Nos. 10-56634, 10-56813

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOG CABIN REPUBLICANS,

Plaintiff-Appellee/Cross-Appellant,

v.

UNITED STATES OF AMERICA et al.,

Defendants-Appellants/Cross-Appellees.

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

REPLY BRIEF FOR THE APPELLANTS

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REPLY BRIEF FOR THE APPELLANTS

INTRODUCTION

1. Our opening brief demonstrated that Congress in the Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010), constitutionally established an orderly process for repealing 10 U.S.C. § 654, the federal statute entitled "Policy concerning homosexuality in the armed forces," while leaving § 654 in place as an interim measure while the repeal process goes forward. That process will in short order render this case moot and any opinion in this case advisory.

Log Cabin nonetheless urges the Court to relitigate the past and proceed as if the Repeal Act does not exist, because that law was enacted after the district court entered its judgment. But the Repeal Act was a massive, historic change in the legal landscape, and it is settled law that the Court should "'give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must "decide according to existing laws."'" *Miller* v. *French*, 530 U.S. 327, 344-45 (2000) (quoting *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) (in turn quoting *United States* v. *Schooner Peggy*, 1 Cranch. 103, 109 (1801))).

For the same reason, Log Cabin is quite wrong in repeatedly contending that the government has, by rejecting Log Cabin's view that the Repeal Act has no bearing on this case, somehow "waived" or "conceded" the government's arguments on the merits. The question before the Court now is whether the current statutory scheme is constitutional, and, as our opening brief showed, it is.

2. Not only will this case soon become moot, but it also fails to present an Article III case or controversy even today. The Supreme Court recently cautioned that "in an era of * * * sweeping injunctions with prospective effect, * * * courts must be more careful to insist on the formal rules of standing, not less so," lest they confer upon themselves "the power to invalidate laws at the behest of anyone who disagrees with them." *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1449 (2011). Log Cabin's claim to standing to pursue a worldwide injunction does not withstand scrutiny.

Log Cabin argues that it has organizational standing because two individuals whom it claims as members, J. Alexander Nicholson and John Doe, would have standing in their own right to bring this suit.

Log Cabin contends that Nicholson has standing because he was once discharged from the military. That past injury, however, would not give Nicholson standing to bring this suit seeking prospective relief, and Log Cabin in its brief no longer pursues any claim that Nicholson has standing on the ground that § 654 would prevent him from returning to the military. Moreover, Nicholson cannot be a basis for Log Cabin's standing because he was not a Log Cabin member – he is not a Republican and has not paid Log Cabin dues annually, as Log Cabin's rules require. Log Cabin answers that these deficiencies are immaterial because Log Cabin made Nicholson an honorary member. Log Cabin cites no prior case holding that organizations may sue on behalf of "honorary members," and such a ruling would undermine the Article III requirement that a membership organization may invoke the jurisdiction of a federal court on behalf of only its members.

Nor does John Doe, an anonymous individual who Log Cabin states is serving as a lieutenant colonel in the military, provide Log Cabin standing. Log Cabin presented no evidence that Doe is a Republican as required by Log Cabin's rules for membership, nor that Doe

has paid Log Cabin dues annually. Moreover, Doe does not have the redressable injury necessary to bring the kind of preenforcement challenge this lawsuit represents, *i.e.*, there has been no showing that Doe has a concrete plan to violate § 654, that he has been threatened with enforcement proceedings, or that he is otherwise likely to be subject to proceedings under § 654.

In the end, Log Cabin proposes an overly broad vision of the associational standing doctrine under which an organization has unreviewable discretion to sue on behalf of anyone that it "considers * * * a member," regardless of the person's actual membership or adherence to the organization's requirements for membership. LCR Br. 27. That is not and cannot be the law.

3. Log Cabin contends that the district court's worldwide injunction against enforcement of § 654 was appropriate because this case is a facial challenge and because injunctions may properly apply to parties without geographic limits. The district court's injunction, however, sweeps far beyond the parties to this case: the injunction purports to confer benefits on any individual in the military anywhere in the world.

Nothing about the "facial" nature of Log Cabin's challenge changes the bedrock remedial principle that injunctions should not sweep beyond the parties, as confirmed by this Court's recent reversal of a nationwide injunction in another facial challenge to federal agency action. *See Los Angeles Haven Hospice, Inc.* v. *Sebelius*, __ F.3d __, 2011 WL 873303, at *15 (9th Cir. Mar. 15, 2011).

4. Log Cabin urges affirmance of the district court's judgment on the alternative ground that § 654 violates the Equal Protection Clause. This argument is foreclosed by *Witt* v. *Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008), and hence was properly rejected by the district court.

ARGUMENT

I. The Orderly Process Established By Congress To Repeal § 654, Which Will Cause This Case Soon To Become Moot, Is Constitutional.

The district court in this case entered a sweeping worldwide injunction prohibiting enforcement of 10 U.S.C. § 654, the statute entitled "Policy concerning homosexuality in the armed forces," against any individual anywhere in the world. After the district court entered

judgment, Congress enacted the Don't Ask, Don't Tell Repeal Act of 2010, which provides for repeal of § 654 once the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff certify that the government has made the preparations necessary for repeal. Pub. L. No. 111-321, 124 Stat. 3515 (2010). Congress left § 654 in effect as an interim measure while the repeal process is ongoing. *Id.* § 2(c), 124 Stat. at 3516.

A. Our opening brief demonstrated that the Court should withhold decision in this appeal until repeal becomes effective, an eventuality that would render this case moot and any decision in this case an advisory opinion. Gov. Br. 25-26.

Recent developments have strengthened the case for the Court to stay its hand. Since the President signed the Repeal Act into law on December 22, 2010, the Department of Defense has been proceeding expeditiously to implement it. The Administration has pledged to implement repeal within the year. Gov. Br. 12-13. The necessary Department of Defense policies and procedures and training materials have been completed, and training of the force has now begun.

Undersecretary of Defense Dr. Clifford L. Stanley explained at a recent congressional hearing that each service began training on or before March 1, 2011. *Implementation Plans for the Repeal of Law and Policies Governing Service by Openly Gay and Lesbian Servicemembers: Hearing Before the Military Personnel Subcomm. of the House Armed Servs. Comm.*, 112th Cong. (2011), 2011 WL 1208797, at 5. More than 200,000 members of the force were trained as of April 1, 2011. *Id.* at 9. The Department of Defense expects that the Services will have trained the preponderance of the force by midsummer. *Id.* at 10. These developments indicate that § 654 will soon be repealed and that this case will soon become moot – which is all the more reason for the Court to withhold decision in this appeal.

B. Our opening brief also demonstrated that, in the event this Court decides this case before it becomes moot, the district court's judgment and worldwide injunction should be reversed. Gov. Br. 24-47. We pointed out that Congress is entitled to great judicial deference on judgments respecting military affairs. Gov. Br. 39. We also explained that every court of appeals to have addressed the facial constitutional-

ity of § 654 – including this Court – has upheld the statute. Gov. Br. 40 & n.15. Just as this Court properly stayed the district court's judgment to avoid the disruption that an abrupt, court-ordered repeal would cause, Congress constitutionally determined in the Repeal Act that an orderly transition in policy justified maintaining the status quo and leaving § 654 in place while the Department of Defense completes the necessary preparations for repeal.

Log Cabin's principal response is not that any of these points is incorrect, but rather that they address the wrong question. The issue in Log Cabin's view is "the constitutionality of Don't Ask, Don't Tell," *i.e.*, § 654, as that question was presented to the district court. LCR Br. 43.

But after the district court's judgment, Congress established an orderly process for repealing § 654. This appeal must account for the Repeal Act because it is black-letter law that the Court should "'give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must "decide according to existing laws."'" *Miller* v. *French*, 530

U.S. 327, 344-45 (2000) (quoting *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) (in turn quoting *United States* v. *Schooner Peggy*, 1 Cranch. 103, 109 (1801))). Thus, Log Cabin is wrong in repeatedly asserting that the government has "conceded" or "waived" its arguments on the merits by not addressing questions Log Cabin would prefer this appeal to present.

Here, the Repeal Act expressly provides for a certification by the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff that, among other things, implementation of the policies and procedures "necessary" for the repeal of § 654 "is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces." § 2(b)(2)(C), 124 Stat. at 3516. The repeal of § 654 then becomes effective 60 days after that certification. In this suit for prospective relief, the only issue properly before the Court is the constitutionality of this new interim statutory framework because the Court must apply this change in the law on appeal. It is well within Congress's broad constitutional authority over military affairs to establish a brief interim

period for transition and implementation of a change of policy throughout the Armed Forces, and to provide for a formal determination prior to the effectiveness of the repeal of § 654 by the President and the top civilian and military officers who assist him in the performance of his constitutional responsibilities as Commander-in-Chief. The constitutionality of that considered approach is in no way undermined by the district court's prior ruling, which was rendered in the absence of the special statutory framework adopted by the branches of the federal government responsible for the conduct of military affairs and the vesting of authority in the Executive, not the courts, to make the requisite determination. Accordingly, if the Court reaches the merits, the judgment of the district court must be reversed because the statutory framework that now governs during this brief period of transition and implementation is plainly constitutional.

II. Log Cabin Lacks Standing.

Log Cabin not only asks this Court to rush to decide constitutional questions unnecessarily in a case on the verge of mootness, but also in a case in which Log Cabin has failed to establish that it has standing

to sue in the first place.

It is common ground that Log Cabin would have standing to sue on behalf of its members only if (1) "its members would otherwise have standing to sue in their own right," and (2) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt* v. *Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). *See* LCR Br. 23. Log Cabin argues that it has standing based on two individuals, J. Alexander Nicholson and John Doe, but neither of them supports Log Cabin's standing.

A. J. Alexander Nicholson

1. The government's opening brief demonstrated that J. Alexander Nicholson, who has been a civilian since 2002 and has asserted no concrete plan to return to the military, has no continuing prospective interest in this lawsuit, which seeks solely prospective relief against enforcement of § 654 against current and future members of the military. Gov. Br. 28-29. Log Cabin's brief in response no longer pursues its contention that Nicholson has standing because § 654 prevents him "from returning to the United States Armed Forces." ER 336 (Amended

Complaint). Instead, Log Cabin now contends that "Mr. Nicholson's discharge from the Army is the injury on which his standing is based." LCR Br. 36 n.17.

To have standing to invoke the jurisdiction of a federal court, however, an individual must not only demonstrate injury, but also that "a favorable judicial decision will prevent or redress" that injury. *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009). And Nicholson's prior discharge under § 654 will not in any way be redressed by the prospective relief Log Cabin seeks. *See, e.g., id.* at 1149-50 (past injury suffered as a result of development on Forest Service land insufficient to obtain forward-looking injunction against future development); *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 111 (1983) (plaintiff that suffered past chokehold injury lacked standing to obtain prospective relief against future chokeholds); *Mayfield* v. *United States*, 599 F.3d 964, 971-72 (9th Cir. 2010) (individual subject to past unlawful warrantless searches lacked standing to obtain a forward-looking declaratory judgment that the searches were unconstitutional). Nor may Log Cabin seek relief particular to Nicholson because, as Log

Cabin concedes, it has associational standing to seek only relief that does not require the individual participation of its members. LCR Br. 23; *see, e.g.*, *United Union of Roofers* v. *Ins. Co. of Am.*, 919 F.2d 1398, 1400 (9th Cir. 1990). Thus, Nicholson plainly would lack standing in his own right to bring this lawsuit.

2. The government's opening brief also demonstrated that Nicholson is not a basis for Log Cabin's associational standing in this case because he did not meet Log Cabin's membership requirements. Gov. Br. 29-33. Nicholson testified that he is not a Republican (ER 480), as required by the organization's bylaws, and the uncontested testimony showed that, at most, he paid annual dues only for one year, 2010. Gov. Br. 32; *see* SER 287, 570-75. Log Cabin cannot seriously dispute that, to be a Log Cabin Republican, one must be a Republican. Log Cabin's mission is to "advance the interests of the gay and lesbian community within the Republican Party." ER 374. Its bylaws provide that its membership is "open to individual persons registered as 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." ER 355.

Echoing the district court, Log Cabin argues that Nicholson's failure to meet these requirements is irrelevant because it conferred "honorary" membership on Nicholson. LCR Br. 34-35. Log Cabin points out that its bylaws recognize a class of "honorary memberships," LCR Br. 34, but the very fact that the bylaws distinguish between members and honorary members demonstrates that an honorary member does not possess all of the rights of a full-fledged member – such as voting and entitlement to hold office. *See* ER 350-51, 358. An honorary member, who has no means of influence over the organization's activities, is thus not a member whose interest in suit would be properly represented in litigation – just as an honorary doctor of medicine should not have surgical privileges and an honorary doctor of law should not practice law.

Log Cabin cites no authority other than the court below and we know of none that upholds an organization's standing based upon the standing of an honorary member. To do so would in effect nullify the

membership requirement set forth in *Hunt*, 432 U.S. at 343, by permitting an organization to manufacture standing based on an individual who, like Nicholson, lacks the essential characteristics of its *bona fide* members, here, being a Republican and paying dues. Notably, Log Cabin conferred honorary membership on Nicholson on the very day that it filed its amended complaint in an attempt to cure the defect that had led to the dismissal of its original complaint. *See* ER 24, 486.

3. Our opening brief also demonstrated that Nicholson cannot provide Log Cabin with organizational standing because he did not become even an honorary member until two years after this suit was brought. *See* Gov. Br. 29-31.

Log Cabin argues that it successfully created standing during the pendency of the suit by making Nicholson an honorary member after its initial complaint had been dismissed for lack of standing. In support of this argument, Log Cabin points out that its amended complaint "supersedes the original" complaint. LCR Br. 39 (internal quotation marks omitted). The question in dispute, however, is not whether the amended complaint "supersedes" the original complaint – it does – but

rather whether Log Cabin can create standing by relying on *facts* occurring only after the filing of the original complaint (here, Log Cabin's belated attempt to confer membership on Nicholson). *See* Gov. Br. 29-32.[1] It cannot. *See* Gov. Br. 29-31.

To support the contrary proposition, Log Cabin musters cases that, in its view, "*analyzed* standing * * * as of the date of the filing of" an amended complaint. LCR Br. 40 (emphasis in original); *see id.* at 41-42. But such "implicit" holdings constitute "drive-by jurisdictional rulings" that the Supreme Court and this Court have made clear "should be accorded no precedential effect." *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 511 (2006) (internal quotation marks and citation omitted); *see Reed Elsevier, Inc.* v. *Muchnick*, 130 S. Ct. 1237, 1244 (2010); *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998); *Bell* v. *Bonneville Power Admin.*, 340 F.3d 945, 952 (9th Cir. 2003).

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[1] Log Cabin criticizes the government (LCR Br. 39) for not mentioning *Loux* v. *Rhay*, 375 F.2d 55 (9th Cir. 1967), but that case merely recognized that "[t]he amended complaint supersedes the original." *Loux*, 375 F.2d at 57. It has nothing to do with whether standing may be based on facts occurring after suit has been filed, which is the issue here.

B. John Doe

Log Cabin likewise fails in its attempts to establish standing based on an anonymous individual, John Doe, who, Log Cabin tells us, is still serving in the military. LCR Br. 26 n.9.

1. The government's opening brief demonstrated that this individual does not provide Log Cabin's standing because there was no evidence that Doe met Log Cabin's membership requirements – not even its "honorary" ones – since there was no evidence that Doe was a Republican or that he kept up his membership dues. Gov. Br. 35-36.

Log Cabin attempts (LCR Br. 28) to fill this gap in its proof by relying on testimony that Doe is "a conservative." ER 416. But despite some overlap, that category is plainly different from what Log Cabin's bylaws require – that members be affiliated with the Republican Party.

Log Cabin also contends that it "considers [Doe] a member and neither the district court nor this Court can dictate who is or is not a member of the organization." LCR Br. 27. This reasoning would eviscerate the associational standing doctrine by permitting an organization to sue on behalf of anyone it likes, rather than only those who are

members according to bylaws and articles of incorporation that the organization itself has adopted.

2. Log Cabin also fails to provide a meaningful rebuttal to the government's showing that Doe would lack standing in his own right to bring a preenforcement challenge, *i.e.*, a suit to enjoin enforcement of § 654 against him personally before the Army has completed enforcement action against him. Gov. Br. 34-35.

Log Cabin contends that Doe would have standing to bring such a challenge because of the "fact" that he "is still serving" in the military and is "still subject to discharge" under § 654. LCR Br. 28. To be "subject to discharge," however, Doe would have to violate the statute during the brief transition period before repeal becomes effective. Log Cabin provides no support for a claim that Doe has done so or has a concrete plan to do so before repeal becomes effective, beyond citing the district court's assertion that Doe 'faces a concrete injury" (LCR Br. 28), based on "the mandatory language" of the statute. ER 29, 168.

Log Cabin downplays its burden to establish a concrete injury to Doe by arguing that a relaxed showing of future injury is sufficient

with respect to First Amendment claims. LCR Br. 29. But even in the First Amendment context, the analysis turns on "'whether the plaintiff[] [has] articulated a "concrete plan" to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute.'" *Humanitarian Law Project* v. *U.S. Treasury Dep't*, 578 F.3d 1133, 1142 (9th Cir. 2009) (quoting *Thomas* v. *Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc)); *see Lopez* v. *Candaele*, 630 F.3d 775, 794 (9th Cir. 2010) (First Amendment plaintiff must demonstrate a "specific and concrete threat" of enforcement to bring preenforcement challenge); *Stormans, Inc.* v. *Selecky*, 586 F.3d 1109, 1122 (9th Cir. 2009). Log Cabin does not contend that it has satisfied that standard with respect to Doe, and has not done so.

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

There is no reason this Court need reach the issue of remedy if it agrees with the government on any of the preceding points; but should

the Court address the remedy issue, it should, in any event, reverse the district court's decision to enjoin § 654 on a worldwide basis.

This case is not a class action, but the district court erroneously treated it as if it were one by awarding what is, in effect, class-wide relief and making every servicemember anywhere in the world the beneficiary of its injunction. That was error because the Supreme Court has made clear that injunctions in such circumstances should not be crafted to apply to nonparties. *See* Gov. Br. 44-45.

Log Cabin claims that the injunction in this case properly applies to any member of the military anywhere in the world because Log Cabin has advanced a facial, rather than an as-applied, challenge to § 654. LCR Br. 56, 59-62. But a challenge to a statute or regulation on the ground that it is invalid on its face is simply an expression of the plaintiff's legal theory in support of his claim for relief. It does not alter the scope of the relief the court may permissibly grant. Accordingly, the facial nature of Log Cabin's challenge does not change the principle that the relief awarded cannot properly extend to nonparties, especially where, as here, the injunction would constitute an extra-

ordinary intrusion into internal military affairs. *Monsanto Co.* v. *Geertson Seed Farms*, 130 S. Ct. 2743, 2760 (2010) (narrowing injunction in a facial challenge to federal agency action in part because the plaintiffs "do not represent a class, so they could not seek to enjoin such an order on the ground that it might cause harm to other parties"); *Printz* v. *United States*, 521 U.S. 898, 935 (1997) (declining "to speculate regarding the rights and obligations of parties not before the Court" after holding federal statutory provisions unconstitutional); *Zepeda* v. *INS*, 753 F.2d 719, 727 (9th Cir. 1983); *Nat'l Ctr. for Immigration Rights* v. *INS*, 743 F.2d 1365, 1371-72 (9th Cir. 1984); *Va. Society for Human Life, Inc.* v. *Fed. Election Comm'n*, 263 F.3d 379, 393-94 (4th Cir. 2001) (relying on *United States* v. *Mendoza*, 464 U.S. 154 (1984), to limit an injunction in a facial constitutional challenge to a Federal Election Commission regulation).

Indeed, just last month this Court vacated a district court's nationwide injunction against the federal government in a facial challenge to a federal regulation. *See Los Angeles Haven Hospice, Inc.* v. *Sebelius*, 2011 WL 873303, at *15 (9th Cir. Mar. 15, 2011). The court observed

that such an injunction was not necessary to afford the plaintiff complete relief, even though the suit was a facial challenge. *Id.* at *16. Log Cabin does not demonstrate why a more limited remedy would not similarly afford it adequate relief here.

This Court likewise refused to impose a nationwide injunction in *Meinhold* v. *Dep't of Defense*, 34 F.3d 1469, 1480 (9th Cir. 1994), which involved a constitutional challenge to the prior, more restrictive regulations respecting homosexuality in the military that preceded § 654. Log Cabin's only answer is to distinguish *Meinhold* on the ground that the plaintiff there "did not mount a facial challenge." LCR Br. 60. But Meinhold did advance a facial challenge; indeed, in opposing the government's stay motion, Meinhold contended that "a nationwide injunction is necessary and appropriate to provide Meinhold the relief requested because Meinhold challenged the constitutionality of the Navy's regulations *on their face*, and as applied to him." Appellee's Opposition to Appellants' Emergency Motion for a Stay at 12 (emphasis in original), *Meinhold* v. *Department of Defense*, 34 F.3d 1469 (9th Cir. 1994) (No. 93-55242). The Supreme Court rejected Meinhold's request

to apply the injunction to nonparties and issued a stay pending appeal of the portion of an injunction that "grant[ed] relief to persons other than" the named plaintiff. *Dep't of Defense* v. *Meinhold*, 510 U.S. 939 (1993).[2]

IV. The District Court Correctly Rejected Log Cabin's Equal Protection Claim.

Log Cabin seeks to "cross-appeal" the district court's dismissal of its claim that § 654 violates the Equal Protection Clause. LCR Br. 62-70. This argument is one for affirmance on alternative grounds, and it is squarely foreclosed by *Witt* v. *Department of Air Force*, 527 F.3d 806,

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[2] If the question were reached, the district court's worldwide injunction would also need to be revisited because the Repeal Act constitutes a material change in circumstances that, at a minimum, would warrant modification of the district court's injunction. *See* Gov. Br. 41-43. Citing nothing, Log Cabin states that "[a] later change in law is not a basis to *reverse* * * * an injunction against enforcement of the unconstitutional statute." LCR Br. 49 (emphasis in original). But in *Miller* v. *French*, the Supreme Court held that a later change in the law required modification of a district court's injunction entered to remedy unconstitutional prison conditions. 530 U.S. at 336-41. And as the government's opening brief pointed out, in *Salazar* v. *Buono,* 130 S. Ct. 1803, 1818-20 (2010), the Supreme Court reversed a First-Amendment-based injunction prohibiting the transfer of a parcel of land because it did not adequately account for changes in the law bearing on the propriety of issuing an injunction. *See* Gov. Br. 42; *Buono*, 130 S. Ct. at 1819.

821 (9th Cir. 2008), as the district court correctly recognized, *see* ER 288-290. *Witt* rejected the argument that *Lawrence* v. *Texas*, 539 U.S. 558 (2003), which held that a statute criminalizing sodomy between consenting civilian adults violated substantive due process, implicitly overruled this Court's precedents upholding § 654 against equal protection challenges. 527 F.3d at 821. That is the same argument Log Cabin advances here. LCR Br. 62-66.

CONCLUSION

For the foregoing reasons, as well as for the reasons discussed in the government's opening brief, the district court's judgment should be reversed and its worldwide permanent injunction should be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in 14-point Century Schoolbook, a proportionally spaced font, and according to the word-count function of Corel WordPerfect X4 contains 4,552 words from its Introduction through its Conclusion.

/s/ Henry Whitaker
Henry C. Whitaker

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on April 28, 2011.

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

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