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 and ROBERT M. GATES,
Secretary of Defense, in his official capacity,
Defendant-Appellants-Cross-Appellees.

On Appeal from the United States District Court
For the Central District of California

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of Defendant-Appellants-Cross-Appellees
Urging Reversal

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Amicus Curiae, The National Legal Foundation has not issued shares to the public, and it has no parent company, subsidiary, or affiliate that has issued shares to the public. Thus, no publicly held company can own more than 10% of stock.

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

This Brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties. No party's counsel authored this Brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the Brief; and no person other than *Amicus Curiae* The National Legal Foundation, its members, or its counsel contributed money that was intended to fund preparing or submitting the Brief.

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INTEREST OF THE *AMICUS*

The National Legal Foundation (NLF) is a 501(c)(3) public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. Since its founding in 1985, the NLF has litigated important First Amendment cases in both the federal and state courts. The NLF, as a public interest law firm, has an interest, on behalf of its constituents and supporters, in arguing on behalf of the many Americans who believe courts continue to erode historic and foundational principles of law, including those protecting a traditional view of marriage. The NLF believes that the "Don't Ask, Don't Tell" (DADT) policy is constitutional and that, in spite of its repeal, its enactment and enforcement has perpetrated no constitutional harm.

This Brief is filed pursuant to consent of all parties.

SUMMARY OF THE ARGUMENT

This Brief expands upon one argument made below by the Defendant-Appellants-Cross-Appellees United States, *et al.* ("United States") in its Supplemental Brief in Support of its Motion to Dismiss, *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal. Feb. 17, 2009) (04-cv-8425). The court below erred when it failed to dismiss Plaintiff-Appellee-Cross-Appellant Log Cabin Republicans' ("Log Cabin") substantive due process claim. Under binding Ninth Circuit authority, substantive due process claims requiring heightened

scrutiny must be brought as-applied, which Log Cabin has not done and cannot do as an organization.

ARGUMENT

I. THE DISTRICT COURT ERRED BY NOT DISMISSING LOG CABIN'S FACIAL CHALLENGE TO DADT ON SUBSTANTIVE DUE PROCESS GROUNDS BECAUSE THIS COURT REQUIRED ANY SUCH CHALLENGE TO BE ON AN AS-APPLIED BASIS.

The United States has thoroughly argued why this Court should reverse the court below on the basis of Log Cabin's lack of standing or, alternatively, should order the case held in abeyance pending the government's ongoing repeal of DADT. (*See generally*, United States' Opening Br.) Of particular importance to your *Amicus's* submission is the fact that Log Cabin has not "claim[ed] any injury to itself," but has instead attempted to base its organizational standing upon two putative members of the organization. (United States' Opening Br. at 27.) This Court could also properly dispose of Log Cabin's *substantive due process claim* due to lack of standing for one additional reason—namely that Log Cabin's failure to bring its substantive due process claim "as-applied" forecloses its standing to bring that claim.[1]

[1] Although the United States did not explicitly re-argue this point in its Opening Brief, questions of standing, which go to the jurisdiction of this Court, are reviewable at any time, even if raised by an *amicus*. *Maricopa-Stanfield Irrigation & Drainage Dist. v. United States*, 158 F.3d 428, 433 (9th Cir. 1998).

Here, Log Cabin sued as an organization and must have standing as such for each of its claims. However, this Court has held that organizations do not have standing to bring as-applied challenges where the only harms would be to individual members of the organization. *See Washington Legal Found. v. Legal Found. of Washington*, 271 F.3d 835, 850 (9th Cir. 2001). Further, as will be discussed below, *Witt v. United States Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008), requires that any substantive due process challenge to DADT be made as-applied. Thus, because Log Cabin is foreclosed from bringing an as-applied challenge and its substantive due process challenge must be brought as-applied, it lacks standing to bring that claim.

Therefore, the court below erred when it refused to dismiss Log Cabin's substantive due process claim. *Log Cabin Republicans v. United States*, 04-cv-8425, at 14-16 (C.D. Cal. June 9, 2009) (order denying motion to dismiss). Instead, the court incorrectly applied this Court's holding in *Witt*, and held that *Witt* merely expressed a "strong preference for as-applied challenges" on substantive due process grounds. *Id.* at 16. Thus, the court below concluded that *Witt* did not forbid a facial challenge and allowed Log Cabin's facial challenge to DADT to move forward. *Id.* The court below essentially gave Log Cabin the option of attacking DADT as-applied under heightened scrutiny or facially under rational basis review. *Id.* at 16-17. However, allowing this option is clearly

contrary to the holding in *Witt*, 527 F.3d at 821, and this Court should vacate the substantive due process portion of the district court' opinion.

A review of the *Witt* litigation demonstrates that DADT can be challenged *only* on an as-applied basis. Initially the *Witt* district court rejected the application of heightened scrutiny to DADT based in part on its belief that, had the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), intended heightened scrutiny, the Court would have needed to have "engage[d] in [an] inquiry to determine whether the law in question was narrowly tailored to meet a compelling state interest," which plainly constitutes an "'as applied' analysis [that] is *required as a part of any strict scrutiny or intermediate review*." *Witt v. United States Dep't of the Air Force*, 444 F. Supp. 2d 1138, 1144 (W.D. Wash. 2006) (internal citation and quotation omitted) (emphasis added). In other words, the *Witt* district court believed that had the *Lawrence* Court intended heightened scrutiny for substantive due process analysis of Texas's sodomy law, the Supreme Court would have conducted the scrutiny as-applied, rather than facially. Because the *Lawrence* Court did no such thing, the *Witt* district court concluded that DADT continued to be subject only to rational basis review.

Although this Court disagreed with the district court that *Lawrence* did not require heightened scrutiny, this Court did agree that heightened scrutiny analysis under substantive due process *necessitates* an as-applied challenge. *Witt*, 527 F.3d

at 819 (explaining that "we hold that this heightened scrutiny analysis [of the plaintiff's substantive due process claim] is as-applied rather than facial."). In reversing the district court in *Witt*, this Court explicitly noted that evaluating DADT under substantive due process required the "*individualized* balancing analysis" as set forth in *Sell v. United States*, 539 U.S. 166, 178-81 (2003). *Witt*, 527 F.3d at 820. In fact, two of the prongs of the *Sell* analysis necessitated remand in *Witt* to see "whether the application of DADT *specifically to [the plaintiff]* significantly furthers the government's interest and whether less intrusive means would achieve substantially the government's interest." *Id.*

Furthermore, this Court's instructions to the district court in *Witt* only amplified the point that substantive due process claims concerning the rights at issue in DADT require an as-applied analysis.

> We hold that when the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*, the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest. In other words, for the third factor, a less intrusive means must be unlikely to achieve substantially the government's interest.
>
> In addition, we hold that this heightened scrutiny analysis *is as-applied rather than facial*. "This is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments."

Witt, 527 F.3d at 819 (quoting *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 447 (1985); other internal citations omitted) (emphasis added). The use

of the indicative "*is* as-applied" demonstrates that the as-applied analysis was mandatory, not optional.

The court below appeared to mistakenly interpret this Court's use of *City of Cleburne*. *Log Cabin Republicans*, 04-cv-8425, at 16 (order denying motion to dismiss). The district court interpreted *Cleburne's* statement that as-applied challenges represent the "preferred course of adjudication" to mean this Court had only a "strong preference for as-applied challenges" in substantive due process cases. *Id.* Instead, this Court simply noted that the substantive due process claim in *Witt* easily fit within the general approach, and that it was *requiring* the analysis to be conducted on an as-applied basis on remand. *Witt*, 527 F.3d at 819. Significantly, on remand, the *Witt* district court unquestionably understood its charge to conduct an as-applied analysis.

Although the district court *was* uncertain as to some aspects of this Court's instructions, it clearly understood its analysis of the plaintiff's substantive due process claim had to be as-applied. *Witt v. United States Dep't of the Air Force*, 2010 U.S. Dist. LEXIS 100781, at *12-15 (W.D. Wash. Sep. 24, 2010) (opining that "[t]he fact-finding task the Ninth Circuit sets for this Court is less clear [than other parts of its opinion]," but noting that "[t]he Ninth Circuit has held that the heightened scrutiny analysis is as-applied rather than facial."). In rejecting the Air Force's argument that DADT was justified by the need for uniformity within the

military ranks, the court noted that uniformity could not be some sort of talisman to withstand constitutional scrutiny because the "call for uniformity defies *as-applied analysis*." *Id.* at *14-15 (emphasis added). The court noted that

> [b]y definition, if uniformity is required, exceptions cannot be encouraged. And if exceptions cannot be encouraged, *as-applied analysis* [would be] pointless. The direction to this Court to apply DADT to the specific circumstances of Major Witt compels it to reject any notion that the overriding need for uniformity trumps individualized treatment of Major Witt.

Id. at *15 (emphasis added).

Yet, as the United States has pointed out below, United States' Supplemental Br. in Supp. of Mot. to Dismiss at 7, *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal. Feb. 17, 2009) (04-cv-8425), and in its opening brief to this Court, (United States' Opening Br. at 1), Log Cabin persists in its facial challenge of DADT on, *inter alia*, substantive due process grounds. Furthermore, as the United States also argued in the court below, Log Cabin's "litigation strategy" defies proper substantive due process analysis under *Witt* because the "challenge is not based upon the record of a particular individual." Supplemental Br., *supra*, at 7 (quoting Log Cabin's *Ex parte* Application, Docket No. 53, at 10). Log Cabin has instead based its claim on the "generalized claims" that DADT is "based upon animus 'toward gay and lesbian members of the nation's armed forces.'" *Id.* Simply put, because Log Cabin has not based its claim for a violation of substantive due process on any allegation of the deprivation of rights of any of

its members, no as-applied analysis has been, nor can be, done. *Witt* forecloses Log Cabin's substantive due process claim, and the court below erred by not dismissing it.

Therefore, the judgment of the district court should be reversed, and the portion of the district court's opinion dealing with Log Cabin's substantive due process claim should be vacated. This Court has granted such relief in the past when a plaintiff lacked standing to bring a claim. *See, e.g.*, *Stoianoff v. Montana*, 695 F.2d 1214, 1216 (9th Cir. 1983) ("We vacate that portion of the district court's decision striking down the advertising prohibition, M.C.A. § 45-10-106, because the plaintiff lacks standing to assert this claim, and affirm the other portions of the district court's opinion . . . ."); and *Overton Power Dist. No. 5 v. O'Leary*, 73 F.3d 253, 258 (9th Cir. 1996) ("Because [the plaintiffs] lack standing to bring this action, we remand this cause to the district court with directions that it vacate its opinion and dismiss the case.").

CONCLUSION

Because any substantive due process challenge to DADT must be brought as-applied, and because Log Cabin has not and could not bring an as-applied challenge as an organization, the judgment of the district court concerning Log Cabin's substantive due process challenge should be reversed and that portion of its opinion vacated.

Respectfully submitted,
this 4th day of March 2011

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2011, I have electronically filed the foregoing Brief *Amicus Curiae* of The National Legal Foundation in the case of *Log Cabin Republicans v. United States, et al.*, Nos. 10-56634 and 10-56813, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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