Case Nos. 10-56634, 10-56813

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LOG CABIN REPUBLICANS,
a non-profit corporation,

Plaintiff-Appellee/Cross-Appellant,

vs.

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

Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
No. CV 04-8425, Honorable Virginia A. Phillips, Judge

MOTION OF APPELLEE / CROSS-APPELLANT LOG CABIN REPUBLICANS TO VACATE STAY OF INJUNCTION

Dan Woods (CA SBN 78638)
dwoods@whitecase.com
Earle Miller (CA SBN 116864)
emiller@whitecase.com
Aaron A. Kahn (CA SBN 238505)
aakahn@whitecase.com

WHITE & CASE LLP
633 West Fifth Street, Suite 1900
Los Angeles, California 90071
Telephone: (213) 620-7700
Facsimile: (213) 452-2329
Attorneys for Plaintiff-Appellee/Cross-Appellant Log Cabin Republicans

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MOTION TO VACATE STAY OF INJUNCTION

Appellee/Cross-Appellant Log Cabin Republicans, plaintiff below, hereby moves for an order vacating this Court's Order of November 1, 2010 (Dkt. 24), which stayed the district court's October 12, 2010 permanent injunction pending appeal. The motion is based on the grounds that a necessary underpinning of that stay order is now lacking.

To obtain the stay, the government had to show, and promised to show, a likelihood of success on the merits, namely the constitutionality of the "Don't Ask, Don't Tell" statute, 10 U.S.C. § 654. The merits briefing on this appeal was completed on April 28, 2011. The briefing makes clear that the government has abandoned that claim and no longer argues that Don't Ask, Don't Tell is constitutional. Accordingly, the government cannot show a likelihood of success on the merits and there is no basis to stay the district court's judgment. While the stay is in effect, the government remains free to, and does, conduct investigations and discharges, and otherwise violate the constitutional rights of current and prospective members of our armed forces, under an unconstitutional statute.

The order staying the district court's injunction should be vacated. In the alternative, if this motion to vacate is denied, Log Cabin requests that the argument of this appeal be set on an expedited basis. The government opposes this motion.

I.

INTRODUCTION

On October 12, 2010, following a two-week bench trial at which a full record was developed, the district court declared unconstitutional the government's policy prohibiting open service by homosexuals in the military, codified at 10 U.S.C. § 654 and its implementing regulations (hereafter referred to as "Don't Ask, Don't Tell" or "DADT"), and entered an order permanently enjoining the government from enforcing or applying DADT against any person under its jurisdiction or command. The district court found that Don't Ask, Don't Tell violated both servicemembers' Fifth Amendment due process rights and their First Amendment rights to free speech and to petition the government for redress of grievances. The district court's judgment was supported by an 85-page Memorandum Opinion (ER 19-104) and an 84-page set of Findings of Fact and Conclusions of Law (ER 105-188).

The government appealed the district court's judgment on October 14, 2010 and on October 20, 2010 moved for an emergency stay of the judgment pending appeal (Dkt. 3-1). In that emergency motion, the government assured this Court, as it was obliged to, that it was likely to succeed on the merits of its defense of the constitutionality of DADT. The government advanced three arguments in this regard: that DADT was justified under the principle of judicial deference to

Congressional judgment in military affairs; that the heightened scrutiny analysis this Court enunciated in *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008), should not govern a facial constitutional challenge; and that DADT did not violate the First Amendment "because it provides for 'discharge for … conduct and not for speech.'" *Id*. at 9-12. Log Cabin opposed the motion. On November 1, 2010, over a partial dissent by Judge William Fletcher, this Court granted the government's motion for a stay. The Court's order was largely premised on the grounds that the appeal presented "serious legal questions" over the constitutionality of DADT (Dkt. 24, at 3-5).

On appeal, however, the government pursues none of the constitutional arguments it made in its motion for stay. Its opening merits brief (Dkt. 58), filed February 25, 2011, does not argue that any judicial deference should be given to Congress' judgment in passing the Don't Ask, Don't Tell statute itself. Instead, the government argues only for deference to the passage of the Don't Ask, Don't Tell Repeal Act of 2010 (the "Repeal Act") – a statute enacted two months after the district court's judgment invalidating DADT. *Id*. at 38-39. And the other points are not argued at all. The government's brief addresses the constitutionality of DADT only to cite – in a footnote – prior, outdated or non-binding decisions of this and other Circuits sustaining its constitutionality, not to challenge the district court's considered determination here that the statute is facially unconstitutional.

Id. at 40-41. The government's reply brief (Dkt. 104), filed April 28, 2011, is even less attentive to the merits, devoting a total of four lines to simply referring the Court to the portions of its opening brief cited just above. *Id*. at 7-8.

The government's silence on these critical points that led to the issuance of the stay demonstrates that the government can no longer maintain that it is likely to succeed on the merits of its defense of the constitutionality of DADT. A continued stay of the district court's injunction is therefore inappropriate.

II.

ARGUMENT

A. Statutory and Procedural Background

The background and history of the Don't Ask, Don't Tell statute is set forth in the parties' merits briefs on appeal and need not be repeated at length here. To summarize, the statute, 10 U.S.C. § 654, was enacted in 1993. It and its implementing regulations provide that a member of the armed forces "shall be separated" if the member has engaged or attempted to engage in a homosexual act, has stated that he or she is a homosexual, or has married or attempted to marry a person of the same sex. Following the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 562 (2003), which held that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct" and mandated a heightened level of scrutiny of laws regulating such

conduct, Log Cabin Republicans brought a facial challenge to the constitutionality of the statute in 2004.

In July 2010, the district court conducted a two-week bench trial, at which over 20 witnesses, both expert witnesses and former servicemembers affected by DADT, testified, and over 100 exhibits were received in evidence. This was, and remains, the only full trial ever conducted on a facial constitutional challenge to Don't Ask, Don't Tell. The government chose to present no testimony or evidence of its own beyond the legislative history of the statute. Following the trial, in October 2010 the district court entered a judgment and permanent injunction declaring DADT unconstitutional, for violating the Fifth Amendment substantive due process rights, and the First Amendment rights to freedom of speech and to petition the Government for a redress of grievances, of current and prospective United States servicemembers. The government appealed the judgment, and moved in this Court for a stay of the district court's injunction pending appeal. This Court entered that stay on November 1, 2010.

On November 24, 2010, the parties moved jointly (Dkt. 35) to expedite the briefing and argument of this appeal, stipulating that expediting the appeal would shorten the time during which servicemembers faced legal uncertainty and ongoing and potential discharge proceedings under DADT. On December 1, 2010, this Court granted the parties' motion as to expediting the briefing schedule, but denied

without explanation the parties' request to expedite the scheduling of oral argument (Dkt. 36).

In December 2010, Congress passed and the President signed the "Don't Ask, Don't Tell Repeal Act of 2010," Pub. L. No. 111-321, 124 Stat. 3515 (2010). That act provides that DADT would be repealed effective 60 days after written certification by the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff that repeal is consistent with the Armed Forces' standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention. *Id*., § 2(b). Until that certification is made, however, the act provides that DADT remains in effect. *Id*., § 2(c). As of the date of this motion, the written certification has not been made, and DADT continues in full force and effect.

On December 29, 2010, the government moved to "hold these appeals in abeyance" in light of the enactment of the Repeal Act (Dkt. 37). Log Cabin opposed the motion, and this Court denied it on January 28, 2011 (Dkt. 53). Pursuant to the Court's scheduling order then entered, the briefs on the merits were filed and completed on April 28, 2011.

B. An Essential Factor on Which This Court's Stay Was Entered No Longer Exists

To obtain a stay of a district court's injunction pending appeal, the moving party must show each of four factors: (1) a strong showing that he is likely to

succeed on the merits; (2) irreparable injury absent a stay; (3) that issuance of the stay will not substantially injure the other parties; and (4) that the public interest favors it. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). These are the same four factors that must be shown by a party moving for a preliminary injunction, "because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *Nken v. Holder*, ___ U.S. ___, 129 S. Ct. 1749, 1761 (2009). The first two factors are the most critical; and the moving party's likelihood of success on the merits must be strong. It is not enough that the chance of success on the merits be "better than negligible," and more than just a "mere possibility" of relief is required. *Id*.

The government recognized these well-established principles in its motion in this Court for a stay pending appeal (Dkt. 3-1 at 5-6). The government's motion argued vigorously that the government was likely to succeed "in its argument that the district court erred in ruling § 654 unconstitutional on its face."[1] The government made three arguments in support of this factor.

[1] The government also raised arguments challenging Log Cabin's standing to sue and challenging the scope of the district court's injunction. As discussed in section II(D) *infra*, the government cannot show a likelihood of success on these arguments either.

The government argued first that "[i]t is well established that 'judicial deference … is at its apogee' when Congress legislates under its authority to raise and support armies'" (Dkt. 3-1, at 9); it claimed that the district court inappropriately substituted its judgment for that of Congress in enacting DADT. Second, the government argued that by applying the "*Witt* standard" – the heightened-scrutiny analysis set forth in *Witt*, *supra* – the district court improperly "conflated as-applied and facial constitutional analysis," and its decision was "inconsistent with controlling precedent." *Id*. at 10, 11. Finally, the government argued that the district court's finding that DADT violates the First Amendment rights of free speech and right to petition was erroneous because DADT "is not a 'content-based' regulation of speech" and does not overbroadly "infringe on protected speech to a 'substantial' degree 'relative to the statute's plainly legitimate sweep.'" *Id*. at 11, 12.

When it came time for the government to file its merits brief on this appeal, however, it abandoned all of these arguments. Instead, the government's position on appeal is that the statute whose constitutionality this Court should evaluate is not Don't Ask, Don't Tell, the subject of six years of proceedings below and a thorough evaluation at trial, but the later-enacted statute conditionally repealing Don't Ask, Don't Tell but leaving it in place indefinitely while the military designs and implements an "orderly" repeal process (Dkt. 58, at 38-41).

The government no longer argues that judicial deference is owed to Congress' 1993 decision to enact DADT, but instead argues for deference to the 2010 decision to enact conditional repeal. Its brief explicitly frames the argument thus: "the question [is] 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." *Id.* at 38. After citing cases discussing the authority of Congress to legislate on military affairs, the government concludes: "It follows … 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." *Id.* at 41. In other words, the government abandons its claim that Congress' 1993 enactment of DADT is entitled to judicial deference.

The government similarly discards its earlier defense of the actual constitutionality of DADT, the heart of this case for the last six years. The government's opening brief merely remarks that past decisions, which it collects in a footnote, have "sustained the constitutionality of § 654 against both substantive due process and First Amendment challenges" (Dkt. 58 at 40). The government offers no record-based argument against the district court's finding here – which, unlike in any of the cases the government cites, was reached after a full trial – that

DADT fails both constitutional challenges. Furthermore, all but one of the cases the government cites in footnote 15 of its brief predate *Lawrence v. Texas*, *supra*, the Supreme Court's seminal decision which altered the legal landscape applicable to this facial challenge.[2] The government no longer contends, as it did when it moved for a stay, that the *Witt* intermediate scrutiny standard does not apply to facial challenges,[3] and does not dispute how *Lawrence* altered the Fifth Amendment due process jurisprudence applicable to DADT. And it makes no argument whatsoever against the district court's findings that DADT violates First Amendment rights to free speech and to petition for redress of grievances. Accordingly, on these points as well, the government has now waived its challenge

[2] The only post-*Lawrence* case cited in the government's brief, *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008), is a First Circuit case which arose on appeal from a motion to dismiss, without the benefit of a full trial record as exists here. The *Cook* court expressly stated that it disagreed with this Court's then-recent decision in *Witt v. Department of the Air Force*, which of course controls in this Circuit, and twice stated that it declined to follow it. *Cook*, 528 F.3d at 45 n.1 and 60 n.10. The government's brief does not mention this.

[3] Indeed, it cannot in good faith make that contention. On February 23, 2011 – two days before filing his opening brief on this appeal – the Attorney General, in a letter to the House of Representatives announcing the Administration's determination not to continue to defend the constitutionality of section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, stated that the position of the Executive Branch is that "classifications based on sexual orientation should be subject to a heightened standard of scrutiny." Letter dated February 23, 2011 from Attorney General Holder to Speaker Boehner, attached as Attachment A, at 5. This position is consistent with this Court's holding in *Witt*, and indicates that the United States disagrees with the contrary holding of *Cook v. Gates*.

to the district court's findings and judgment on the issue of constitutionality, and concedes the unconstitutionality of 10 U.S.C. § 654.[4]

"It is well established in this Circuit that claims which are not addressed in the appellant's brief are deemed abandoned." *Collins v. City of San Diego*, 841 F.2d 337, 339 (9th Cir. 1988). The government's merits briefs attempt to shift the focus of the appeal to the constitutionality of a different statute that is outside the record and never formed part of the proceedings below. By failing to argue for the constitutionality of DADT, the government has abandoned that contention, effectively conceding the unconstitutionality of that statute, conceding that it is not likely to succeed on the merits of its appeal, and nullifying the basis for the stay of the district court's injunction.[5] Even if a "serious legal question" of the

[4] In its answering brief on the merits, Log Cabin Republicans pointed out that the government had abandoned its defense of the constitutionality of DADT by failing to present argument on that issue (Dkt. 79, at 43-44). The government's reply brief merely points back to these same portions of its opening brief, without elaboration (Dkt. 104, at 7-8). That the government consciously declined the opportunity to present reasoned argument in support of a contention of constitutionality is further, and conclusive, proof that it has abandoned any such contention. *See* FRAP 28(a)(9)(A).

[5] It is also noteworthy that the government's appeal challenges only the injunction that the district court entered. The district court's judgment also includes, separate from the injunctive relief it granted, a declaration that DADT infringes the fundamental rights of current and prospective United States servicemembers by violating their Fifth and First Amendment rights. ER 2, ¶ (1). That declaration is the functional equivalent of an injunction since it is presumed that federal officers will adhere to the law as declared by the court. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985). The government makes no argument in its briefs challenging the declaratory judgment, and therefore has not shown and cannot show that it has a likelihood of success on the merits on this point either.

constitutionality of DADT existed at the time this Court entered its stay, no such question now remains on this appeal. The stay should therefore be vacated.

C. The Government Cannot Show a Likelihood of Success on its Other Arguments Either

Though it no longer defends the constitutionality of Don't Ask, Don't Tell, the gravamen of this case, the government does assert two other bases for its appeal. It argues that Log Cabin Republicans lacked standing to bring the case and that the scope of the district court's injunction was overbroad. Neither argument goes to the merits of Log Cabin's claim that DADT is unconstitutional, so we need not address them at length here; but the government has not shown and cannot show a likelihood of success on either of these claims.

As to standing, Log Cabin's answering brief on the merits showed that ample evidence was presented at trial to sustain the district court's factual findings that Log Cabin Republicans had proper associational standing to bring this lawsuit (Dkt. 79, at 20-43). These factual findings are reviewed under a clearly erroneous standard, *San Diego County Gun Rights Commission v. Reno*, 98 F.3d 1121, 1124 (9th Cir. 1996), and are not likely to be disturbed on appeal. The government's briefs entirely omitted to discuss the standard of review, in violation of Ninth Circuit Rule 28-2.5, even ignoring the issue in the reply brief despite Log Cabin's having called the omission to the government's attention in its answering brief

(Dkt. 79, at 24 n.7 and 54). This omission as well signals that the government cannot show a likelihood of success on appeal with regard to its standing argument.

On the other issue the government raises, the scope of the district court's injunction, again the government's merits briefing omits any discussion of the applicable standard of review, but the law is that the scope of an injunction is reviewed under an abuse of discretion standard. *United States v. Laerdal Mfg. Corp.*, 73 F.3d 852, 854 (9th Cir. 1995). The district court found, in another detailed order (ER 4-18), that a military-wide injunction was necessary to accomplish the purpose of the injunction and afford Log Cabin appropriate relief. *See Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987). The government cannot show that it is likely to succeed in showing that to be an abuse of discretion.

D. The Stay Should Be Vacated for Other Reasons as Well

While the unconstitutional Don't Ask, Don't Tell statute remains in place, ongoing harms are visited daily on current and prospective American servicemembers. By its attempt to shift the focus of this appeal, the government ignores the harms resulting from the continuing impact of DADT today and pending appeal. Some of these harms were detailed at the trial and in the district court's findings. Some of these harms are also described in the *amicus curiae* briefs filed by the Servicemembers Legal Defense Network (Dkt. 82); Lambda

Legal Defense and Education Fund, Inc., *et al*. (Dkt. 83); and Servicemembers United (Dkt. 88). In addition, contrary to the government's contention, even if the Repeal Act is consummated with the required executive certifications and the Don't Ask, Don't Tell act is repealed, this case will not be moot, and the district court's judgment and injunction should stand, because absent a constitutional determination by a court, what one Congress does another Congress can undo.

1. DADT remains in effect and is causing ongoing daily harms

While the district court's injunction is stayed and DADT remains in place, investigations and discharges under the statute continue. This is a significant constitutional violation in and of itself, as American servicemembers live under a constant threat that infringes on their Fifth and First Amendment rights. Servicemembers who are discharged cannot re-enlist while the injunction is stayed, which deprives them of a career honorably serving their country and deprives the country of their service, for no valid reason and at risk to our national security.

In addition to those constitutional harms, Don't Ask, Don't Tell has many pernicious day-to-day real-world consequences to American servicemembers and those who wish to be. These harms are not ameliorated by the prospect of repeal on some future date as yet undetermined. Some of those harmful effects were presented in evidence at trial and described in the district court's opinion. In addition, as described in the *amicus* submissions, DADT continues to cause serious

infringements on Americans' liberty. These infringements are continuing even since the stay of the district court's injunction, and include the following:

- DADT – the only law, federal, state, or local, that punishes individuals merely for coming out – not just authorizes, but *requires* discharge (Dkt. 82, at 2-3).

- DADT induces servicemembers not to report sexual harassment and even rape; it requires servicemembers to lie, commanding deceit in an institution built on honor, and leaves servicemembers in constant fear of being "outed," at the cost of their career (Dkt. 82, at 4).

- The government is continuing to process administrative separations of servicemembers under DADT, including for statements made to military therapists in the course of psychiatric counseling (Dkt. 82, at 14-17).

- DADT puts servicemembers in financial peril as the military normally seeks "recoupment" of scholarship and training expenses from individuals discharged under DADT, and will even pursue recoupment through tax impounds, even when those individuals wish to continue to serve and would not have voluntarily quit the military. The military is still pursuing recoupment proceedings since the stay was entered (Dkt. 82, at 17; Dkt. 83, at 13-14).

- Some individuals discharged under DADT receive "Other Than Honorable" discharges, a debilitating stigma that imposes ongoing burdens in civilian life. Even individuals discharged under DADT with Honorable discharges are barred from re-enlistment and that information is disclosed to potential employers who may refuse to hire based on that fact alone (Dkt. 83, at 7-11, 11-13).

- Each branch of the Armed Forces has strict age limits for enlistment and commissioning. Every day that DADT is in force, individuals – both those who wish to join the military for the first time, and those who have been discharged under DADT

> and wish to return – grow older. Some inevitably surpass the age limits, forever "aging out" of eligibility to serve their country; and even those who do not formally "age out" face stalled careers, demotions, repeat training, and stale skills. These age limits, and their inexorable effect on individuals who will be forever barred from service, are completely unaffected by the potential repeal of DADT (Dkt. 88, at 6-11).

2. This case will not become moot even if DADT is repealed

Finally, the continuation of a stay of the district court's injunction cannot be justified on the supposed premise that this case will be moot after certification is given under the Repeal Act and 10 U.S.C. § 654 is repealed. Even assuming that that certification is given, this lawsuit will not then be moot. Mere repeal of a statute that a lower court decision had invalidated does not make the court's decision moot. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). A statutory change will not moot a lawsuit challenging the statute if there is still a possibility of further legislative action. *See Ballen v. City of Redmond*, 466 F.3d 736, 741 (9th Cir. 2006). And while likelihood of reenactment is a factor to be considered in the evaluation of mootness, "even if the government is unlikely to reenact the provision, a case is not easily mooted where the government is otherwise unconstrained should it later desire to reenact the provision." *Coral Construction Co. v. King County*, 941 F.2d 910, 928 (9th Cir. 1991) (citing *City of Mesquite, supra*). Congress remains free at any time to "repeal the repeal" and

reinstate the law, or to impose additional onerous conditions on certification that would effectively prevent certification from taking place.[6]

E. In the Alternative, If This Motion Is Not Granted, the Appeal Should Be Set for Expedited Argument

As long as the district court's injunction is stayed, current and prospective American servicemembers sustain daily infringements of their constitutional rights as the government continues to enforce DADT and investigate and discharge individuals under it. Since the government no longer argues that DADT is constitutional, the best remedy for these ongoing harms is to vacate the stay, as this motion requests.

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[6] Rep. Duncan Hunter, with the support of Rep. Howard McKeon, the Chairman of the House Armed Services Committee, has introduced legislation that would expand the certification requirement. *See* Chris Johnson, *McKeon Backs Legislation to Disrupt 'Don't Ask' Repeal*, Washington Blade (Apr. 19, 2011), http://www.washingtonblade.com/2011/04/19/mckeon-backs-legislation-to-disrupt-to-dont-ask-repeal/. That legislation is scheduled to be considered this week in the House Armed Services Committee. *See* Charles Hoskinson, *'Don't Ask' amendment coming in new defense bill*, Politico (May 10, 2011), http://www.politico.com/news/stories/0511/54644.html. And at least five potential candidates for President – Haley Barbour, Mike Huckabee, Roy Moore, Tim Pawlenty, and Rick Santorum – have publicly stated that as President they would support reinstatement of Don't Ask, Don't Tell. *See* Igor Volsky, *Santorum Pledges to Reinstate Don't Ask, Don't Tell*, Think Progress (Apr. 18, 2011), http://thinkprogress.org/2011/04/18/rick-santorum-reinstate-dadt/; Stephanie Samuel, *Ala. 'Ten Commandments Judge' Mulls Presidential Run*, The Christian Post (Apr. 18, 2011), http://www.christianpost.com/news/ala-ten-commandments-judge-mulls-presidential-run-49884/.

However, if the Court denies this motion, it should expedite the argument of this appeal so that the issue can be resolved on the merits swiftly, and current and prospective servicemembers' constitutional rights may be fully restored without the uncertainty of waiting for a repeal that may be delayed, may never come, or may be reversed by Congressional action. When this Court previously denied the parties' joint request to expedite the appeal, the expectation was that the government would be defending the constitutionality of DADT on appeal. Now that that is no longer the case, this fundamental change in circumstances warrants an expedited argument of the appeal.

III.

CONCLUSION

For all the reasons set forth above, this Court should vacate that portion of its Order of November 1, 2010 which stayed pending appeal the district court's October 12, 2010 order. In the alternative, Log Cabin requests that the argument of this appeal be set on an expedited basis.

Dated: May 10, 2011

Respectfully submitted,

WHITE & CASE LLP

By: */s/ Dan Woods*

Dan Woods

Attorneys for Appellee/Cross-Appellant Log Cabin Republicans

CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 633 West Fifth Street, Suite 1900, Los Angeles, California 90071.

I hereby certify that I electronically filed the foregoing MOTION OF APPELLEE / CROSS-APPELLANT LOG CABIN REPUBLICANS TO VACATE STAY OF INJUNCTION 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 May 10, 2011.

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

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on May 10, 2011, at Los Angeles, California.

/s/ Earle Miller
Earle Miller