Case Nos. 10-56634, 10-56813

# IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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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*.

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

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## BRIEF FOR APPELLEE / CROSS-APPELLANT LOG CABIN REPUBLICANS

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, counsel for Log Cabin Republicans certifies that:

1. Log Cabin Republicans is a not-for-profit corporation organized pursuant to the District of Columbia Nonprofit Corporation Act and section 501(c)(4) of the Internal Revenue Code.

2. Log Cabin Republicans issues no stock and has no parent corporation. No publicly-held corporation owns ten percent or more of the stock of Log Cabin Republicans.

Dated: March 28, 2011

Respectfully submitted,

**WHITE & CASE LLP**

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page**

## FEDERAL CASES

**FEDERAL STATUTES**

**FEDERAL RULES**



**MISCELLANEOUS**

# I.

# INTRODUCTION

After years of hard-fought litigation and a bitterly contested bench trial, at which a full record was developed, the district court declared unconstitutional the government's policy prohibiting open service by homosexuals[1] 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"). Specifically, the district court found that Don't Ask, Don't Tell violated both Fifth Amendment due process rights and First Amendment rights and it issued judgment in favor of plaintiff Log Cabin Republicans ("Log Cabin") on its claims for declaratory and injunctive relief.

The government appealed and informed this Court, in its motion for a stay of the district court's injunction, that it was likely to prevail on the merits of its contention that the district court erred in finding DADT unconstitutional.[2] Its opening brief, however, does not argue that DADT was or is constitutional. This is an amazing about-face by the government. For over six years, the government has vigorously defended the constitutionality of DADT. Now, it has abandoned and waived any such claim and concedes that the district court correctly found that

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[1] We use the term "homosexual" throughout this brief in its broad, inclusive sense, as this Court did in Witt v. Department of the Air Force, 527 F.3d 806 (9th Cir. 2008).

[2] Log Cabin's Supplemental Excerpts of Record ("SER") at 13-16.

Don't Ask, Don't Tell is unconstitutional. In so doing, the government effectively sweeps under the rug the fact that over 13,000 servicemembers have been unconstitutionally discharged under DADT and thousands more have lived – and continue to live today – under the threat of investigation and discharge simply for being who they are.

While it now concedes the unconstitutionally of DADT, which the government recognizes as still current law, the government argues that the allegedly orderly process of repealing DADT is constitutional. This was, of course, not the issue tried below. Its "constitutionality" argument need not be considered at all and, in any event, is not supported by the cases it cites.

The government also argues that Log Cabin lacks standing but this argument lacks any merit for the reasons shown in detail below. The district court informed the government at the pre-trial conference that this was a "weak" argument; it is even weaker now, because the clear error standard of review governs the district court's factual findings on standing issues.

The government also argues that the district court's injunction exceeded its authority but, as shown below, the government's argument ignores the governing standard of review, ignores many cases authorizing nationwide relief when federal statutes are declared unconstitutional, and provides no reason to reverse or modify the district court's injunction.

Finally, Log Cabin has filed a cross-appeal from the district court's dismissal of its equal protection claim. As shown below, this Court should revisit its equal protection analysis in Witt, particularly in light of the Attorney General's recent admissions on the appropriate standard of scrutiny to be applied in equal protection cases involving discrimination against homosexuals.

## II.

## JURISDICTIONAL STATEMENT

Log Cabin concurs with the government's jurisdictional statement with regard to the appeal. With regard to Log Cabin's cross-appeal, the district court, on June 9, 2009, granted the government's motion to dismiss Log Cabin's equal protection claim. ER288-290, 294. Log Cabin proceeded to trial on its other claims. The district court entered final judgment on October 12, 2010. Log Cabin filed a timely notice of cross-appeal on November 18, 2010 under Federal Rule of Appellate Procedure 4(a)(1)(B). ER295-296. This Court has jurisdiction over Log Cabin's cross-appeal under 28 U.S.C. § 1291.

## III.

## REVIEWABILITY OF CROSS-APPEAL AND STANDARD OF REVIEW

Log Cabin cross-appeals from the district court's order, under Federal Rule of Civil Procedure 12(b)(6), dismissing its claim challenging the constitutionality of 10 U.S.C. § 654 on equal protection grounds. ER288-290, 294. The applicable

standard of review on the cross-appeal is *de novo* and Log Cabin's allegations are accepted as true and construed in the light most favorable to it. Gompper v. VISX, Inc., 298 F.3d 893, 895 (9th Cir. 2002).

## IV.

## STATEMENT OF THE ISSUES

Log Cabin generally concurs that two of the issues remaining on appeal, as presented by the appellants in their brief, include Log Cabin's associational standing and whether the district court properly enjoined the government from further enforcing 10 U.S.C. § 654 following its judgment that the statute offends the Constitution on its face.

Log Cabin does not agree that an issue on appeal is whether Congress has the constitutional authority to establish an orderly process for repeal of DADT. That issue was never before the district court and cannot be an issue on appeal. Moreover, appellants no longer argue that DADT was a valid, constitutional exercise of Congressional power. They have waived their appeal of that portion of the district court's holding. As a result, the unconstitutionality of DADT under the First and Fifth Amendments is not at issue; it is a given.

The issue on cross-appeal is whether the district court correctly concluded that 10 U.S.C. § 654 survives review under the equal protection component of the Fifth Amendment to the Constitution.

## V.

## STATEMENT OF FACTS AND PROCEEDINGS BELOW

Log Cabin Republicans, a non-profit political organization whose mission is to work within the Republican party to advocate equal rights for all Americans, including homosexual Americans (SER567-569), filed this case on October 12, 2004 as a facial constitutional challenge to DADT seeking declaratory and injunctive relief. In 2006, the district court granted the government's first motion to dismiss, with leave to amend, finding that Log Cabin lacked associational standing. ER314-331. It ordered Log Cabin to identify at least one member of the organization with standing to sue individually. Log Cabin's amended complaint specified two members: John Alexander Nicholson and Lt. Col. John Doe, who remained anonymous because he is a current member of the military.[3] ER336, 337.

The government again moved to dismiss. After the reassignment of the case to a different district court judge and several rounds of briefing and argument, the district court granted in part and denied in part the government's second motion to

[3] Mr. Nicholson was an Army soldier skilled in languages and counter-intelligence discharged under Don't Ask, Don't Tell after someone read a private letter he had written in Portuguese to another man about their relationship before he enlisted. SER494-500. John Doe is a homosexual Lieutenant Colonel in the U.S. Army Reserves who serves his country under constant fear of discharge under Don't Ask, Don't Tell and who cannot communicate regarding the core of his identity in the same manner as heterosexual servicemembers. ER414-415, 420-423, SER239-242.

dismiss. The court found Log Cabin had established "standing to bring suit on behalf of current and former homosexual members of the armed forces." ER281-284. It dismissed Log Cabin's equal protection claim under the authority of Witt v. Department of the Air Force, 527 F.3d 806 (9th Cir. 2008), but found that Log Cabin had stated a claim under the First Amendment and, in light of Lawrence v. Texas, 539 U.S. 558 (2003), and Witt, the Fifth Amendment guarantee of substantive due process. ER284-294. The district court then held a routine Rule 26 scheduling conference on July 6, 2009, denied the government's request to preclude discovery, and set the case for trial, assigning an initial trial date of June 14, 2010, approximately 11 months later. ER268-270; SER1549.

The government then moved under 28 U.S.C. § 1292(b) for certification of the district court's dismissal order for interlocutory appeal. SER1501-1548. The court found the motion untimely and recognized it as merely an effort to avoid discovery. ER265-266. The government also moved for a stay, arguing the political branches had indicated an intention to reconsider DADT, and claimed that the discovery Log Cabin sought would interfere with the work of the political branches as they deliberated over changing DADT. The district court denied the stay, concluding that Congress and the President cannot insulate a law from Constitutional challenge just by holding hearings. ER262-267.

During pre-trial proceedings, the government continually resisted its obligation to participate in discovery. The district court examined and rejected almost every argument appellants presented, holding that a defendant is not exempt from discovery because the case involves a facial challenge (ER268-270); that the government had waived any deliberative process privilege and had failed to support any protections under the attorney-client privilege or attorney work product doctrine (SER1462-1464); and that the government had to answer requests for admission regarding statements made by the Commander in Chief that DADT does not contribute to and weakens our national security (SER1298-1300). After the district court overruled the government's objections and ordered discovery, the government responded to Log Cabin's written discovery requests and conducted depositions of Log Cabin's lay and expert witnesses.[4] The government also produced three witnesses for deposition under Fed. R. Civ. P. 30(b)(6).

At the close of discovery, the government moved for summary judgment. In addition to moving on the merits, appellants challenged Log Cabin's standing. The issues were extensively briefed (SER1334-1461. 1229-1297, 1116-1157) and standing was the subject of its own hearing and lengthy reasoned order. SER1158-

[4] The government incorrectly suggests that the district court permitted plaintiff to depose 14 witnesses. AOB at 16. In fact, the government noticed all 14 depositions defendants reference.

1228, ER227-253. The district court held that, for purposes of summary judgment, Log Cabin had associational standing through either Mr. Nicholson or Lt. Col. Doe. ER237-252.

When it first heard the government's summary judgment motion, the district court announced that it was considering applying the heightened scrutiny "Witt standard" of review, rather than rational-basis review, to DADT. SER1209-1210. Contrary to the government's assertion, Brief for the Appellants ("AOB") at 17, this was not "on the eve" of trial but on April 26, 2010, two and a half months before trial. On May 27, 2010, the district court formally requested additional briefing on the standard of review applicable to Log Cabin's facial challenge. ER252-253. The parties submitted briefs on this point on June 9 and June 23, 2010. SER1087-1115, 663-737. The court addressed the parties' arguments at length during the pre-trial conference on June 28, 2010, two weeks before trial, and issued another reasoned opinion. SER589-662, ER204-226. Recognizing that Witt construed Lawrence to require a heightened level of review, the court adopted the intermediate scrutiny standard announced in Witt: the government must advance an important governmental interest, any intrusion on the rights identified in Lawrence must significantly further that interest, and the intrusion must be necessary to that interest. The court adopted this standard, although Witt announced it in the context of an as-applied challenge, because the constitutional

standard of review depends on the nature of the right implicated, not the nature of the plaintiff's challenge. Rather, the court explained, the consequence of a facial challenge is simply that the plaintiff must prove the unconstitutional operation of DADT across a broader set of circumstances. The district court then denied summary judgment on the merits. ER204-226.

In the months before trial, the government again requested a stay, claiming that the President had now promised repeal of DADT in his State of the Union address and that the Defense Department intended to study DADT and issue new regulations. SER1473-1474. The district court echoed its same concerns about the uncertainty of political action (SER1497) and again denied the stay. SER1465-1466. Then, one month before trial, the government again argued for a stay "because the political branches [had] taken concrete steps to facilitate repeal of the DADT statute." SER1093. In a lengthy decision, the court rejected this request as well, prophetically stating, "Given the many contingencies involved – including the threshold contingency of Congressional approval – and the lack of clear timelines, any ultimate repeal that may result from this legislation is at this point remote, if not wholly speculative." ER221-226.

Next, the government filed three comprehensive motions in limine seeking to exclude essentially all of Log Cabin's exhibits (SER819-887), expert witnesses (SER888-1086), and lay witnesses (SER738-818) – for practical purposes, all of

Log Cabin's evidence. The parties fully briefed each of these motions in limine and the court heard argument on them. SER593-642. The government continued to contend that a plaintiff is precluded from introducing any evidence when it mounts a facial challenge. The court, taking guidance from the heightened scrutiny Lawrence requires, rejected the government's position and held that evidence should be received. ER213-214, SER585. For the most part, the court denied the motions in limine. The court stated (SER611):

> [I]t seems that the government is trying to have it both ways. … [T]he government keeps focusing on, that it's a facial challenge. So the plaintiff has to prove that [DADT] doesn't further or advance any legitimate or important governmental objective. Yet, by this motion, … the defendants are attempting, really, to prevent the plaintiff from putting in any evidence that goes to this element of its case.

Following these extensive and hard-fought pretrial proceedings, the district court commenced a bench trial on July 13, 2010. The government's opening brief glosses over the trial in a single paragraph of its Statement of Facts, which does a grave injustice to the detailed record on which the district court based its judgment. Log Cabin presented some twenty witnesses during the two-week trial. They included five witnesses who established Log Cabin's organizational standing. They included seven eminent experts who testified regarding the history and effect of DADT from a variety of disciplines, including history, political and social

science, psychology, and sociology; these experts included highly credentialed professors, writers, an expert on the Canadian military, and a former Assistant Secretary of Defense. The district court summarized the testimony of some of these experts at length (ER75-91, 146-166), including Dr. Lawrence Korb, the former Assistant Secretary of Defense, whom the court found an "extraordinarily well-credentialed and powerfully credible witness." ER79 n. 29.

Log Cabin also presented extensive expert testimony on the disproportionally negative effect on women of DADT, and both expert testimony and government admissions of the experience of foreign militaries that permit open service by homosexuals, none of which have experienced the negative effects on military readiness or unit cohesion that DADT purports to avoid.[5]

Log Cabin also presented the testimony of six former servicemembers representing a cross section of our military – officers and enlisted persons, male and female, gay and straight, from several branches of the service. They testified that service of openly homosexual servicemembers has no effect on unit cohesion, morale, or readiness; that their discharges under DADT actually impaired those interests; and that the military does not act consistently with the claimed goals of

[5] The testimony in this regard was that of, *inter alia*, Log Cabin's expert witnesses Elizabeth Hillman, Melissa Embser-Herbert, Alan Okros, and the government's Rule 30(b)(6) designee Paul Gade. Because of the volume of this testimony, Log Cabin does not file their complete trial testimony as part of the SER.

DADT in any case. The district court also comprehensively summarized these witnesses' testimony and credibility. ER39-64, 86-90, 101-102, 111-137, 157-161, 164-165.

Log Cabin also introduced evidence, including testimony both from its experts and via Rule 30(b)(6) deposition of government witnesses who admitted, *inter alia*, that over 13,000 individuals have been discharged under DADT; that many of those discharges were of servicemembers with critically needed skills including language fluency, military intelligence, counterterrorism, weapons development, and medicine; that discharges under DADT are greater in peacetime than in wartime; that investigations and discharges under DADT are routinely suspended if the individual was deployed to combat; that no study exists showing that DADT furthers its stated objectives; that the military has allowed thousands of convicted felons to enlist while it categorically excludes openly homosexual individuals; and that the largest category of servicemembers discharged under DADT are individuals who were never deployed to a combat zone. ER75-84, 146-155. Log Cabin also introduced numerous documents produced in discovery, many generated by the government itself, that supported Log Cabin's claims. Well over 100 exhibits in all were received into the record.

Finally, Log Cabin introduced admissions from officials at the highest level of government demonstrating that DADT detracts from its stated objectives. For

instance, Defense Secretary Gates admitted that the assertions purportedly justifying DADT's intrusion on the personal and private lives of homosexuals "have no basis in fact." SER279. Admiral Mike Mullen, the Chairman of the Joint Chiefs of Staff, admitted that that DADT "forces young men and women to lie about who they are in order to defend their fellow citizens," that he is unaware of any studies or evidence suggesting that repeal of DADT would undermine unit cohesion, and that "allowing homosexuals to serve openly is the right thing to do" and is a matter of "integrity." SER269, 279, 286. And President Obama, the Commander in Chief, admitted DADT "doesn't contribute to our national security," "weakens our national security," and reversing DADT is "essential for our national security." SER243-246, 260-261, 284-285.

Against the weight of Log Cabin's presentation, the government offered no evidence, other than the text and the 1993 legislative history of the statute. The district court admitted the entire legislative history of DADT, over 2700 pages of Congressional record, and expressly considered it. ER67-74; received as trial exhibits 344-348.[6] Appellants had ample opportunity to present at trial any lay

[6] The government asserts that the district court reached its judgment without considering the full legislative record. AOB at 18. That is untrue. The district court received the entire record into evidence. SER540. Because of their volume, Log Cabin does not file the entirety of these trial exhibits as part of the Supplemental Excerpts of Record. The district court also closely examined each of the seven specific items in the record that defendants singled out during closing argument. ER 68-74.

witness, expert witness, or other evidence that DADT furthered any of its stated purposes, but did not do so.

At the close of the trial, the district court took the matter under submission, and on September 9, 2010, the court issued an 85-page memorandum opinion explaining in detail its reasons for concluding that Log Cabin had established standing and declaring that DADT violates the Fifth and First Amendments. The court ordered Log Cabin to submit a proposed judgment and injunction.

Log Cabin submitted its proposed judgment and injunction (SER99-101), the government submitted 14 pages of objections (SER76-98), and Log Cabin submitted a lengthy response to those objections (SER56-75). The district court sustained in part and overruled in part the government's objections, issuing a lengthy and detailed order explaining its decision. ER4-18. Because Log Cabin proved the statute is facially unconstitutional, the district court rejected the government's argument that the injunction must be limited to Log Cabin and its members. And it overruled objections to the scope of the injunction, reasoning that the injunction binds the defendants wherever they act and that territorial application "would create an untenable result in which Defendants could, pursuant to the Act, discharge servicemembers in Maine, Massachusetts, and New Hampshire, but not elsewhere." ER7-15.

As a result, the district court entered its Judgment and Permanent Injunction. ER1. The judgment: (1) declared that DADT violates the substantive due process rights of the Fifth Amendment, and the rights to freedom of speech and to petition the Government for redress of grievances guaranteed by the First Amendment; (2) permanently enjoined the government from enforcing or applying DADT against any person under its jurisdiction or command; and (3) ordered the government to immediately suspend and discontinue any pending investigation, or discharge, separation, or other proceeding under DADT. ER2.

Included in the government's objections to the injunction was yet a fourth motion to stay, based on the same argument that the political branches are "considering repeal." With repeal still speculative, the district court again rejected a stay. ER16-17. The district court slightly amended its Memorandum Opinion and issued lengthy, detailed findings of fact and conclusions of law. ER105-188.

In sum, the district court arrived at its permanent injunction after careful analysis at every stage of this lengthy litigation. Throughout its six-year history, the government had multiple opportunities to introduce evidence that DADT actually furthered unit cohesion, morale, good order and discipline, and military readiness. It never did so. Based on the record presented at trial, the district court had no choice but to enter judgment in favor of Log Cabin.

The government appealed. This Court granted the government's motion to stay the district court's injunction, and set an expedited briefing schedule for this appeal. After that briefing schedule was set, the government then filed a motion to hold this appeal "in abeyance," based on the same arguments that it had repeatedly raised unsuccessfully below: the political branches have set in motion a process for repeal of DADT, that process is underway, to proceed with this litigation would interfere with that "orderly process," and so forth. This Court denied the government's motion to hold the appeal in abeyance. SER1. The government nevertheless continues to reference the ongoing, and incomplete, repeal process as a basis for reversal, going so far as to repeat that "[t]he government continues to believe that it would be appropriate to hold this case in abeyance pending the completion of [the] certification process." AOB at 37-38.

But, as argued below, the fact that a process is underway for the potential eventual repeal, at some undetermined future time, of DADT does not require reversal of the district court's judgment; and it does not cure the unconstitutionality of DADT. Until the repeal process is complete – and, despite statements by politicians, it may never be complete – DADT remains in place, fully effective as the law of the land; and the government may continue to investigate and discharge servicemembers under DADT just as it has been doing for the 18 years prior to the district court's judgment and currently-stayed injunction.

Finally, the government's brief on appeal relies extensively on the activities of the Department of Defense Comprehensive Review Working Group (CRWG) established in March 2010; the report and conclusions that the CRWG issued on November 30, 2010; and comments of the President and other administration officials regarding the timing of eventual repeal of DADT. AOB at 8-13. The CRWG report, however, is not in the record. It could hardly have been, since the group's report was not issued until well after the district court's judgment was entered. The hearsay statements of the President and other politicians that the government quotes are also not in the record and not properly part of this Court's review of the judgment below. They should be disregarded.

## VI.

## SUMMARY OF ARGUMENT

**I.** On standing, the government's brief ignores the governing standard of review. It does not contend that the district court applied the incorrect legal standard, so the factual determinations underlying the district court's decision must be reviewed under the clear error test. Based on the evidence presented at trial through the testimony of five witnesses and other evidence, there was sufficient evidence for the district court to conclude that Log Cabin had established associational standing by a preponderance of the evidence through either of two of its members, Lt. Col. John Doe or Alexander Nicholson, when either of them

individually would be sufficient. The government only disputes the existence of one of the three Hunt factors for determining associational standing – whether Log Cabin has members who would individually have standing to sue. In doing so, the government ignores most of the evidence presented to establish standing. It also takes the inconsistent "heads-I-win, tails-you-lose" position, arguing both that Log Cabin cannot base standing on Lt. Col. Doe because he has not been discharged and that Log Cabin cannot base standing on Mr. Nicholson because he has been discharged. And the government repeatedly mentions Lt. Col. Doe's anonymity but fails to mention that the government refused Log Cabin's offer to reveal his identity if the government would agree to take no action against him. The government also fails to mention, much less distinguish, many of the cases on which the district court relied in its opinions regarding standing. The government's brief repeatedly mentions a district court tentative ruling on a motion for summary judgment as to standing but omits any explanation as to the reasons why the district court correctly changed its tentative decision.

**II.** The government has abandoned its challenge to the district court's findings and judgment declaring that DADT unconstitutionally violates the Fifth and First Amendments. On this appeal, it therefore concedes the unconstitutionality of 10 USC § 654 and its implementing regulations. Instead, the government argues that the inquiry on appeal should be something else entirely:

namely, whether the process of repeal that is underway, following Congress's enactment of the Don't Ask, Don't Tell Repeal Act in December 2010, is constitutional and should be left to proceed. However, the repeal act was enacted after the district court's judgment in this case, and was not argued in the proceedings below; and the evidence to which the government refers to support its refocused argument is not in the record and is not properly before this Court. Moreover, repeal has not yet taken place, and DADT remains in full force and effect, with investigations and discharges of homosexual servicemembers ongoing. Appellants' argument that the unconstitutionality of DADT is cured by an unfinished repeal process that leaves the unconstitutional statute in place is absurd.

**III.** On appeal, the government argues that the district court's injunction must be overturned because it is overbroad. Not so; the injunction is precisely as broad as it should be. Log Cabin brought a successful facial challenge against Don't Ask, Don't Tell. Accordingly, the district court's injunction binds the government, as the party before the court, from further violating an unconstitutional law. That the injunction applies to the government wherever it operates does not render the injunction overbroad. To the contrary, as Log Cabin demonstrates, the injunction is the appropriate remedy to Log Cabin's requested relief.

**IV.** The district court dismissed Log Cabin's equal protection claim because it was bound by this Court's holding in Witt that Lawrence v. Texas did not change the standard of scrutiny applied to classifications based on sexual orientation. This Court should revisit its holding in Witt, however, for several reasons. First, Lawrence was not silent regarding equal protection. It requires that Log Cabin's equal protection claim receive the same intermediate scrutiny as its due process claim such that both should have survived dismissal. Second, the government recently admitted that classifications based on sexual orientation are suspect such that equal protection demands heightened scrutiny of statutes singling out homosexuals for unequal treatment. On its face, DADT discriminates against homosexuals. Thus, the government's position is now irreconcilable with any continued defense of DADT on equal protection grounds. Third, this Court is not constrained by Witt's holding on equal protection because Witt analyzed a different equal protection claim than is presented here.

## VII.

## ARGUMENT

### A. THE DISTRICT COURT CORRECTLY DECIDED THAT LOG CABIN REPUBLICANS HAS STANDING

In all Don't Ask, Don't Tell litigation, the government contests the plaintiff's standing. E.g., Witt, 527 F.3d at 812 (government unsuccessfully argues

that Major Witt lacks standing because she was "only" suspended, not discharged, under DADT).

In this case, to attempt to avoid litigating the merits of plaintiff's constitutional challenges to DADT, the government contested Log Cabin's standing at every stage of the litigation. The district court thoroughly considered the standing issues and ruled in favor of Log Cabin.

On the government's motion to dismiss the first amended complaint, after extensive briefing, SER1583-1629, 1643-1729, and oral argument, SER1561-1582, 1630-1642, district court ruled that the first amended complaint adequately pleaded standing and explained its reasoning over four pages of its written decision on that motion. ER281-284.

After the government moved for summary judgment on the standing issue, after moving, opposition, and reply briefs and evidentiary material was submitted, SER1281-1297, 1334-1461 the district court issued a written tentative decision, ER254-261; the parties then submitted additional briefing and evidence, SER1229-1280; the court conducted a lengthy oral argument, SER1158-1227; the parties submitted further briefing, SER1116-1157; and the district court then ruled that a triable issue of material fact existed regarding standing and denied the motion, in a 27-page opinion, ER227-253.

Standing was next discussed at the pretrial conference, where the district court told government counsel:

> I think there is standing. If you wish to continue to challenge it by challenging the witnesses on standing, I would allow you to do so, to cross-examine. But I think that's a very weak issue.

SER607.

At trial, Log Cabin presented numerous witnesses who testified as to standing issues, the government cross-examined them, and documentary evidence was received on standing. After closing arguments, including arguments on standing, the district court found that Log Cabin had met its burden of establishing standing by a preponderance of the evidence and explained its reasoning in 12 pages of its memorandum opinion, ER21-32, and over 6 pages of its findings of fact and conclusions of law, ER166-171.

Now, the government argues, again, that Log Cabin lacks standing. Its arguments on this issue, however, should be rejected for any or all of the following reasons.

**1. Governing Law and Standard of Review**

Associational standing is a recognized part of our judicial system. As the Supreme Court stated in Warth v. Sedlin:

> There is no question that an association may have standing in its own right to seek judicial relief from injury to itself

> and to vindicate whatever rights and immunities the association itself may enjoy. Moreover, in attempting to secure relief from injury to itself the association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties.

422 U.S. 490, 511 (1975).

After Warth v. Sedlin, many cases have found associational standing. E.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., 528 U.S. 167, 180-81 (2000); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 342-45 (1977); Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1171-73 (9th Cir. 2002); Associated Gen. Contractors of Cal. v. Coal. For Econ. Equity, 950 F.2d 1401, 1406, 1409 (9th Cir. 1991).

In evaluating whether Log Cabin had standing, the district court employed the three-part test articulated in Hunt, 432 U.S. at 342: (1) at least one member of the organization has standing, in his or her own right, to present the claim asserted; (2) the interests sought to be protected are germane to the organization's purpose; and (3) neither the claim asserted nor relief requested requires that the organization's members participate individually. ER21, 166-67. The government cites the same standard, AOB at 27, thereby conceding that the district court employed the correct legal test to determine Log Cabin's standing. In addition, while it required Log Cabin to present evidence at trial on all three Hunt factors, its

brief only argues that the district court erred in finding the first factor satisfied, thereby conceding that the district court correctly found the second and third factors to be established.

The government's brief ignores the standard of review of decisions on standing, presumably because it knows that it cannot meet it. In reviewing district court decisions on standing, this Court reviews legal determinations de novo but reviews the underlying factual determinations under the clearly erroneous standard. San Diego Cnty. Gun Rights Comm. v. Reno, 98 F.3d 1121, 1124 (9th Cir. 1996); American-Arab Anti-Discrimination Comm. v. Thornburgh, 970 F.2d 501, 506 (9th Cir. 1991).[7]

Furthermore, in connection with the third Hunt factor, "the standing of a single member is sufficient to support organizational standing." E.E.O.C. v. Nevada Resort Ass'n, 792 F.2d 882, 885 (9th Cir. 1986). The district court cited this rule in denying the government's motion to dismiss, ER283-84, in its Memorandum Opinion, ER21 (citing Hunt requirement that "at least one" of association's members must have standing), and its Findings of Fact and

[7] The government's failure to identify the applicable standard of review also violates Ninth Circuit Rule 28-2.5. This significant omission by experienced appellate attorneys must be intentional and betrays the lack of merit of the appeal. Unless the government can explain this omission in its reply brief, the government's arguments may properly be disregarded. See Sekiya v. Gates, 508 F.3d 1198, 1200 (9th Cir. 2007); N/S Corp. v. Liberty Mutual Ins. Co., 127 F.3d 1145, 1146 (9th Cir. 1997).

Conclusions of Law, ER166-67 (same). The government does not contend otherwise and therefore concedes this legal point. As explained below, the district court correctly found, as a factual matter, that either of two Log Cabin members sufficed.[8]

**2. Lt. Col. John Doe**

At trial, Log Cabin presented evidence that established Lt. Col. Doe's membership in Log Cabin before the action was filed in 2004. Specifically, Log Cabin presented the testimony of Philip Bradley, the chairman of the South Carolina chapter of Log Cabin in 2004, and C. Martin Meekins, an attorney on Log Cabin's national board in 2004. Mr. Bradley testified as to his long, personal acquaintance with Lt. Col. Doe and his relationship with Log Cabin, including his efforts to get Lt. Col. Doe more involved with Log Cabin and Lt. Col. Doe's concerns about remaining an anonymous member. ER414-425. Mr. Meekins testified that Lt. Col. Doe completed a membership application, paid dues to Log Cabin, and became a member of Log Cabin before the complaint was filed in October 2004. ER438-442. The district court found Mr. Meekins' testimony

[8] Log Cabin also presented evidence that other of its members were impacted by DADT. ER437-438; SER576-581, 222-238.

credible. ER111. The government presented no witnesses or evidence to refute the testimony of these witnesses.[9]

The district court summarized the evidence concerning Lt. Col. Doe's membership in its Memorandum Opinion, ER28-29, and Findings of Fact and Conclusions of Law, ER107-108, and concluded that Lt. Col. Doe was a member in good standing of Log Cabin when the complaint was filed. ER107 (Finding of Fact 7). Based on its factual finding, the district court concluded that Log Cabin satisfied the first Hunt factor through its member Lt. Col. Doe. ER28, ER168-171. The government does not even attempt to show that this factual finding was clearly erroneous.[10]

With respect to Lt. Col. Doe's anonymity, the government's brief completely ignores Log Cabin's offers to reveal his identity. During this case, Log Cabin offered to reveal Lt. Col. Doe's name if the government would agree to take no action against him under DADT. E.g., ER338 (First Amended Complaint

[9] Log Cabin also submitted a declaration from Lt. Col. Doe, dated April 27, 2006, which was received into evidence for the purpose of showing his state of mind as to how Don't Ask, Don't Tell chilled his speech and ability to petition to government for redress. SER239-242; ER21 n.3.

[10] The government's brief insults Lt. Col. John Doe in two ways. Rather than thank him for his service to our country while he has been denied his constitutional rights, the government's brief does not offer him the courtesy of calling him by his correct title, Lt. Col. John Doe. It also states twice that he is "supposedly" still serving in the military, while the evidence at trial showed that he was still serving our country and the government cites no evidence to the contrary. We assure this Court that Lt. Col. Doe is still serving in our country's military.

¶¶ 21, 22 and n.3); SER1191-1196. On every occasion, the government refused the offer. The district court made a factual finding about this in its order denying the government's motion for summary judgment.[11]

The government claims that Log Cabin failed to carry its burden of demonstrating standing through Lt. Col. Doe because "there was no evidence that Doe was a Republican as is required by Log Cabin's by-laws and articles of incorporation." AOB at 35. This claim fails for many reasons. First, Log Cabin considers him a member and neither the district court nor this Court can dictate who is or is not a member of the organization. Second, the district court made a factual finding of Lt. Col. Doe's membership, supported by the facts described above, and the government has not even attempted to show that it was clearly erroneous. Third, the by-laws and articles of incorporation do not "require" a Log Cabin member to be a Republican. Section 2.01 of the by-laws state that membership is open to registered Republican voters, to persons who participate in their State Republican party, and to persons who have publicly self-identified as members of the Republican Party. ER355-56. They also state that a person may become a member by personally registering as a member. Id. The articles of

[11] "In fact, they [the defendants] are unwilling to stipulate not to initiate such [separation] proceedings against him were his identity revealed for purposes of this litigation." ER244. Log Cabin renews its offer to reveal Lt. Col. Doe's identity if the government will agree not to take any action to investigate or punish him under Don't Ask, Don't Tell.

incorporation say nothing about members being "required" to be Republicans; they specify that members shall be individuals "who support the purposes of the corporation" and pay dues. ER350 (article 4). The evidence showed that Lt. Col. Doe was a "conservative," completed an application to become a member, and paid dues. ER416-417, 420-424, 438-442.

The government also argues that Lt. Col. Doe has not been subject to discharge proceedings and therefore has no "concrete stake" in this lawsuit sufficient to give him standing. AOB at 34-35. This argument ignores the fact that Lt. Col. Doe is still serving, still subject to discharge, and still suffering a violation of his constitutional rights every day he serves our country to protect the constitutional rights of all Americans. For this reason, the district court rejected the government's argument, finding that Lt. Col. Doe "faces a concrete injury caused by Defendants – discharge from the Army Reserve – which is likely, not speculative, in nature, given the mandatory language" of DADT. ER29, 168-169.

This was consistent with controlling law. A plaintiff who challenges a statute must show that the operation or enforcement of the statute presents the danger of direct injury, but need not "await the consummation of threatened injury to obtain preventive relief…. When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder,

he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."' Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979); see also Jones v. Bates, 127 F.3d 839, 847 n. 8 (9th Cir. 1997) (state legislators challenging term limits did not have to actually be barred by such limits, but rather "demonstrated an adequate likelihood of future injury … merely by alleging their desire to run"). Moreover, "when the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing," because "free expression – of transcendent value to all society, and not merely to those exercising their rights – might be the loser." LSO, Ltd. v. Stroh, 205 F.3d 1146, 1155 (9th Cir. 2000).[12]

[12] Stormans v. Selecky, 586 F.3d 1109 (9th Cir. 2009), cited by the government on this issue, does not support its argument. The case involved the constitutionality of Washington State rules regarding pharmacies, challenged by a corporation and individual pharmacists. The discussion of standing focused on the corporate plaintiff and this Court held that the corporation had standing to assert the First Amendment rights of its owners. Id. at 1120. The portion of the opinion cited by the government addresses ripeness – an issue not addressed in the government's brief – but, in any event, supports Log Cabin's position. The holding of the case requires a genuine threat of prosecution for a case to be ripe and here the district court correctly found that Lt. Col. Doe faces a genuine threat that Don't Ask, Don't Tell will be enforced against him every day he serves. ER242-246. The government also cites Schlesinger v. Councilman, 420 U.S. 738 (1975), but that case is irrelevant. It addressed the situation where the alleged harm to the plaintiff was a court-martial under the Uniform Code of Military Justice and the Supreme Court held that the plaintiff had standing as long as the action did not interfere with the military justice system. Id. at 742-43, 753. That Log Cabin derives standing from the injuries being suffered by its member Lt. Col. Doe will not in any way interfere with the military justice system.

The government's brief also ignores other cases. For example, in Forum for Academic & Institutional Rights, Inc. v. Rumsfeld, 291 F. Supp. 2d 269 (D.N.J. 2003), rev'd on other grounds, 390 F.3d 219 (3rd Cir. 2004), rev'd, 547 U.S. 47 (2006), an association of law schools and law faculties ("FAIR") sued to enjoin the enforcement of the Solomon Act, 10 U.S.C. § 983(b), which authorized the United States to deny federal funding to educational institutions that prohibit or prevent on-campus military recruiting. FAIR contended that the Solomon Amendment interfered with its members' First Amendment rights of academic freedom, free speech, and freedom of expressive association, by forcing its members to abandon their non-discrimination policies under the threat of losing federal funding under the statute. Id. at 274. The government moved to dismiss FAIR's claim for lack of standing.

The court held that a member school's actual loss of funding was not a necessary prerequisite for such a member to have standing to challenge the statute:

> law school members of FAIR have a sufficient stake in this controversy insofar as the allegations demonstrate that the schools have capitulated to government threats of losing federal funding due to non-compliance with the Solomon Amendment. The relevant injury for standing purposes is the government-induced abandonment of the schools' non-discrimination policies and not, as the Government urges, an actual loss of funding.

Id. at 286. And since an individual member would have standing although it had

not yet suffered an actual loss of funding, so too did FAIR have standing: "[t]here are no remaining uncertainties as to the effect of the Solomon Amendment on FAIR law school members. Thus, the factual allegations are sufficient to confer associational standing on FAIR." Id. at 288.[13]

The government also argues that there was a lack of evidence that Lt. Col. Doe kept his dues current and therefore was not a member of Log Cabin. It is true that there was no direct evidence as to whether he paid dues after the 2004 payment. The government's argument, however, again ignores the standard of review and omits to mention evidence that failure to pay dues would not result in a member's name being stricken from the membership rolls or electronic database (see ER406), a fact noted by the district court's opinion. ER31.[14]

The government also argues that Log Cabin did not prove that Lt. Col. Doe was a member continuously throughout the case. AOB at 35-36. In making this

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[13] While the Supreme Court ultimately rejected the merits of the plaintiffs' claims, it upheld FAIR's associational standing. 547 U.S. at 53 n.2.

[14] Based on the evidence received, the district court was also entitled to infer that Lt. Col. Doe renewed and paid his dues annually and remained a Log Cabin member continuously.

In any case, as the district court recognized (SER318-319), standing does not require adherence to corporate formalities and formal membership structure. Concerned Citizens Around Murphy v. Murphy Oil, 686 F. Supp. 2d 663, 675 (E.D. La 2010) (citing Hunt, 432 U.S. at 344-45). "[C]ourts do not exalt form over substance. … [T]he association must demonstrate that the individuals it seeks to represent possess sufficient indicia of membership." Id. (citations and quotations omitted); see also Friends of the Earth, Inc. v. Chevron Chem. Co., 129 F.3d 826,828-29 (5th Cir. 1997).

argument, the government cites only a portion of the district court's decision and ignores the facts and law on which the district court relied in rejecting the argument. The government's brief says: "Even the district court allowed that plaintiff did not present evidence that Doe has kept his membership dues current throughout the pendency of this litigation" and cites a portion of the district court's decision. AOB at 39. It goes on to note that the district court found this fact to be irrelevant in an associational standing case. The government ignores, however, the next two pages of the district court's decision, in which it explained both the factual reasons and case law on which it relied to reject this argument. ER31-32. See also ER108, 169-170.

The only case cited by the government on this point, Williams v. Boeing Co., 517 F.3d 1120 (9th Cir. 2008), does not support its position. Williams contains a statement of the general rule that a plaintiff's stake in the case must be continuous, id. at 1128, but then rules that the individual plaintiffs did have standing to appeal and denied Boeing's motion to dismiss the appeal, even after the plaintiffs had voluntarily dismissed some of their claims. Id. at 1129. In any event, as the district court correctly observed, this is not an individual standing case.

The government's brief also fails to address the case cited on this issue by Log Cabin during its closing argument. SER341. In NAACP v. City of Parma,

263 F.3d 513 (6th Cir. 2001), an associational standing case, the Court of Appeals for the Sixth Circuit addressed the question of when standing is to be determined and ruled as follows:

> Our review of Supreme Court and Sixth Circuit case law informs us that, contrary to the district court's conclusion, standing does not have to be maintained throughout all stages of litigation. Instead, it is to be determined as of the time the complaint is filed.

Id. at 524. The court then explained its reasons for this holding at length, id. at 524-26, and ruled "we conclude that the court must determine whether standing exists at the time of the filing of the complaint only." Id. at 526 (emphasis added).[15]

### 3. Alexander Nicholson

At trial, Log Cabin presented three witnesses whose testimony established Mr. Nicholson's membership in Log Cabin before the filing of the first amended complaint on April 28, 2006. Specifically, Log Cabin presented Mr. Arthur James Ensley, the president of the Georgia Chapter of Log Cabin, who testified that he made Mr. Nicholson one of the few honorary members of the Georgia Chapter on April 28, 2006, as a result of his work with Log Cabin on DADT advocacy.

[15] City of Parma cited, among other cases, this Court's decision in White v. Lee, 227 F.3d 1214 (9th Cir. 2000), for support. White case found that standing must exist at the time of the filing of the action and that subsequent changes of circumstances throughout the pendency of the litigation do not impact standing but may make an action moot. Id. at 1242. The government has not argued mootness in its brief.

ER401-405. Mr. Terry Hamilton, the National Chairman of Log Cabin, testified that Mr. Nicholson is in the organization's data base as a member and has a membership number. SER569-575. He also explained that the organization's by-laws specifically provide for honorary memberships. ER397.[16] Both testified also about Mr. Nicholson's involvement in the activities of the organization. ER404-405, SER575-576. Mr. Hamilton also testified about Mr. Nicholson's payment of dues. SER570-574, 287-288. Mr. Nicholson himself testified as to his membership in Log Cabin since April 28, 2006. SER429-431. The district court found all three witnesses to be credible. ER58, 109-110. The government offered no witnesses on these issues.

The district court summarized the evidence concerning Mr. Nicholson's membership in Log Cabin in its Memorandum Opinion, ER24-28, and its Findings of Fact and Conclusions of Law, ER108-111, and concluded that Mr. Nicholson officially joined Log Cabin as a member on April 28, 2006, and has been a member continuously since then. ER110. Based on its factual findings, the district

[16] The relevant provision of the by-laws reads, in full, as follows: "Section 2.02: Honorary and Special Members. The Board of Directors may establish other criteria for granting an Honorary Membership to Log Cabin Republicans for individuals who have exhibited a unique or noteworthy contribution to the Mission of the Corporation or a Special Membership to Log Cabin Republicans for individuals or entities that have provided assistance to the Corporation." ER 356. Log Cabin also presented the testimony of Log Cabin's corporate counsel to authenticate the by-laws. SER605-606, 1302.

concluded that Log Cabin also satisfied the first Hunt factor through Mr. Nicholson. ER26, 168.

As with Lt. Col. Doe, the government does not even attempt to argue that the district court's factual findings regarding Mr. Nicholson were clearly erroneous. Instead, the government argues that Log Cabin cannot use Mr. Nicholson to establish standing because he was discharged in 2002, before Log Cabin sued in 2004, and that he therefore has no concrete stake in the litigation. AOB at 28-29. This is, of course, the exact opposite of the government's argument regarding Lt. Col. Doe, who allegedly lacks standing because he has not been discharged, demonstrating the incoherence of the government's position. As a former Army soldier discharged under DADT, Mr. Nicholson certainly has a stake in the constitutionality of that law and the cases cited by the government on this issue do not support its position.

The government cites City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983), claiming that it holds that a plaintiff asserting a past injury lacked standing to seek prospective relief. AOB at 28-29. But this case is very different from Lyons. The plaintiffs' challenge in Lyons was purely speculative because it depended on the unwarranted assumption that plaintiffs would violate otherwise unchallenged lawful criminal statutes. 461 U.S. at 102-03. Accordingly, the allegations that would be required to establish standing would be "incredible" and

mere conjecture. Under DADT, Mr. Nicholson faced discharge from the military and loss of pension and benefits. Nor do the claims here rely on injury from past conduct alone with mere speculation whether such injury will recur, as in Lyons.

The other case cited by the government on this point, Summers v. Earth Island Institute, 129 S. Ct. 1142 (2009), does not support its position either. In that case, an organization attempted to base its standing to challenge any sale by the Forest Service of 190 million acres of forest land on one individual, based on his "desire" to "visit" forests. Id. at 1150-51. Not surprisingly, the court found his "some day" intentions to visit forests did not amount to the required injury. Id. at 1151. In contrast, Mr. Nicholson was discharged pursuant to DADT.[17]

The government also argues that Mr. Nicholson was not a "bona fide" Log Cabin member because he did not pay dues and was not a Republican. AOB at 29, 32. This claim again ignores the standard of review by not arguing that the district court finding of his membership was clear error and it ignores the evidence on

[17] The government also argues that Mr. Nicholson's desire to return to military service, to which he testified at trial, is not a sufficient basis upon which to base his standing. AOB at 29. But the district court did not base its standing decision on this fact. Mr. Nicholson's discharge from the Army is the injury on which his standing is based. The argument lacks merit in any case. Mr. Nicholson's desire to return to the military which discharged him, to which he testified at trial (SER431), is much more concrete than the "some day" intentions in the cases cited by the government. E.g., Summers, 129 S. Ct. at 1150-51; Wilderness Soc'y, Inc. v. Rey, 622 F.3d 1251 (9th Cir. 2010) (individual's vague desire to return to forest area, without any description of a concrete plan to visit by a certain date, insufficient.).

which the district court based its decision, including the Log Cabin by-law provision regarding eligibility of members (who do not, as shown above, have to be Republicans), the by-law provision for honorary members (who are not required to pay dues), and the testimony of Messrs. Hamilton, Ensley, and Nicholson.

The government also argues that Log Cabin cannot base standing on Mr. Nicholson's membership because he was not a Log Cabin member when the original complaint was filed. In this argument, the government repeatedly mentions a district court tentative decision to grant its motion for summary judgment on standing, e.g., AOB at 16-17, 29-31, and that the district court "reversed course." AOB at 17. The government fails to explain the proceedings below fully, however. Before oral argument on the government's motion for summary judgment, the district court provided a 12-page written tentative opinion, noting that plaintiff had only showed that Lt. Col. Doe was a member since "2004", not as of October 12, 2004, and that Mr. Nicholson's membership as of April 28, 2006 did not suffice. ER254-261. Following the issuance of the tentative decision, however, Log Cabin submitted additional evidence as to the date of Lt. Col. Doe's membership, SER1251-1253, and additional briefing to show that Mr. Nicholson's membership before the filing of the first amended complaint sufficed. SER1275-1280. The government responded with its own briefing. SER1254-1262. The district court then conducted a lengthy hearing on

the motion, SER1158-1228, agreed to receive additional briefing, and the parties submitted additional briefs. SER1116-1157. Following all of this briefing and argument, the district court found in a 27-page opinion that Lt. Col. Doe was a member before the complaint was filed and that Mr. Nicholson's membership before the filing of the first amended complaint sufficed. ER227-253.

The government fails to mention this extensive briefing and argument, omits these materials from its excerpts of record, and does not mention, much less attempt to distinguish, the cases on which the district court relied in finding that Mr. Nicholson's membership sufficed because the critical date for standing purposes was the date of the filing of the first amended complaint, April 28, 2006. The district court's order cited the general proposition that standing must exist at the time of the commencement of the action, but explained that the general rule did not apply because Log Cabin's original complaint had been dismissed, with leave to amend, and it had filed a first amended complaint. In that portion of its order, the district court cited two cases, Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967), and County of Riverside v. McLaughlin, 500 U.S. 44 (1991). The district court repeated this finding in its Memorandum Opinion and Findings of Fact and Conclusions of Law. ER23, 111, 168.

Log Cabin's standing must be evaluated as of the date of filing of the first amended complaint in April 2006, because a complaint is not coextensive with the

action in which it is filed. The amended complaint "supersedes the original, the latter being treated thereafter as non-existent," but the action itself persists. Loux, 375 F.2d at 57; see also W. Schwarzer, A. Tashima, J. Wagstaffe, Fed. Civil Procedure Before Trial, § 8 at 1550.

In McLaughlin, 500 U.S. at 44, for example, one plaintiff filed a complaint. Later, a second amended complaint was filed, adding three additional plaintiffs. The defendant claimed that the plaintiffs lacked standing. In analyzing this claim, the Supreme Court reviewed it as of the time of the filing of the second amended complaint, not as of the time of the filing of the original complaint. Id. at 51. ("The County does not dispute that, *at the time the second amended complaint was filed***,** plaintiffs James, Simon, and Hyde had been arrested without warrants and were being held in custody without having received a probable cause determination") (emphasis added).

The government's brief ignores these cases. It does not mention Loux v. Rhay once. It only attempts to distinguish McLaughlin in a footnote by claiming that the Court did not "discuss whether standing is evaluated at the time of the original complaint or amended complaint," AOB at 32 n.12 (emphasis added).[18]

[18] In the same footnote, the government also cites Perry v. Village of Arlington Heights, 186 F.3d 826 (7th Cir. 1999), to argue that standing must exist at the time of the commencement of the action and cannot be satisfied as the case progresses, AOB at 31 n.11, but that case is readily distinguishable. It is not an associational standing case. It does not involve an amended complaint either. Instead, it

The McLaughlin Court may not have explicitly discussed the effect of filing an amended complaint, but it certainly analyzed standing in that case as of the date of filing the second amended complaint in that case. 500 U.S. at 50-52.[19]

The cases the government does cite do not support its position either. It cites Rey, 622 F.3d at 1251, for the general rule that standing depends on the state of things when the action is brought, AOB at 30, but that case is readily distinguishable. It does not involve an amended complaint. It is an associational standing case where the plaintiff organization challenged Forest Service regulations but the plaintiff's individual member did not even identify any concrete plans to visit the forest lands involved, so he had not suffered any injury; the court also ruled that he would have standing if he had shown that he repeatedly visited the area, planned to do so again, and his plans would be harmed if the project went forward. Id. at 1256-57. It also cites Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 570 (2004), for the same general proposition, AOB at 30, but that

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addresses an individual's standing to challenge the constitutionality of Illinois state law and a city municipal code provision regarding the seizure and disposal of abandoned vehicles by an individual who did not live in the city or own a car. Id. at 828.

[19] The government also cites Arbaugh v. Y & H Corp., 546 U.S. 500, 511 (2006), to suggest that "drive by jurisdictional rulings … should be accorded no precedential effect …", but Arbaugh does not mention McLaughlin, much less suggest that it lacks precedential value, and does not address whether standing is determined at the time of the filing of an amended complaint.

case does not address the situation of an amended complaint being filed after the original case was dismissed.[20]

The government cites but one case on the issue of standing when an amended complaint is involved, but it does not support its position either. In a footnote, it cites a footnote in Schreiber Foods v. Beatrice Cheese, Inc., 402 F.3d 1198 (Fed. Cir. 2005), for the proposition that "the initial standing of the original plaintiff is assessed at the time of the original complaint, even if the complaint is later amended," AOB at 31 n.11, but the case is distinguishable because it involved an individual plaintiff, not associational standing. The court analyzed the individual standing of the specific plaintiff as of the date of filing the complaint. That analysis does not control the outcome here, however, where the organizational nature of the plaintiff, Log Cabin, means that its standing flows from that of any member of the organization at any time.

Support for Log Cabin's position is also found in other cases involving amended complaints holding that standing is to be determined by reviewing the operative complaint at the time. In Thomas v. Mundell, 572 F.3d 756 (9th Cir.

[20] The government also cites Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826 (1989), for the same general rule in Rey, id. at 830, but this case goes on to say that jurisdiction "ordinarily" depends on the facts as they exist when the case is filed and states: "Like most general principles, however, this one is susceptible to exceptions …." Id.

2009), the County Attorney for Maricopa County filed a complaint alleging constitutional law violations arising from a separate probation department program for DUI offenders; three individual plaintiffs were added in a first amended complaint. The defendants contested the standing of all plaintiffs and the district court granted their motion to dismiss for lack of standing. Id. at 764. This Court affirmed but, of importance here, separately analyzed the standing of the original plaintiff and the plaintiffs added by the first amended complaint and did not analyze whether the new plaintiffs had standing at the time of the filing of the original complaint. Id. at 763-64.

Similarly, in Jadwin v. County of Kern, No. 1:07-CV-00026-OWW-DLB, 2009 WL 2424565, at *6 (E.D. Cal. Aug. 6, 2009), plaintiff had filed a second amended complaint and the Court evaluated his standing as of the date of the filing of the second amended complaint. Id. at *6 (citing McLaughlin and Thomas). See also Bochese v. Town of Ponce Inlet, 405 F.3d 964, 978 (11th Cir. 2005); Lynch v. Leis, 382 F.3d 642, 647 (6th Cir. 2004); Focus on the Family v. Pinellas Suncoast Transit Auth., 344 F.3d 1263, 1275 (11th Cir. 2003); Kerr Corp. v. 3M Co., No. 06-C-423-C, 2006 WL 6005803, at *2 (W.D. Wis. Dec. 19, 2006).

In sum, Log Cabin established its organizational standing through both Mr. Nicholson and Lt. Col. Doe.

### B. THE GOVERNMENT CONCEDES THAT THE DISTRICT COURT CORRECTLY FOUND THAT DON'T ASK, DON'T TELL IS UNCONSTITUTIONAL

In a concession that eviscerates its appeal, the government no longer argues, as it had for six years below, that Don't Ask, Don't Tell was a valid, constitutional exercise of Congressional power. Its Statement of the Issues on Appeal and Summary of Argument (AOB at 2, 21-23) omit any challenge to the district court's findings that DADT is unconstitutional under the Fifth Amendment and the First Amendment. Instead, the government frames the constitutional issue on appeal as being whether the *process* that Congress established three months ago for the eventual repeal of DADT is constitutional. The government devotes only a sliver of its brief to that new issue, and completely ignores the central issue that was tried in the case: the constitutionality of Don't Ask, Don't Tell under the Fifth and First Amendments. The government no longer contends that the Witt intermediate scrutiny standard does not apply to facial challenges, and does not dispute how Lawrence altered the Fifth Amendment due process jurisprudence applicable to DADT. Accordingly, the government has waived any challenge to the district court's findings and judgment on the issue of constitutionality, and concedes the unconstitutionality of 10 U.S.C. § 654 and its implementing regulations. "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).[21]

The district court's judgment came after protracted pretrial proceedings, at which numerous legal issues were contested, fully briefed, and resolved in thorough reasoned written opinions. The judgment resulted from a two-week bench trial at which the district court heard extensive testimony from more than twenty witnesses, including both expert witnesses and former servicemembers affected by DADT, and received and considered well over 100 exhibits in evidence. The trial was the first and to date the only trial ever to hear and review actual evidence of how DADT operates in practice, impairs military readiness and unit cohesion, and violates the constitutional rights of all those subject to it, not just a single challenger.

[21] Though the government has not appealed the district court's finding that DADT is unconstitutional, and thus does not challenge the district court's application of the heightened-scrutiny "Witt standard," rather than rational basis review, to this facial constitutional challenge, that point is raised in the *amicus curiae* brief of the National Legal Foundation. However, appellate courts will not consider issues raised only in an *amicus* brief and not by the parties. Chaker v. Crogan, 428 F.3d 1215, 1220 (9th Cir. 2005); Swan v. Peterson, 6 F.3d 1373, 1383 (9th Cir. 1993). Similarly, an *amicus curiae* may not raise a point of law that has been waived by the party to the appeal on whose behalf the *amicus* brief is filed. See, e.g., Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 861-62 (9th Cir. 1982). Accordingly, this Court should disregard the argument of *amicus* National Legal Foundation regarding the standard of review to be applied to a facial constitutional challenge, because it addresses an issue the government has abandoned and waived.

The district court concluded, from its review of all the trial evidence, that DADT violates the Fifth Amendment due process clause and the First Amendment's guarantees of free speech and the right to petition. The government chose not to present any evidence beyond the legislative history of the statute, all of which the district court considered. The government chose to present no witnesses of its own, and to make no showing to the district court of any circumstance in which DADT has been or could be applied constitutionally. Having made that choice and lost, the government now pretends that this appeal addresses a different issue altogether. But an appeal is not a moving target, this Court is not a trial court in a position to fashion remedies based on circumstances arising outside the record, and the issue the government presents is not properly before this Court.

The government has now waived its prior assertions that DADT is constitutional and its challenge to the district court's judgment that the statute violates the Fifth and First Amendments. The government does so despite having requested, and obtained, from this Court a stay of the district court's injunction based in part on the argument that it was likely to prevail on the merits of its argument that DADT is constitutional. SER13-16. With its newly reframed argument, the government would have this Court decide that notwithstanding the conceded unconstitutionality of DADT, that statute may nevertheless be left in

place – in full force and effect, see Pub. L. No. 111-321, § 2(c), 124 Stat. 3515, 3516 (2010), and with investigations and discharges – while the Defense Department and the Executive Branch work through the process of repeal. This cavalier approach to violations of the constitutional rights of current and prospective members of our country's armed forces does the government no honor, and it should be rejected.

The government makes two arguments for the supposed constitutionality of leaving a tainted statute in place while an uncertain repeal process unfolds: that courts owe deference to the military judgments of Congress and the military establishment; and that the pendency of a repeal process "undermines the validity" of the district court's injunction because the injunction precludes an "orderly transition" away from DADT. Neither argument is persuasive.

First, deference to military judgment does not foreclose judicial evaluation of statutes. As the district court correctly recognized, the military is not immune to the demands of the Constitution. "Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs...." Weiss v. United States, 510 U.S. 163, 176 (1994); and, as this Court itself has recognized in this very context, "deference does not mean abdication." Witt, 527 F.3d at 821 (citing Rostker v. Goldberg, 453 U.S. 57, 70 (1981)).

Just as, in Talleyrand's words, "war is too serious a matter to be left to the generals," due process and Constitutional guarantees are matters too serious to be left to the political process. Congress cannot subvert the protections of the Constitution merely because it is legislating in the area of military affairs. The Supreme Court has never held that judicial deference to the military is absolute, and the judiciary retains its authority as the final arbiter of constitutional rights even in the military context. This is so even in a time of ongoing war, as the Supreme Court's recent decisions in Hamdan v. Rumsfeld, 548 U.S. 557, 588 (2006), and Hamdi v. Rumsfeld, 542 U.S. 507, 527, 533-34 (2004), make clear.

The government presented no evidence below to support a finding that open service by homosexuals harms the military's interests. Quite the contrary: the record shows that both civilian and military leaders admitted, repeatedly, that DADT actually impairs military interests. The unrebutted admissions in the record are that DADT "doesn't contribute to our national security," "weakens our national security," and reversing DADT is "essential for our national security," SER243-246, 260-261, 284-285; that no studies or evidence suggest that repeal of DADT would undermine unit cohesion, SER279; and that the assertions purportedly justifying DADT's intrusion on the personal and private lives of homosexuals "have no basis in fact." Id. If anything, judicial deference to military judgment here counsels affirmance of the district court's judgment, not reversal.

The government's second argument on the constitutional point is that Congress's recent enactment of Pub. L. No. 111-321, the "Don't Ask, Don't Tell Repeal Act of 2010," renders the district court's injunction against enforcement of DADT inappropriate. That is so, the government claims, because the injunction enjoining the government from enforcing DADT and from continuing with investigation and discharge proceedings "disrupt[s] the transition process" that Congress enacted.[22]

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[22] The government only appeals the portion of the district court's judgment ordering injunctive relief. The government's brief does not address, and therefore it does not appeal, the other portion of the judgment, which granted declaratory relief declaring DADT unconstitutional for infringing current and prospective servicemembers' rights to substantive due process under the Fifth Amendment and to freedom of speech and to petition the Government for redress of grievances guaranteed by the First Amendment. ER 2.

But as was recently recognized in another case with national significance, where a statute is declared unconstitutional, injunctive relief is not even strictly necessary:

> there is a long-standing presumption that officials of the Executive Branch will adhere to the law as declared by the court. As a result, the declaratory judgment is the functional equivalent of an injunction.

Order Granting Summ. J., Florida v. Dep't of Health & Human Servs., No. 3:10-cv-00091-RV, 2011 WL 285683, at *39 (N.D. Fla. Jan. 31, 2011) (citing Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985) ("declaratory judgment is, in a context such as this where federal officers are defendants, the practical equivalent of specific relief such as an injunction … since it must be presumed that federal officers will adhere to the law as declared by the court") (Scalia, J.)) (citations otherwise omitted).

An unconstitutional statute does not become constitutional because a process for its possible eventual repeal – even an "orderly" one – has commenced. A later change in law is not a basis to *reverse* a prior judicial finding that a statute is unconstitutional, or an injunction against enforcement of the unconstitutional statute. Yet that is what the government asks this Court to do on appeal. This novel argument is not only unsupported by any case law, it is absurd.

Suppose a state's capital punishment statute calls for execution by hanging, and a court invalidates that statute as violative of the Eighth Amendment. The state legislature responds by passing an act providing that the statute will be repealed effective after the Bureau of Prisons certifies that it has developed a replacement protocol, but that the existing statute will remain in place, and executions will continue to be carried out, until the state's supply of rope runs out. Should any court accept the proposition that the state's repeal plan rescues the capital statute from unconstitutionality?

The government cites Miller v. French, 530 U.S. 327, 347 (2000), for the proposition that "[t]he 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." The issue in Miller was whether a district court's injunction ordering prospective relief – the amelioration of conditions at a state prison – would be automatically stayed by virtue of a provision in the later-enacted

Prison Litigation Reform Act of 1995 (PLRA), 18 U.S.C. § 3626(e)(2). That provision directed that a motion to terminate prospective relief operated as an automatic stay of that relief for a period of time. The PLRA "establishe[d] standards for the entry and termination of prospective relief in civil actions challenging conditions at prison facilities," and those standards applied retroactively to existing injunctions. Miller, 530 U.S. at 333. The Supreme Court held that the injunction would be stayed, since Congress could constitutionally establish new standards for the enforcement of prospective relief and such relief must be modified if some of its obligations have "become impermissible under federal law," id. at 347; that is because "[p]rospective relief under a continuing, executory decree remains subject to alteration due to changes in the underlying law." Id. at 344.

The result in Miller does not control this case. The district court's injunction here did not direct "prospective relief under a continuing, executory decree"; it invalidated a federal statute for multiple constitutional violations, and enjoined enforcement of that statute. No subsequent Congressional change in law could affect the constitutionality of the statute, and there was no ongoing relief or court supervision to be affected by any change in law.

The other cases cited by the government on this point are similarly inapposite. Salazar v. Buono, 130 S. Ct. 1803 (2010), the Mojave Desert cross

case, refused to enjoin the implementation of a land-transfer statute designed to accommodate the placement of a cross as a veterans' memorial. After an earlier court judgment held that displaying the cross on federal land violated the Establishment Clause, Congress passed a statute transferring the land on which the cross stood to a private party, in exchange for a different parcel of land of equivalent value. Id. at 1812-13. The Supreme Court did *not* hold, as the government states, that the injunction against display of the cross should be "revisited";[23] it held that there was a question "whether an ongoing exercise of the court's equitable authority is supported by the prior showing of illegality, judged against the claim that changed circumstances have rendered prospective relief inappropriate." Id. at 1818. Just as in Miller, the issue presented in Salazar involved an ongoing executory injunction, which a change in law could render inappropriate. That is not the case here.

The government's other cases, System Federation No. 91 v. Wright, 364 U.S. 642 (1961) and Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421 (1855), have even less relevance. The former modified an injunction forbidding discrimination against non-union employees, after the Railway Labor

[23] The Court's opinion is very clear on this point: "The Government therefore does not – and could not – ask this Court to reconsider the propriety of the 2002 injunction or the District Court's reasons for granting it. The question now before the Court is whether the District Court properly enjoined the Government from implementing the land-transfer statute." Salazar, 130 S. Ct. at 1815-16.

Act was amended to permit union shop agreements; the latter vacated an injunction against the continued maintenance of a bridge, which had been issued on the grounds that the bridge was too low and obstructed free navigation of a river, after Congress passed an act specifically deeming the bridge to be lawful at its current elevation. See Miller, supra, 530 U.S. at 345-46. In none of the cases that the government cites did a court find that later Congressional action vitiated a court's prior declaration of unconstitutionality of a statute.

The district court found Don't Ask, Don't Tell unconstitutional under the First and Fifth Amendments. The government does not challenge those findings. The inchoate repeal process of Pub. L. No. 111-321 does not cure those findings. The government's attempt to redirect the course of this appeal away from a review of the district court's judgment and into an consideration of the constitutionality of a *new* act of Congress – an act passed after judgment was entered, never presented to the district court, and wholly outside the record – is sleight of hand that has no basis in law. It should be rejected and the district court's judgment as to the constitutional issues should be affirmed.

### C. THE DISTRICT COURT'S INJUNCTION WAS WITHIN ITS AUTHORITY AND WAS THE APPROPRIATE REMEDY

The government has been aware since this suit was initiated in 2004 that Log Cabin challenged the constitutionality of Don't Ask, Don't Tell on its face.

Accordingly, after the district court determined that DADT violated the Constitution, it granted appropriate relief when it issued an injunction preventing the government as a whole from enforcing the statute. The government repeatedly has claimed that the injunction is overbroad, but this Court should reject this claim.

In its September 9, 2010, order finding DADT unconstitutional, the district court ordered Log Cabin to submit a proposed judgment consistent with the terms of the order. SER102-187. Log Cabin did so. SER99-101. The government filed its objections, based on arguments nearly identical to those it raises now. SER76-98. Log Cabin responded to the government's objections and lodged an amended proposed judgment (SER51-75), to which the government filed supplemental objections. SER46-50.

On October 12, 2010, the district court issued its 15-page Order Granting Permanent Injunction overruling the government's objections in part. ER4-18. The court also issued its Judgment and Permanent Injunction, which, among other things, "permanently enjoins the Defendants United States of America and the Secretary of Defense … from enforcing or applying [DADT], against any person under their jurisdiction or command." ER1-3.

As the district court stated, "[t]he nature of the remedy stems from the nature of the challenge — here, a facial challenge." ER8. Nonetheless, the government continues to regurgitate here the same arguments that rightly failed below. The

government's multiple theories why the district court exceeded its authority do not apply to the situation at hand. Plaintiff pursued a facial challenge to DADT and the injunction order is the appropriate remedy to that successful challenge.

**1. Standard of Review**

A district court's grant of a permanent injunction is reviewed for abuse of discretion. Biodiversity Legal Found. v. Badgley, supra, at 1176. The scope of such injunction is reviewed under the abuse of discretion standard as well. United States v. Laerdal Mfg. Corp., 73 F.3d 852, 854 (9th Cir. 1995). The legal questions underlying the district court's grant of injunction are reviewed *de novo*. Biodiversity, 309 F.3d at 1176.

The government fails to mention the appropriate standard of review — because it cannot reasonably argue that the district court abused its discretion when it ordered the injunction. The government provides no argument, authority, or evidence showing that the district court's injunction constitutes an abuse of discretion.

Moreover, the government ignores the many cases the district court cited to demonstrate why the injunction is appropriate. E.g., Earth Island Inst. v. Pengilly, 376 F. Supp. 2d 994 (E.D. Cal. 2005), aff'd, 490 F.3d 687 (9th Cir. 2007), rev'd on other grounds, Summers v. Earth Island Inst., 129 S. Ct. 1142 (2009) (invalidating five U.S. Forest Service regulations and prohibiting it from enforcing such

regulations in an action brought by several associations, effectively a nationwide injunction); Coyne Beahm, Inc. v. FDA, 966 F. Supp. 1374, 1400-01 (M.D.N.C. 1997), rev'd on other grounds sub nom., Brown & Williamson Tobacco Corp. v. FDA, 153 F.3d 155 (4th Cir. 1998), aff'd, 529 U.S. 120 (2000) (enjoining the FDA from enforcing tobacco regulations, effectively a nationwide injunction); Finley v. Nat'l Endowment for the Arts, 795 F. Supp. 1457, 1476 (C.D. Cal. 1992), aff'd, 100 F.3d 671 (9th Cir. 1996), rev'd on other grounds, 524 U.S. 569 (1998) (enjoining enforcement of a National Act on a successful facial challenge, effectively a nationwide injunction); Va. Surface Min. & Reclamation Ass'n v. Andrus, 483 F. Supp. 425 (W.D. Va. 1980), rev'd on other grounds sub nom., Hodel v. Va. Surface Min. & Reclamation Ass'n, 452 U.S. 264 (1981) (enjoining Secretary of the Interior from enforcing unconstitutional act, effectively a nation-wide injunction). ER8-9. The government's brief fails to mention, much less distinguish, any of these cases that the district court cited to support its injunction.

**2. The Scope of the Injunction Is Appropriate**

The government argues the injunction is overbroad because of its geographic range. This is not the standard. The standard is whether the injunction's scope fits the relief requested and it meets that standard. The injunction binds the government as defendants in this action. It does not bind parties not before the court. That the government operates in a large geographic area does not make the

injunction overbroad. The government does not suggest any way in which the injunction should be limited, nor does it ever argue that the scope of the injunction makes it impossible, or even difficult, to comply. As such, the injunction is tailored exactly to provide the relief to which Log Cabin is entitled.

A district court has wide discretion to fashion appropriate injunctive relief in a particular case. Lemon v. Kurtzman, 411 U.S. 192, 200 (1973). The relief granted must be sufficient to redress the plaintiff's complaints. Bresgal v. Brock, 843 F.2d 1163, 1170 (9th Cir. 1987).

Here, Log Cabin mounted a facial challenge to DADT and the appropriate remedy is an injunction that prevents the government from enforcing an unconstitutional statute wherever it seeks to enforce it. ACLU v. Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007), aff'd, ACLU v. Mukasey, 534 F.3d 181 (3d Cir. 2008), cert. denied, 129 S. Ct. 1032 (district court found Child Online Protection Act violated the First and Fifth amendments and enjoined the Attorney General from enforcing it "at any time for any conduct," effectively a nationwide injunction); Rothe Dev. Corp. v. Dep't of Def., 606 F. Supp. 2d 648 (W.D. Tex. 2009), aff'd, 545 F.3d 1023 (Fed. Cir. 2008), cert. denied, 131 S. Ct. 907 (2011) (in an individual action against the Department of Defense and the Department of the Air Force, the district court found a section of the National Defense Authorization Act of 1987 to be facially unconstitutional and enjoined such

section's application, effectively a world-wide injunction); PHE, Inc. v. Dept. of Justice, 743 F. Supp. 15, 20 (D.D.C. 1990) (issuing nationwide injunction where "defendants are acting in a coordinated effort to cause plaintiffs to face criminal prosecutions in multiple federal district courts for the purpose of coercing plaintiffs to refrain from distributing materials which defendants acknowledge are constitutionally protected."). As these cases show, the appropriate remedy for the government's violations of the Constitution is an injunction preventing the government from enforcing DADT wherever it operates.

The government argues that the injunction is overbroad because it determines rights of persons not before the court. AOB at 44-45, citing Zepeda v. INS, 753 F.2d 719, 727 (9th Cir. 1983) and Nat'l Ctr. for Immigration Rights v. INS, 743 F.2d 1365, 1371-72 (9th Cir. 1984). But this is incorrect. The injunction binds the government, a party to this action, and does not prohibit enforcement of an unconstitutional statute by anyone who was not before the court.

Further, the cases on which the government relies are unpersuasive. First, both Zepeda and National Center involved preliminary rather than permanent injunctions and, as such, Bresgal noted that "the logic behind [these cases] cannot control here." Bresgal, 843 F.2d at 1170. Second, unlike Zepeda and National Center, the necessary parties here were and are before the court. Id. at 1169-70 (further distinguishing both Zepeda and National Center and noting that "[t]he

import of the rule underlying Zepeda is that an injunction cannot issue against an entity that is not a party to the suit. The injunction here was issued only against the Secretary, who is a party."). As such, the government's argument lacks merit.

### 3. That the Injunction Order May Benefit Additional Parties Is Irrelevant

"There is no general requirement that an injunction affect only the parties in the suit." Bresgal, 843 F.2d at 1169. Consequently, "an injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit – even if it is not a class action – *if such breadth is necessary to give prevailing parties the relief to which they are entitled*." Id. at 1170-71 (emphasis in original).

In Bresgal, the Northwest Forest Workers Association, on behalf of migrant agricultural workers in the forestry business, sought declaratory and injunctive relief requiring the Secretary of Labor to enforce the Migrant and Seasonal Agricultural Worker Protection Act (the "Act") as to such workers. Id. at 1170. The district court granted the plaintiffs' request for declaratory judgment resulting in the requirement that the Secretary apply the Act to commercial forestry workers. Id. This Court upheld the declaratory relief. Id. The district court also issued a nationwide injunction against the Secretary and required the Secretary to amend and/or re-write certain departmental regulations. Id. The Secretary argued that the

injunction was overbroad and would affect a larger group than just the plaintiffs in the suit but this Court held that nationwide enforcement of the injunction was appropriate even if it would effect other types of laborers. Id. at 1171.

Here, the injunction will benefit homosexual servicemembers who could be otherwise discharged pursuant to DADT but are not Log Cabin members. But that the effect of the injunction may touch parties not directly before the court does not render the injunction overbroad, as Bresgal makes clear. Bresgal is directly on point and the government does nothing to distinguish it. The government cites Bresgal, AOB at 47, but fails to show how it is not directly applicable.

#### 4. The Government Continues to Misrepresent the Nature of Log Cabin's Suit

Throughout this case, the government advanced numerous arguments based on the facial nature of Log Cabin's challenge. AOB at 1, 2, 17, 18. But now, after having put Log Cabin to its proof on a facial challenge, the government argues that the injunction is too broad as if the case has been an as-applied challenge all along. The government attempted the same obfuscation below, causing the district court to observe that it "attempts to transform Plaintiff's challenge into an as-applied attack on [DADT], which squarely contradicts [the government's] position throughout this litigation." ER7. The government cannot have it both ways.

Initially, the cases it cites for its argument that the injunction is overbroad involve as-applied challenges. Neither Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2760 (2010), Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) nor Wisconsin Right to Life, Inc. v. Schober, 366 F.3d 485, 490 (7th Cir. 2004), involved facial constitutional challenges. These cases do not hold, as the government suggests, that a worldwide injunction is not appropriate in a facial constitutional challenge. The courts simply fashioned remedies in those cases that were appropriate to the relief sought.

Moreover, the government's claim that Log Cabin's challenge "purports to advance the interests of two individuals," (AOB at 44) is not only misleading but wrong. Log Cabin derives its associational standing from the two individual members it identified, but it "purports to advance" the interests of its entire membership, as well as all current and prospective homosexual members of our Armed Forces. As such, the government's reliance on Meinhold v. Department of Defense, 34 F.3d 1469 (9th Cir. 1994), is misplaced. There, the plaintiff challenged only his own specific discharge – he did not mount a facial challenge to DADT. Id. at 1480. Accordingly, the injunction he obtained needed to be no broader than to address his own case.

### 5. The Injunction Does Not Interfere with the Development of Law in Other Circuits

"When a district court has jurisdiction over all parties involved, it may enjoin the commission of acts outside of its district." United States v. Oregon, 657 F.2d 1009, 1016 n.17 (9th Cir. 1981). As the district court noted, the government cites "no case in which a court finding a federal statute unconstitutional on its face has limited its ruling to a particular judicial district." ER12.

The government's brief also fails to show how the district court's finding of unconstitutionality interferes with other courts. Ostensibly, the government is referring to Cook v. Gates, 528 F.3d 42 (1st Cir. 2008), which explicitly disagreed with this Court's ruling in Witt, and the pre-Lawrence cases that challenged DADT. But the district court clarified that this case is the only final decision on the merits regarding the facial constitutionality of DADT after Lawrence. ER13-15. Additionally, the government cannot argue that the finding of unconstitutionality interferes with other courts because it does not challenge the district court's decision on that point. As such, the injunction does not interfere with the development of law in other circuits.

Further, United States v. AMC Entertainment, Inc., 549 F.3d 760, 773 (9th Cir. 2008), on which the government relies, is inapposite because it turned on an issue of statutory construction, not on Constitutional rights. And Virginia Society

For Human Life, Inc. v. FEC, 263 F.3d 379 (4th Cir. 2001), is distinguishable because that court acknowledged the rule that the remedy must be tailored to the harm but found that complete relief was afforded by limiting injunction to the particular plaintiff. Id. at 394.

Ultimately, the government fails to meet its burden of demonstrating that the injunction is not the most appropriate remedy to Log Cabin's facial challenge to DADT's constitutionality. The only relief commensurate with such a challenge is a complete invalidation of Don't Ask, Don't Tell and an injunction preventing the named defendants from enforcing the statute. The district court's judgment to that effect should be affirmed.

### D. THE DISTRICT COURT'S DISMISSAL OF LOG CABIN'S EQUAL PROTECTION CLAIM SHOULD BE REVERSED

From the start of this case, Log Cabin has alleged that Don't Ask, Don't Tell violates the equal protection component of the Fifth Amendment. ER345-46. There can be little question that DADT implicates this fundamental guarantee. It intentionally distinguishes between the status, speech, and conduct of heterosexual and homosexual servicemembers, subjecting the latter to different and punitive treatment.

The district court granted the government's motion to dismiss Log Cabin's equal protection claim. ER288-290. It was bound by this Court's pronouncement

in Witt that, because Lawrence declined to address equal protection, pre-existing Ninth Circuit precedent regarding equal protection controls. Witt, 527 F.3d at 821. According to Witt, that precedent subjects DADT to rational basis scrutiny and holds that it withstands that scrutiny. Id. (citing Philips v. Perry, 106 F.3d 1420, 1424-25 (9th Cir. 1997)).

Log Cabin cross-appeals from the district court's dismissal order. ER295-96. While Log Cabin recognizes that the district court was bound by the Witt panel's equal protection holding, this Court can and should revisit that holding for several reasons.

### 1. Lawrence Requires that Log Cabin's Equal Protection Claim Receive Heightened Scrutiny

Lawrence was not silent regarding equal protection. It did not leave equal protection jurisprudence in this area intact. Lawrence held that equal protection provided an alternative "tenable" means to invalidate Texas' prohibition on same-sex sexual intercourse. 539 U.S. at 574 (emphasis added). Justice Kennedy and the majority concluded, however, that a due process analysis was necessary because it provided more protection under the Constitution than would equal protection. Invalidating the Texas statute under equal protection would have allowed the state to avoid constitutional scrutiny simply by expanding its prohibition to include opposite-sex participants. Lawrence, 539 U.S. at 575. The

Court also thought it necessary to address the continuing validity of Bowers v. Hardwick, 478 U.S. 186 (1986). Id.

Nonetheless, Lawrence noted that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests." Id. Thus, while Lawrence applied due process to remedy the impermissible stigma that Texas' prohibition perpetuated, it cannot be read as preserving existing equal protection jurisprudence.

Justice O'Connor's concurring opinion in Lawrence further demonstrates that the case was not silent with regard to equal protection. See 539 U.S. at 579-85. Justice O'Connor did not endorse the majority's due process approach, but would have invalidated the Texas statute under equal protection. Invoking the teachings of equal protection cases Romer v. Evans, 517 U.S. 620 (1996), and Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), Justice O'Connor concluded that "a more searching form of rational basis review" applies when a law is motivated by "a desire to harm a politically unpopular group." Lawrence, 539 U.S. at 580 (O'Connor, J., concurring). This higher-level constitutional scrutiny is most likely to invalidate a law under the Equal Protection Clause when it "inhibits personal relationships." Id.

Justice O'Connor concluded that the Texas statute impermissibly singles out homosexuals for disfavored legal status. Lawrence, 539 U.S. at 584. She recognized that equal protection concerns exist where a law regulates conduct that "is closely correlated with being homosexual," such as where the conduct defines the very class being regulated. Id. at 583. Justice O'Connor further stated, "the State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law." Id. at 584.

Five justices agreed that Texas' sodomy prohibition is invalid under the more broadly applicable guarantees of liberty found in the due process clause. However, six justices – five in the majority plus Justice O'Connor – would have reached the same result via an equal protection analysis. DADT regulates the same conduct at issue in Lawrence to once again single out homosexuals for disfavored legal status. Log Cabin alleged and presented evidence that, like the Texas sodomy statute, DADT exists only due to moral disapproval of homosexuals.

Lawrence requires that Log Cabin's equal protection claim receive the same intermediate scrutiny as its due process claim such that both should have survived dismissal.[24] At a minimum, Log Cabin's equal protection claim should be

[24] An appeal from an order of dismissal under Federal Rule of Civil Procedure 12(b)(6) is reviewed *de novo* and plaintiff's allegations are accepted as true and

reinstated because it requires application of the stricter form of rational basis review that applies when a law is motivated by "a desire to harm a politically unpopular group" or when it "inhibits personal relationships." Lawrence, 539 U.S. at 580 (O'Connor, J., concurring).

### 2. The Government Admits that Sexual Orientation Classifications Compel Heightened Scrutiny Under Equal Protection

In moving to dismiss Log Cabin's equal protection claim, the government argued that rational basis scrutiny should apply. SER1724-1725. The Department of Justice recently admitted that equal protection demands heightened scrutiny of classifications based on sexual orientation, contradicting its previous position in this case. On February 22, 2011, the President and the Attorney General concluded that section 3 of the Defense of Marriage Act, 1 U.S.C. § 7 ("DOMA"), violates the Constitution's guarantee of equal protection. RFJN, Ex. 1. The government announced that it would no longer defend that portion of DOMA against two constitutional challenges. Id.

In concluding that heightened scrutiny should apply, the Attorney General wrote that each of the four factors identified, for example, in Cleburne, 473 U.S. at 441-42, "counsels in favor of being suspicious of classifications based on sexual

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construed in the light most favorable to plaintiff. Gompper v. VISX, Inc., supra, at 895.

orientation." Id. The Attorney General recognized that a significant history of purposeful discrimination against gay and lesbian citizens exists, that sexual orientation is an immutable characteristic, that gays and lesbians have limited political power – particularly as demonstrated by "the longstanding ban on gays and lesbians in the military," and that sexual orientation bears no relation to an ability to perform and contribute to society. Id.

The government then echoed Log Cabin's arguments in this case – that circuit court authority applying rational basis review to sexual orientation-based classifications is of doubtful validity in the wake of Lawrence (and its overruling of Bowers) and that authority relied on long-since disavowed justifications for discrimination against homosexuals.[25] Id.

Also according to the government, Section 3 of DOMA does not withstand heightened scrutiny because the Congressional "record contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships – precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against." Id. Log Cabin

[25] Though the Attorney General did not include Philips in the small subset of cases he addressed specifically, he included High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563 (9th Cir. 1990), among the cases of doubtful continuing validity. Philips expressly relied on High Tech Gays in foregoing any analysis of whether homosexuals qualify as a suspect class and jumping immediately to rational basis review of DADT. Philips, 106 F.3d at 1425.

identified precisely the same type of evidence at trial regarding DADT's enactment – a legislative record littered with moral disapproval, fear, and animus towards homosexuals. SER289-309, 405-408. In sum, the government's position on DOMA is irreconcilable with any continued defense of DADT on equal protection grounds.

### 3. Log Cabin's Equal Protection Claim Differs From the Claim in Witt

This Court is not constrained by Witt's holding on equal protection because Witt required analysis of a different equal protection claim than is presented here – a claim that has not been addressed since Lawrence. Major Witt argued that DADT offends equal protection because it categorically excludes sexually active homosexual servicemembers on the purported basis that their presence in the military makes others uncomfortable, thereby undermining unit cohesion and military effectiveness; meanwhile, others who cause the same discomfort – for example, child molesters – are not subject to a mandatory rule of exclusion. RFJN, Ex. 2 at 52-54.

Log Cabin's equal protection claim is different and simpler. Log Cabin challenges the line that DADT draws between heterosexual conduct, status, and speech and the very same conduct, status, and speech when it comes from a

homosexual servicemember. The Ninth Circuit has not considered this equal protection theory since Lawrence. It should do so here notwithstanding Witt.

The same evidence that Log Cabin introduced at trial to prove that DADT offends due process and the First Amendment would have demonstrated that DADT cannot survive equal protection scrutiny as well. Log Cabin properly alleged, and would have proven, that DADT impermissibly discriminates on the basis of a suspect classification. For all the foregoing reasons, this Court can and should revisit Witt and reverse the district court's dismissal of Log Cabin's equal protection claim.

To the extent this Court considers itself bound by Witt's holding regarding equal protection, Log Cabin submits that the Witt position is erroneous and requests that the panel call for an en banc court to reconsider the matter. See Espinosa v. United Student Aid Funds, Inc., 530 F.3d 895, 898 (9th Cir. 2008).

## VIII.

## CONCLUSION

For all the reasons set forth above, this Court should affirm the judgment and injunction entered below. Log Cabin further requests that this Court reverse the district court's dismissal of Log Cabin's equal protection claim and remand that aspect of the case to the district court for its decision in the first instance

whether the evidence it received at trial also requires a finding that Don't Ask, Don't Tell violates the equal protection component of the Fifth Amendment.

Dated: March 28, 2011

Respectfully submitted,

**WHITE & CASE LLP**

By: /s/ Dan Woods
Dan Woods
*Attorneys for Plaintiff-Appellee/Cross-Appellant Log Cabin Republicans*

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(B)(i) and this Court's order dated December 1, 2010 because this brief contains 16,490 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Dated: March 28, 2011

Respectfully submitted,

**WHITE & CASE LLP**

By: */s/ Dan Woods*
Dan Woods
*Attorneys for Plaintiff-Appellee/Cross-Appellant Log Cabin Republicans*

## STATEMENT OF RELATED CASES

Log Cabin Republicans is unaware of any pending related cases before this Court. Preliminary issues arising out of this case were previously before this Court as Court of Appeals docket numbers 08-56185 and 08-73194.

## 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 BRIEF FOR APPELLEE / CROSS-APPELLANT LOG CABIN REPUBLICANS 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 March 28, 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 also certify that on March 28, 2011, I served Defendants by U.S. Postal Service a hard copy of APPELLEE / CROSS-APPELLANT LOG CABIN REPUBLICANS SUPPLEMENTAL EXCERPTS OF RECORD (VOLUMES 1-7).

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 March 28, 2011, at Los Angeles, California.

*/s/ Dan Woods*
Dan Woods