of a federal court to hear a particular case, it must exist at the commencement of the suit" and "[i]t is not enough for" the plaintiff "to attempt to satisfy the requirements of standing as the case progresses").

allegations of the complaint, not assert *new facts* occurring after commencement that support jurisdiction. *See Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 830-31 (1989).[12]

In any event, regardless of the timing of Mr. Nicholson's "honorary membership," the district court erred in permitting plaintiff to sue on behalf of such an "honorary member." Plaintiff's own articles of incorporation and bylaws make clear that its actual membership is limited to dues-paying members who are Republicans. ER 350, 355-356. Mr. Nicholson paid no dues to the organization during the period he claimed membership. ER 475-476. The first time he did so was on March 18, 2010, three days after his deposition in this case. ER 477-478. Mr. Nicholson, moreover, admitted that he was not a Republican, ER 480.

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[12] In support of its contrary view, the district court relied heavily on *County of Riverside* v. *McLaughlin*, 500 U.S. 44 (1991). ER 240-241. That decision addressed whether the plaintiffs had standing to bring a class action lawsuit against a county for conducting allegedly unconstitutional probable-cause hearings. 500 U.S. at 51. The Court did not, however, discuss whether standing is evaluated at the time of the original complaint or amended complaint. Such "drive-by jurisdictional rulings . . . should be accorded no precedential effect." *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 511 (2006) (internal quotation marks and citation omitted).

The district court nonetheless observed that Mr. Nicholson became an "honorary member" as a result of giving a speech to plaintiff's national convention on April 28, 2006 – the very same day plaintiff filed its amended complaint – and "was told his membership was granted in exchange for his services to the organization." ER 23-25. The district court stressed that plaintiff's bylaws recognize a class of "honorary membership" for "individuals who have exhibited a unique or noteworthy contribution to" plaintiff's organization. ER 26. But an "honorary membership" should be no more sufficient to establish standing here than an "honorary" degree should be to establish a *bona fide* academic credential. Plaintiff is an association with an avowed purpose of "advanc[ing] the legislative and policymaking interests of the American gay and lesbian community *within the Republican Party*." ER 349 (emphasis added). To permit plaintiff to sue on behalf of someone who is not even a Republican on the basis of some amorphous concept of "honorary membership" would effectively permit an organization to sue on behalf of virtually anyone, no matter how unconnected to the organization's basic aims and membership

requirements.

B. John Doe

The only other individual plaintiff offered to support its standing was an unnamed individual, John Doe, an anonymous individual supposedly still serving in the military.[13] There is no allegation, however, that Doe is or ever has been subject to discharge proceedings under § 654. To bring a preenforcement challenge to a federal statute, Doe would have to show that he had a concrete plan to violate § 654; that he has been threatened with some kind potential enforcement proceedings; or otherwise that he is likely to be subject to discharge proceedings under the statute. *See Stormans, Inc.* v. *Selecky*, 586 F.3d 1109, 1122 (9th Cir. 2009). Plaintiff offered no evidence suggestive of any such threat; plaintiff's evidence showed, at most, that Doe was at the time of trial a currently serving member of the military and was a

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[13] C. Martin Meekins, then a White & Case attorney and a Log Cabin officer, had the responsibility of finding a Log Cabin member who was in the military on whose behalf the organization would bring suit. ER 437-438. He contacted John Doe, and in the month preceding the commencement of this suit, Doe filled out a Log Cabin membership application, paid its dues for 2004, and authorized it to sue on his behalf, provided he could proceed anonymously. ER 438-441.

dues-paying member of the Log Cabin Republicans at the time of the filing of the lawsuit. ER 414-415, 439-441.[14] Plaintiff thus did not demonstrate that Doe has any concrete stake in this lawsuit sufficient to give him standing. And plaintiff's failure to show Doe's standing here applies with special force to bar preenforcement review actions challenging possible military discharge proceedings. *See Schlesinger* v. *Councilman*, 420 U.S. 738, 756-58 (1975).

In any event, plaintiff failed to carry its burden of demonstrating that Doe was a Log Cabin member at all relevant times during this lawsuit. Although there was some testimony that Doe applied to join Log Cabin in the month before the complaint was filed, ER 421-423, 439-440, there was no evidence that Doe was a Republican as is required by Log Cabin's bylaws and articles of incorporation, ER 350, 355-356, or even that he was an "honorary member" of the organization. Even the district court allowed that plaintiff did not

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[14] Although plaintiff submitted a declaration by Doe in which Doe asserted in conclusory fashion that § 654 injured him, plaintiff did not offer that declaration as substantive evidence, but instead only to demonstrate Doe's state of mind. *See* ER 21 n.3. The declaration thus provides no support for Doe's standing here.

present evidence that Doe had kept his Log Cabin membership dues current throughout the pendency of this litigation. ER 30; *see* ER 425-426. The district court held that this fact was irrelevant "in an associational standing context." ER 30. But nothing about that context overrides the well established principle that, "[i]n addition to having standing at the outset, a plaintiff's stake in the litigation must continue throughout the proceedings, including on appeal." *Williams* v. *Boeing Co.*, 517 F.3d 1120, 1128 (9th Cir. 2008).

Moreover, the court allowed plaintiff to establish standing based on an alleged injury to Doe as an anonymous individual without affording the government any means of verifying that Doe is currently in the military and thus subject to § 654. That is a significant issue, since Doe is apparently a long-standing member of the military – indeed, a Lieutenant Colonel – who could well be approaching the end of his career. ER 414-415. "It is the duty of counsel to bring to the federal tribunal's attention, *without delay*, facts that may raise a question of mootness." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 68 n.23 (1997) (emphasis in original; citations and internal

quotation marks omitted).

Doe is the only asserted Log Cabin member who provides it with associational standing to support the worldwide injunction issued by the district court because, as explained previously, Mr. Nicholson is a civilian who was discharged from the military long before this lawsuit was commenced, and hence lacks any cognizable prospective interest in prohibiting enforcement of § 654. The basis for Doe's standing is even more tenuous now that Congress has established a process to repeal § 654.

II. The Orderly Process Established By Congress To Repeal § 654 Is Constitutional, Particularly Given The Deference Owed To Congress's Constitutional Authority To Craft Legislation Respecting Military Affairs.

Congress has now enacted the Don't Ask, Don't Tell Repeal Act of 2010, which provides for repeal of § 654 once the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff certify that the government has made the preparations necessary for that repeal. Pub. L. No. 111-321, 124 Stat. 3515 (2010). The government continues to believe that it would be appropriate to hold this case in abeyance pending the completion of that certification

process, given that this case will become moot upon the effective date of repeal of § 654.

A. Should the Court issue an opinion in this case before it becomes moot because of repeal, however, and should the Court conclude that plaintiff has standing to sue, the question then would be whether it is constitutional for Congress to leave § 654 in place to facilitate an orderly transition in military policy while the Department of Defense completes the training and preparation needed in advance of repeal.

When this Court granted the stay of the injunction and left § 654 in place pending appeal, it found "convincing" the government's arguments that "the lack of an orderly transition in policy will produce immediate harm and precipitous injury." ER 302-303. "[T]he public interest in ensuring orderly change of this magnitude in the military," this Court continued, "strongly militates in favor of a stay." ER 303. It was well within Congress's constitutional authority, particularly in the area of legislation respecting military affairs, likewise to maintain the status quo before repeal becomes effective later this year.

Congress has wide authority to legislate on matters respecting military affairs. Indeed, "'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 this Court noted in granting our earlier stay motion, "the Constitution contemplates that Congress has plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures, and remedies related to military discipline." ER 301 (quoting *Weiss* v. *United States*, 510 U.S. 163, 177 (1994) (internal quotation marks and citation omitted)).

Before Congress enacted the Repeal Act and established an orderly process to repeal § 654, all the courts of appeals to have addressed the matter – including this Court – had sustained the constitutionality of § 654 against both substantive due process and First Amendment challenges.[15] As we noted in our stay motion, "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.'" Gov't Stay Mtn. 9 (quoting *Cook* v. *Gates*, 528 F.3d 42, 60 (1st Cir. 2008)). As our stay motion also noted, this Court sustained the facial constitutionality of the prior, more restrictive version of the policy in *Beller*, and the validity of that holding was not altered by this

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[15] *See Holmes* v. *Cal. Army Nat'l Guard*, 124 F.3d 1126, 1136 (9th Cir. 1997); *Philips* v. *Perry*, 106 F.3d 1420, 1429-30 (9th Cir. 1997); *Cook* v. *Gates*, 528 F.3d 42, 60 (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 Beller* v. *Middendorf*, 632 F.2d 788, 810 (9th Cir. 1980) (Kennedy, J.), *overruled in part on other grounds by Witt* v. *Dep't of Air Force*, 527 F.3d 806, 820 (9th Cir. 2008); (upholding prior regulations); *Steffan* v. *Perry*, 41 F.3d 677, 692 (D.C. Cir. 1994) (en banc) (same).

Court's later decision to apply heightened scrutiny to § 654 in *Witt*, which involved an as-applied challenge. *See* Gov't Stay Mtn. 10-11. It follows with even greater force that Congress constitutionally determined in the Repeal Act that an orderly transition in policy justified maintaining the status quo and leaving § 654 in place while the Department of Defense completes the necessary preparations for repeal.

B. Moreover, even if the district court were correct that § 654 was unconstitutional, Congress's subsequent decision to enact an orderly process for repeal of the statute would, standing alone, render the district court's immediate injunction an inappropriate remedy. Congress's enactment of the Repeal Act further undermines the validity of the district court's immediate worldwide injunction because that immediate injunction would preclude any such orderly transition. If the stay of the injunction were lifted and the injunction allowed to take effect, the injunction would disrupt the transition process that was duly enacted subsequent to the injunction. Thus, the injunction must now be reversed regardless of whether § 654 was constitutional standing

alone before the Repeal Act.

"The provision of prospective relief is subject to the continuing supervisory jurisdiction of the court, and therefore may be altered according to subsequent changes in the law." *Miller* v. *French*, 530 U.S. 327, 347 (2000). If a subsequent change in the law undermines the basis for the injunction, the Court should consider whether the change warrants dissolving the injunction. *See id.* at 336-41 (holding that subsequent enactment of "automatic stay" provision of the Prison Litigation Reform Act invalidated district court injunction entered to remedy unconstitutional prison conditions); *Salazar* v. *Buono*, 130 S. Ct. 1803, 1818 (2010) (holding that First-Amendment-based injunction should be revisited in light of subsequent enactment of a federal statute bearing on the constitutional issues); *Sys. Federation No. 91* v. *Wright*, 364 U.S. 642, 647-53 (1961) (dissolving injunction in light of subsequent enactment of a federal statute); *Pennsylvania* v. *Wheeling Bridge & Belmont Bridge Co.*, 59 U.S. 421, 432 (1855) (same).

Here, Congress's subsequent enactment of the Repeal Act has changed the circumstances surrounding § 654 and undermines the

district court's decision to end § 654 abruptly by court order. In contrast to that order, the Repeal Act permits the military to establish the necessary policies and procedures, and to train the force, before repeal becomes final. Congress's judgment on matters respecting military affairs is entitled to judicial deference, and, as this Court noted in granting a stay pending appeal, an immediate court-ordered end to the policy would cause substantial disruption. The court should defer to the orderly method Congress chose to end the statutory policy, and not allow the immediate worldwide injunction to stand. *See Lewis* v. *Casey*, 518 U.S. 343, 361-63 (1996) (holding that district court failed to afford sufficient deference to judgments of prison officials in fashioning remedy for unconstitutional prison conditions); *Missouri* v. *Jenkins*, 515 U.S. 70, 88-89 (1995).

III. The District Court's Worldwide Injunction Against The Federal Government's Enforcement Of A Statute Exceeded Its Remedial Authority.

The district court erred in awarding relief that was, in essence, a grant of classwide relief in a case that is not a class action. The court enjoined the federal government from applying a federal statute to any

member of the military anywhere in the world. That relief was far beyond the authority of the court in this case, which was brought by a single organizational plaintiff purporting to advance the interests of two individuals.

Where, as here, a party challenging the application of a statute and regulations does not bring a class action, any injunction obtained by that party cannot prevent government enforcement of those laws against nonparties on a nationwide, let alone a worldwide, basis.[16] The constitutional judgment of one district court in a case involving one organization, where no class of any type has been certified, should not and cannot have worldwide binding effect against the federal government. Such authority would effectively enable one district court judge to prevent the government from defending the constitutionality of

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[16] *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) (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"); *Wisc. Right to Life, Inc.* v. *Schober*, 366 F.3d 485, 490 (7th Cir. 2004).

the law in any other court, and interfere with the development of the law in other circuits – a particularly acute concern here given that other courts have upheld the statute's constitutionality.[17] This Court has thus refused to "determine the rights of persons not before the court" in similar challenges to federal government action. *Zepeda* v. *INS*, 753 F.2d 719, 727 (9th Cir. 1983); *see Nat'l Ctr. for Immigration Rights* v. *INS*, 743 F.2d 1365, 1371-72 (9th Cir. 1984).

The Supreme Court acted in accordance with those principles 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

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[17] *See United States* v. *Mendoza*, 464 U.S. 154, 159 (1984) ("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" (citation and internal quotation marks omitted)); *United States* v. *AMC Entm't, Inc.*, 549 F.3d 760, 773 (9th Cir. 2008) ("[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); *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).

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 the Court should likewise reverse the district court's worldwide injunction here.

The district court recognized that its worldwide injunction would prevent the government "from defending the constitutionality of the" statute, ER 12, but viewed that as inconsequential because plaintiff challenged the statute on its face rather than as applied, ER 7, 12. A plaintiff's legal theory, however, does not change the permissible scope of a court's remedy. *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 under which he is being prosecuted is facially unconstitutional gets his conviction reversed – he does not obtain a court order that prevents the government from prosecuting

anyone else under the statute. And, contrary to the district court's apparent view, ER 7-8, 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 identified and represented.

CONCLUSION

For the foregoing reasons, the district court's judgment and worldwide permanent injunction should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in 14-point Century Schoolbook, a proportionally spaced font, and according to the word-count function of Corel WordPerfect X4 contains 8,820 words from its Jurisdictional Statement to its Conclusion.

/s/ Henry Whitaker
Henry C. Whitaker

STATEMENT OF RELATED CASES

This Court also has before it a constitutional challenge to an application of 10 U.S.C. § 654. *Witt* v. *Department of Air Force*, No. 10-36079 (9th Cir.). We are aware of no other potentially related cases within the meaning of Ninth Circuit Rule 28-2.6.

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on February 25, 2011.

I certify as well that on that date I caused a copy of this brief to be served on the following counsel registered to receive electronic service.

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