IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOG CABIN REPUBLICANS, Plaintiff-Appellee/Cross-Appellant, v. UNITED STATES OF AMERICA and ROBERT M. GATES, Secretary of Defense Defendants-Appellants/ Cross-Appellees.	)	Nos. 10-56634, 10-56813

GOVERNMENT'S OPPOSITION TO LOG CABIN'S MOTION TO VACATE STAY OF INJUNCTION

For the third time, Log Cabin seeks to vacate this Court's decision to stay pending appeal the district court's judgment and worldwide injunction against enforcement of 10 U.S.C. § 654, the statute entitled "Policy concerning homosexuality in the armed forces," which, under current law, will remain in effect only during the short period of time until the process for repealing the statute is completed. *See* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010). Log Cabin also asks the Court to rush to decide constitutional questions unnecessarily and overturn this Court's previous decision to

deny expedition of the oral argument in this case, which, as this Court has previously observed, will become moot once the repeal of § 654 becomes effective. There is no basis for Log Cabin's latest requests to overturn the decisions of prior motions panels and undermine the Supreme Court's refusal to vacate this Court's stay. Accordingly, Log Cabin's motion should be denied.

1. After the district court took the extraordinary step of entering a worldwide injunction against enforcement of § 654 against any individual anywhere in the world, this Court stayed the district court's injunction pending appeal. ER 298. The Supreme Court denied Log Cabin's request to vacate this Court's stay, 2010 WL 4539545, and this Court declined to vacate the stay when Log Cabin requested that relief in opposition to the government's subsequent motion to hold this appeal in abeyance.

2. Although Log Cabin filed two briefs totaling 52 pages in opposition to the government's original 20-page stay motion, and four groups filed *amici curiae* briefs totaling 44 additional pages in further opposition to a stay, Log Cabin has filed still another brief opposing a

stay. In doing so, Log Cabin barely mentions, let alone addresses, the reasons why the Court granted a stay.

This Court stayed the district court's worldwide injunction because "Acts of Congress are presumptively constitutional, creating an equity in favor of the government when balancing the hardships in a request for a stay pending appeal." ER 300. Observing that "'"judicial deference is at its apogee" when Congress legislates under its authority to raise and support armies,'" ER 301 (quoting *Rumsfeld* v. *Forum for Academic & Institutional Rights*, 547 U.S. 47, 58 (2006) (in turn quoting *Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981)), the Court pointed out the conflict between the district court's constitutional ruling and the rulings of other circuits, ER 301-302. Finally, the Court concluded "that the public interest in ensuring orderly change of this magnitude in the military . . . strongly militates in favor of a stay," particularly because "if the administration is successful in persuading Congress to eliminate § 654, this case and controversy will become moot." ER 303.

Congress has now provided for the repeal of § 654 in precisely the orderly fashion this Court contemplated when it granted the stay. To

avoid what this Court described as the "immediate harm and precipitous injury" that an immediate repeal would cause, ER 302-303, Congress provided for repeal of § 654 only after the President transmits to Congress a document signed by him, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff, certifying that the government has made the preparations necessary for repeal. Pub. L. No. 111-321, 124 Stat. at 3516 (2010). Section 654 now remains in effect only as part of a set of statutory provisions that includes the provision for its repeal, and only during this transition period. *Id.* § 2(c), 124 Stat. at 3516. The repeal process is well underway and the Department of Defense anticipates that the preponderance of our armed forces will have been trained by midsummer. Reply Br. 7.

3. Log Cabin suggests that this Court's stay decision should be overturned because Log Cabin believes that the government has "conced[ed] that it is not likely to succeed on the merits of its appeal." Mot. 11. That assertion is plainly wrong and would, in any case, be no basis for overturning the decision of a prior motions panel to enter a stay pending appeal. The government's briefs on the merits in this case,

like its stay motion, advanced three independent grounds for overturning the district court's injunction: that Log Cabin lacks standing to sue; that § 654, as it now exists following enactment of the Repeal Act and pending completion of the orderly process required for repeal to become effective, is constitutional; and that the district court lacked authority to enter a worldwide injunction. Gov. Br. 26-47; Reply Br. 5-23.

Log Cabin attaches great significance to the fact that the government's merits briefs do not address a question that is no longer before the Court – namely, the constitutionality of § 654 before enactment of the Repeal Act. Mot. 9. But as the government's reply brief explains – without contradiction from Log Cabin – the Court must apply the law as it currently exists. Reply Br. 1, 8-10 (citing, among other cases, *Miller* v *French*, 530 U.S. 327, 344-45 (2000)). That law includes the Repeal Act, which was enacted after the district court entered judgment and this Court granted a stay.

That the government is arguing in defense of current federal law in no way undermines this Court's decision to grant a stay. To the

contrary, it reinforces the compelling reasons for a stay. In urging the Court to grant a stay, the government discussed the strong deference owed to Congress and the President in military judgments, as well as "numerous appellate decisions upholding various applications" of § 654. Gov. Stay Mtn., SER 13, 15. Those arguments, the government has observed, apply "with even greater force" to the question now before the Court – whether it was constitutional for Congress to leave § 654 in effect until repeal becomes effective. Gov. Br. 41; *cf.* Gov. Br. 40 ("[a]s we noted in our stay motion, 'the "detailed legislative record" that Congress assembled in enacting § 654 "makes plain that Congress concluded, after considered deliberation, that the Act was necessary to preserve the military's effectiveness as a fighting force"'. . . ." (quoting Gov. Stay Mtn., SER 13 (in turn quoting *Cook* v. *Gates*, 528 F.3d 42, 60 (1st Cir. 2008)). Further, the Repeal Act expressly ties the effective date of repeal to a careful consideration of the effects of repeal on the military by the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff. Judicial deference owed to this congressional scheme, involving the military judgments of the President, the

Secretary, and the Chairman, is at its zenith.

This Court accepted the government's arguments in granting a stay, and the government relied on those arguments in its merits briefs. *Compare* Gov. Br. 40 ("[A]ll the courts of appeals to have addressed the matter – including this Court – ha[ve] sustained the constitutionality of § 654 against both substantive due process and First Amendment challenges."), *with* Order Granting Stay, ER 301 (noting that "the district court's analysis and conclusions are arguably at odds with the decisions of at least four other Circuit Courts of Appeal"); *compare also* Gov. Br. 39 ("Congress has wide authority to legislate on matters respecting military affairs."), *with* Order Granting Stay, ER 301 ("Courts are ill-suited to second-guess military judgments that bear on military capability and readiness." (internal quotation marks omitted)). That logic applies even more strongly today and supports denial of the request to vacate the stay.

4. Quite apart from the merits of the constitutional question, the government's arguments that Log Cabin lacks standing and that the district court lacked authority to enter a worldwide injunction, which

we also advanced in our stay motion, Gov. Stay Mtn., SER 10-13, 16-19, independently support this Court's stay. Log Cabin dismisses the relevance of those arguments because they do not "go[] to the merits of Log Cabin's claim that [§ 654] is unconstitutional." Mot. 12. But if the district court lacked authority to issue the injunction in the first place, the government would prevail on the merits because the injunction (and any "functional equivalent[s]," Mot. 11 n.5) would be dissolved. The fact that the district court's injunction exceeded its authority powerfully supports this Court's decision to grant a stay. *See Brady* v. *Nat'l Football League*, 2011 WL 1843832, at *3-*7 (8th Cir. May 16, 2011) (granting stay pending appeal based on appellant's likelihood of success on argument that district court lacked jurisdiction to issue injunction); *United States* v. *Evans*, 62 F.3d 1233, 1235 (9th Cir. 1995) (stay pending appeal granted where the district court lacked jurisdiction); *Ayuda, Inc.* v. *Thornburgh*, 919 F.2d 153, 153 (D.C. Cir. 1990) (per curiam) (similar); *Dep't of Defense* v. *Meinhold*, 510 U.S. 939 (1993) (stay pending appeal of injunction granted where injunction exceeded the district court's authority); *Heckler* v. *Lopez*, 463 U.S. 1328, 1330-31

(1983) (Rehnquist, J., in chambers) (similar).

5. Log Cabin also seeks to overturn this Court's prior refusal to expedite oral argument in this case. Mot. 18. After this Court declined to expedite, Congress provided for an orderly process for repealing § 654. That process is well underway, and the Department expects that the preponderance of the armed forces will have been trained by mid-summer. Reply Br. 7. Once repeal becomes effective later this year, as this Court observed in granting a stay,"this case and controversy will become moot." ER 303. The fact that this case will soon become moot counsels in favor of withholding, not accelerating, decision; the Court does not rush to decide constitutional questions unnecessarily. *See*, *e.g.*, *The San Remo Hotel* v. *City and County of San Francisco*, 145 F.3d 1095, 1104-05 (9th Cir. 1998) (invoking the abstention doctrine because an independent proceeding might avoid the need to decide a constitutional claim).

6. Log Cabin takes the position that this case will not be moot even when repeal becomes effective. Mot. 16-17. Again, this Court has indicated otherwise. *See* Order Granting Stay, ER 303 ("if the adminis-

tration is successful in persuading Congress to eliminate § 654, this case and controversy will become moot"). Repeal of a statute renders a facial constitutional challenge to the law moot. *See, e.g.*, *Burke* v. *Barnes*, 479 U.S. 361, 363-64 (1987); *Dep't of Treasury* v. *Galioto*, 477 U.S. 556, 559-60 (1986); *Chem. Products & Distributors* v. *Helliker*, 463 F.3d 871, 878 (9th Cir. 2006) ("Because the statutory amendment has settled this controversy, this case is moot."). This Court has recognized a narrow exception to that rule where "it is 'virtually certain that the repealed law will be reenacted,'" *Helliker*, 463 F.3d at 878 (quoting *Native Village of Noatack* v. *Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994)), but Log Cabin cannot credibly claim that there is a virtual certainty that § 654 will be reenacted. Respect for the coordinate Branches of Government, and for the role of the Judiciary under the Constitution's separation of powers, requires giving effect to Congress's action in repealing § 654 and making the repeal effective following orderly implementation and certification.

CONCLUSION

For the foregoing reasons, the Court should deny Log Cabin's request to vacate the stay pending appeal. The Court should also deny Log Cabin's alternative request to expedite the oral argument in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 20, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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