Case No. 10-56634

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOG CABIN REPUBLICANS,
a non-profit corporation

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

APPEAL FROM U.S. DISTRICT COURT FOR THE CENTRAL DISTRICT
OF CALIFORNIA CASE NO. CV 04-08425 VAP (Ex)

AMICUS CURIAE BRIEF OF SERVICEMEMBERS LEGAL DEFENSE NETWORK IN SUPPORT OF PLAINTIFF-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Servicemembers Legal Defense Network ("SLDN") is a not-for-profit corporation and has no parent corporation. No publicly held corporation owns ten percent or more of SLDN.

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INTEREST OF THE *AMICUS CURIAE*

Servicemembers Legal Defense Network ("SLDN") is a non-partisan, non-profit national legal services and policy organization that provides free legal services to military personnel affected by Don't Ask, Don't Tell, 10 U.S.C. § 654 ("DADT"). Dedicated to helping servicemembers affected by the discriminatory regime within the military that this statute requires, SLDN was formed shortly after the statute's enactment and is the nation's premier organization addressing the effects of DADT. SLDN has responded to more than 10,000 requests for assistance and has counseled numerous servicemembers in various stages of investigation and discharge. This experience has given SLDN a thorough understanding of the treatment of gay servicemembers under DADT. For example, SLDN has identified DADT's impact on women, particularly women of color, and youth, highlighting the disproportionate representation of women and servicemembers under age 26 in SLDN's enormous case load. Several years after DADT's enactment, the Department of Defense conceded that it relied on SLDN's annual reports for information about what is happening in the field under DADT due to the insufficiency of its own data.[1]

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[1] *See* Bradley Graham, *Military Reviews Allegations of Harassment Against Gays*, Wash. Post, May 17, 1997, at A1.

When it became clear that commanders had been insufficiently trained in DADT-related regulations, SLDN distributed copies of a memo to every major command in each of the services and to every Navy ship explaining the scope of permissible investigations. SLDN also produced a comprehensive guide for servicemembers whose lives are regulated by DADT.

Through its work, SLDN has obtained a number of changes to military policy and practice, including an Executive Order on hate crimes in the military.[2] SLDN has also litigated many cases involving DADT, both as *amicus* and as co-counsel.[3] SLDN submits this brief in support of plaintiff-appellee ("Plaintiff") seeking affirmance of the District Court's judgment (*Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal. 2010)) declaring DADT unconstitutional and enjoining its enforcement. This brief is filed with the consent of all parties.

A. The Effects of DADT on SLDN's Clients

For more than 18 years, "Don't Ask, Don't Tell" has been the only law that punishes gays and lesbians merely for coming out. No other federal, state

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[2] Exec. Order No. 13140, 64 Fed. Reg. 55,115 (Oct. 6, 1999).

[3] *See, e.g.*, *Rumsfeld v. FAIR*, 547 U.S. 47 (2006); *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008); *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008) ("*Witt*"); *Able v. Cohen*, 155 F.3d 628 (2d. Cir. 1998); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996); *Cammermeyer v. Perry*, 97 F.3d 1235 (9th Cir. 1996).

or local law specifically authorizes – much less requires – the firing of an individual for revealing that he or she is gay. If a military commander learns that a servicemember has confided his or her sexual orientation to anyone – even a parent or friend outside the military – that information can and often has triggered a formal inquiry leading to discharge. Almost 14,000 servicemembers have been discharged since enactment of this law. Gay servicemembers continue to fear investigation and discharge even today, as a result of this Court's stay of the District Court's decision below.

In the 18 years since enactment, DADT has lead to the investigation and discharge of servicemembers in a variety of circumstances that wreak anguish and suffering on gay servicemembers, including:

- listing a same-sex person as the beneficiary of a servicemember's life insurance policy or as the guardian of a servicemember's child in the event the servicemember dies in combat;
- answering a question of a local police officer about an alleged same-sex assault;
- testifying in a divorce proceeding brought by an ex-husband describing his wife's relationship with her same-sex partner;

- having messages in a servicemember's personal email account that are improperly read by another servicemember and forwarded to the commanding officer; and
- declining to answer when asked if one is gay or citing DADT when asked.

DADT also harms SLDN's clients even when it does not result in an investigation or discharge. The statute has induced servicemembers not to report sexual harassment and even opposite-sex rape because of the threat by the harasser or rapist to disclose the victim's sexual orientation. It also prevents servicemembers from being truthful with their colleagues, requires that they seek to cover up any disclosure that they had made of their sexual identity before or after joining the military, and puts all gay servicemembers in constant fear of being "outed" at the cost of their careers. DADT commands deceit in an institution that should be built on honor.

B. The Repeal of DADT

On December 22, 2010, President Obama signed into law the Don't Ask, Don't Tell Repeal Act of 2010 (the "Repeal Act"). The Repeal Act reflects a legislative consensus that the discrimination required by DADT does not further military readiness and is not needed to promote unit cohesion – the purported justification for enacting and maintaining DADT. *See, e.g.*, 156 CONG. REC.

H8400 (daily ed. Dec. 15, 2010) (statement of Rep. Jim Langevin: "The Department of Defense's own internal survey has contradicted the claim that allowing gays and lesbians to serve openly would somehow hamper military readiness."); 156 CONG. REC. S10669 (daily ed. Dec. 18, 2010) (statement of Sen. Patty Murray: "[The Pentagon] report … showed that repealing this policy would not inhibit [the military's] ability to carry out the missions they are charged with").

Yet the Repeal Act provides that DADT "shall remain in effect" until certain conditions are met, and the Government has yet to establish a firm date by which repeal will be concluded. *See* Repeal Act § 2(c). Thus, even today, gay Americans who wish to join the military may not do so openly. Gay servicemembers are forced to continue to conceal fundamental aspects of their personal identity. Gay servicemembers continue to risk the threat of investigation and continue to be subject to discharge, as illustrated by the cases discussed below. Since the signing of the Repeal Act on December 22, 2010, SLDN has received hundreds of requests for help.

Given the circumstances that exist today and will continue for months, it is important that the District Court judgment be affirmed and that the stay pending appeal which this Court granted be lifted at the earliest possible time.

STATEMENT OF THE CASE

The appeal at bar is most unusual in that defendants-appellants (the "Government") do not contest any of the District Court's findings of fact and do not assert that the District Court erred in holding DADT unconstitutional. Instead, the Government complains that Plaintiff – which identified one member (J. Alexander Nicholson), who was discharged under DADT and who wishes to re-enlist, and another member (Lt. Col. John Doe), who as an active-duty servicemember is currently subject to DADT's onerous discrimination, liberty abrogation and speech regulation – does not have standing. The Government also complains about the scope of the District Court's injunction and makes the extraordinary claim that a federal court lacks authority to declare a law unconstitutional and enjoin the enforcement of that law. Gov. Br. at 44 n.16.

A. The Decision Below

At trial, Plaintiff provided uncontroverted evidence that from 1993 through 2009, more than 13,000 men and women were discharged under DADT, including many servicemembers with critical skills.[4] The District Court's

[4] While these numbers have continued to decline, they have by no means stopped; on March 24, 2011, it was widely reported that 261 service members were discharged under DADT in 2010, totaling 13,686 since enactment of DADT. *See, e.g.*, "261 DADT Discharges in 2010," Advocate.com (Mar. 25, 2011), www.advocate.com/News/Daily_News/2011/03/25/261_DADT_Discharges_in_2010/.

Judgment and Permanent Injunction, entered on October 12, 2010, declared that DADT:

> infringes the fundamental rights of United States servicemembers and prospective servicemembers and violates (a) the substantive due process rights guaranteed under the Fifth Amendment to the United States Constitution, and (b) the rights to freedom of speech and to petition the Government for redress of grievances guaranteed by the First Amendment to the United States Constitution.

Log Cabin Republicans v. United States, Judgment and Permanent Injunction, Case No. CV 04-08425-VAP (Ex) (filed Oct. 12, 2010).

The District Court held that the facts at trial, not disputed by the Government, undermined "any contention that the act furthers the government's purpose of military readiness, as it shows Defendants continue to deploy gay and lesbian members of the military into combat, waiting until they have returned before resolving the charges arising out of suspected homosexual conduct." *Log Cabin*, 716 F. Supp. 2d at 918. In declaring DADT unconstitutional under the Due Process Clause, the District Court found that the act does not further military readiness or unit cohesion. *Id*. at 965. To the contrary, the District Court found that DADT contributes to recruiting shortages, causes the discharge of qualified servicemembers with critical skills and contributes to lower recruitment standards. *Id.* at 918-19. The District Court also concluded that the Government failed to

demonstrate that DADT significantly furthers an important governmental interest. *Id.* at 923.

In declaring DADT unconstitutional under the First Amendment, the District Court concluded that DADT is "far broader than is reasonably necessary to protect the substantial government interest" asserted. *Id.* at 927. The District Court held that DADT regulates speech content in a manner that harms servicemembers and the military without any adequate justification. *Id.* at 927-28.

B. The Attorney General's Statement

Just two days before the Government filed its brief on appeal, Attorney General Eric Holder announced that the documented history of discrimination against gays prompted the Government to conclude that "classifications based on sexual orientation warrant heightened scrutiny" and that Section 3 the Defense of Marriage Act, 1 U.S.C. § 7, the federal law banning recognition of same sex marriage, could not withstand such scrutiny. The Attorney General, specifically referencing DADT, stated as follows:

> [T]here is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today. Indeed, until very recently, states have "demean[ed] the[] existence" of gays and lesbians "by making their private sexual conduct a crime." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).
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> Second, while sexual orientation carries no visible badge, a growing scientific consensus accepts that sexual

> orientation is a characteristic that is immutable, *see* Richard A. Posner, Sex and Reason 101 (1992); it is undoubtedly unfair to require sexual orientation to be hidden from view to avoid discrimination, *see* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).
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> [T]here is a growing acknowledgment that sexual orientation "bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality). Recent evolutions in legislation (including the pending repeal of Don't Ask, Don't Tell), in community practices and attitudes, in case law (including the Supreme Court's holdings in *Lawrence* and *Romer*), and in social science regarding sexual orientation all make clear that sexual orientation is not a characteristic that generally bears on legitimate policy objectives. *See, e.g.*, Statement by the President on the Don't Ask, Don't Tell Repeal Act of 2010 ("It is time to recognize that sacrifice, valor and integrity are no more defined by sexual orientation than they are by race or gender, religion or creed.")[.]

Letter from Eric H. Holder, Jr., Attorney General, to the Hon. John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011) (*available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html).

ARGUMENT

The District Court's judgment declaring DADT unconstitutional is supported by the record and should be affirmed. The District Court set forth 187 findings of fact, none of which is challenged on appeal.[5] For example, the District Court found that (i) servicemembers with critically needed skills and training were discharged under DADT; (ii) DADT has a negative effect on recruitment; (iii) DADT necessitated the admission of lesser qualified enlistees; and (iv) DADT enforcement against gay and lesbian soldiers has often been delayed until they return from theaters of active combat. *Log Cabin*, 716 F. Supp. 2d at 950-53. This Court should accept these findings on appeal.

The Government asserts that passage of the Repeal Act is a reason to modify or vacate the District Court's judgment. Gov. Br. at 41-43. But enactment of legislation that will at some future time end DADT does not affect the District Court's declaratory judgment that DADT is unconstitutional. *Compare Brown v.*

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[5] Although the Government has not challenged the District Court's decision to admit Plaintiff's evidence, it should be noted that courts have a long history of taking evidence with respect to facial constitutional challenges. *See, e.g.*, *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 668 (1994) (remanding First Amendment facial challenge to "permit the parties to develop a more thorough factual record"); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 888-91 (1992) (evaluating evidence set forth at trial and detailed findings of fact by the district court). By its very nature, legislative history cannot demonstrate the continuing necessity of an infringement of liberty interests years after a statute's enactment.

Bd. of Educ., 347 U.S. 483 (1954) (declaring segregation in the field of public education unconstitutional) *with Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (requiring desegregation with all deliberate speed); *cf. Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) (affirming lower court's holding that the U.S. Navy was engaged in a clear, ongoing violation of the Clean Water Act but requiring a distinct analysis as to whether that statutory violation should be enjoined). Thus, the Government errs in seeking vacatur of the District Court's declaratory judgment merely because the Government asserts that, in light of the Repeal Act, it should be given more time to end its unconstitutional discrimination against gay servicemembers.

Congress' legislation in the Repeal Act as to the ultimate repeal in no respect undermines the District Court's declaratory judgment that DADT is unconstitutional, as established by the uncontroverted findings that the discrimination it requires is not only unnecessary to further any legitimate government objective but is actually counterproductive to the statute's purported military objectives. Contrary to the Government's implicit claim, a decision by this Court affirming the District Court's declaratory judgment that DADT is unconstitutional would not constitute a holding that the Repeal Act is unconstitutional, as the Repeal Act merely concerns the process by which DADT will be repealed.

POINT I

AFFIRMATION OF THE DISTRICT COURT DECISION WILL AVOID ONGOING IRREPARABLE HARM TO PLAINTIFF'S MEMBERS, SLDN'S CLIENTS AND COUNTLESS OTHERS

The Government challenges the standing of one of Plaintiff's members, John Doe, on the ground that Plaintiff "presented no evidence that Doe has ever in his many years of service been subject to any concrete threat of being discharged or investigated under § 654, let alone subject to such a threat after Congress enacted a process for repeal of the statute." Gov. Br. at 21. The Government's argument fails to acknowledge the constant anxiety that gay servicemembers experience in seeking to conceal their identity, the palpable harm they suffer every day from the risk of exposure, the statute's ever-present regulation of their speech, and DADT's discriminatory and severe restriction on their freedom of intimate association. Servicemembers are forced to "live a lie" and not reveal who they really are to their comrades-in-arms.

Even in the absence of formal investigation and discharge, these harms constitute "injury" sufficient to establish standing. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 184-85 (2000) (holding that as long as plaintiffs had curtailed their activities as a reasonable response to the action they were challenging "that is enough for injury in fact"); *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1001 (9th Cir. 2010)

(where an individual "has refrained from engaging in expressive activity for fear of prosecution under the challenged statute, such self-censorship is a 'constitutionally sufficient injury' as long as it is based on 'an actual and well-founded fear' that the challenged statute will be enforced") (citing *California Pro-Life Council Inc. v. Getman*, 328 F.3d 1088, 1093, 1095 (9th Cir. 2003)); *Arizona Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) (finding that an entity that was "forced to modify its speech and behavior to comply with the statute" had suffered injury even though it had "neither violated the statute nor been subject to penalties for doing so").

There are numerous servicemembers for whom the harm of DADT is imminent today. These are the servicemembers already in the military discharge process and threatened with separation before this appeal is decided. While the Government has adopted additional review procedures before a servicemember is discharged,[6] gay servicemembers continue to be harmed by DADT.

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[6] *See* Memorandum from Robert M. Gates, Sec'y of Def., to Secretaries of the Military Dep'ts, Under Sec'y of Def. for Personnel and Readiness, and Gen. Counsel of the Dep't of Def. (Oct. 21, 2010) ("no military member shall be separated pursuant to 10 U.S.C § 654 without personal approval of the Secretary of the Military Department concerned, in coordination with the Under Secretary of Defense for Personnel and Readiness and the General Counsel of the Department of Defense").

A. Seaman David Jones

David Jones joined the Unites States Navy in 2010.[7] His shipmates named him as the Honor Recruit for his Division when he graduated from Recruit Training Command, and until the fall of 2010 he looked forward to a long career with the Navy.

Late last year, another sailor falsely accused Jones of engaging in non-consensual sex, and Jones defended himself by saying that the same-sex conduct was consensual. The Naval Criminal Investigative Service dropped its investigation when the accuser admitted to lying and admitted that the conduct was consensual. Jones' commanding officer, moved by Jones' exemplary service, wrote a letter to the Admiral recommending that there be no DADT investigation. However, in November 2010, the Admiral issued an administrative separation processing notice to Jones under DADT.

Seaman Jones was ordered to appear before an Administrative Separation Board, which would determine whether he should be retained. A colleague of Seaman Jones' testified that even after the event in question, there had been no disruption to unit cohesion, morale, or good order and discipline in their unit, nor did the Navy even make that claim. Nevertheless, the Board, on February 15, 2011, recommended that Jones be separated under DADT. Jones' file

[7] The Seaman's name has been changed to protect his anonymity.

will soon reach the desk of the Secretary of the Navy, where after coordination with the Under Secretary of Defense for Personnel and Readiness and the General Counsel of the Defense Department, the Secretary will either approve or disapprove Seaman Jones' separation.

B. Linguist Jessica Thompson

Jessica Thompson joined the Navy as a linguist more than five years ago and has served a tour of duty in Iraq.[8] During that time, Thompson was awarded an Army Commendation Medal, a Joint Service Commendation Medal and became a recognized subject matter expert as a Voice Analyst, Voice Collection Operator, Indications and Warning Analyst and a Geospatial Metadata Analyst. Thompson returned from Iraq to the Defense Language Institute for advanced language training in 2010 but began to exhibit signs of post-traumatic stress disorder.

Thompson, a bisexual, sought treatment through counseling provided by the military but distrusted the military therapist.[9] Thompson's stress was aggravated by her sexual orientation and the pressures of serving under DADT. Deeply troubled, Thompson attempted to take her own life. She was found and

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[8] The servicemember's name has been changed to protect her anonymity.

[9] On March 29, 2010, the Department of Defense first directed that information disclosed to psychotherapists and clergy will not be used for purposes of DADT discharges. *See* Dep't of Def. Instruction 1332.14 Encl. 5 ¶ 2.f.2 (Aug. 28, 2008) (incorporating Change 1, Mar. 29, 2010).

taken to a nearby hospital for treatment, where she received effective counseling. Subsequently, under a civilian therapist's advice, Thompson came out as bisexual to her commanding officer.

In March 2011, Thompson received paperwork informing her that she is being administratively separated for "Homosexual Conduct as evidenced by member's statement that she is a homosexual or bisexual or words to that effect." She wants to be retained.

C. Cadet John Smith

The continued prosecution of discharges under DADT is a problem not only for active duty, guard, and reserve servicemembers, but also for students enrolled in the Reserve Officer Training Corps ("ROTC"). Cadet John Smith is currently undergoing disenrollment proceedings from ROTC under DADT.[10] He enrolled in ROTC in high school, signing an agreement to join the military as an active duty servicemember or ROTC-trained officer.

CDT Smith was the highest ranking cadet in his program at a junior military college and was elected class president by his peers. However, CDT Smith, a gay man, felt that DADT prevented him from living up to the core values of the Army. Upon news of the District Court's decision in this case – and erroneously thinking that DADT was no longer in effect – CDT Smith met with the

[10] The cadet's name has been changed because he is still an ROTC member.

Professor of Military Science for his ROTC program on September 29, 2010 and presented him with a letter disclosing his sexual orientation, stating that he will be proud to continue serving a military that no longer discriminates against its members. In response, on February 3, 2011, CDT Smith was notified that disenrollment proceedings were underway. The notice also included a demand for recoupment of his military academy scholarship, totaling $47,171. CDT Smith wants to continue to serve.

The cases of these three SLDN clients are illustrative of the harm DADT continues to cause today, even after enactment of the Repeal Act. These servicemembers and many others are suffering the very discrimination found by the court below and which that court's injunction was designed to bring to an end. This Court should affirm that decision and reinstate that injunction.

POINT II

THE DISTRICT COURT'S JUDGMENT THAT DADT VIOLATES SUBSTANTIVE DUE PROCESS RIGHTS WAS CORRECT AND SHOULD BE UPHELD ON APPEAL

The District Court's Judgment and Permanent Injunction, entered on October 12, 2010, declared that DADT:

> infringes the fundamental rights of United States Servicemembers and prospective servicemembers and violates (a) the substantive due process rights guaranteed under the Fifth Amendment to the United States Constitution, and (b) the rights to freedom of speech and to petition the Government for redress of grievances

> guaranteed by the First Amendment to the United States Constitution.

Log Cabin Republicans v. United States, Judgment and Permanent Injunction, Case No. CV 04-08425-VAP (Ex) (filed Oct. 12, 2010). On appeal, the Government does not set forth an affirmative argument that DADT is constitutional. Thus, there are no grounds upon which to reverse the District Court's declaratory judgment, and it should be affirmed.

A. The Caselaw Cited By The Government Is Inconsistent With This Court's Decision In *Witt*

The Government's Brief essentially concedes that DADT violates constitutional guarantees of substantive due process. The Government's only suggestion to the contrary is its assertion that "all the courts of appeals to have addressed the matter – including this Court – had sustained the constitutionality of [DADT] against both substantive due process and First Amendment challenges." Gov. Br. at 40. Examining the cases cited in support of this proposition, however, reveals that most of them were decided prior to the Supreme Court's *Lawrence v. Texas* decision. 539 U.S. 558 (2003). Four of the decisions (*Able v. Cohen*, 155 F.3d 628 (2d Cir. 1998); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996); and *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994)) applied a rational basis standard, which this Court has held to be inapplicable to DADT after *Lawrence*, requiring that a heightened level of scrutiny be applied instead. *See Witt*, 527 F.3d at 813, 821-22.

The Ninth Circuit cases cited by the Government each relied on *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), but *Witt* held that *Beller* is no longer good law. *Witt*, 527 F.3d at 819. The only remaining case cited by the Government is *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008), but *Cook* articulated no standard by which to conduct the necessary balancing test between government interests and protected liberties and relied entirely on the congressional record underlying DADT to determine that it passed constitutional scrutiny. *Cook* is therefore inconsistent with this Court's decision in *Witt*, as the First Circuit itself recognized. *See Cook*, 528 F.3d at 45 n.1 (acknowledging that "[w]e [*i.e.*, the First Circuit] … part ways with the 9th Circuit's approach [in *Witt*] in some significant respects"). *Cook* is also undermined by the enactment of the Repeal Act.

B. Plaintiff's Facial Challenge Does Not Pose the Same Concerns Associated with Facial Challenges Generally

The District Court was correct to consider Plaintiff's facial challenge to the statute, and it properly applied the standard of scrutiny articulated in *Witt* (and advocated by the Attorney General, *see supra* at 8-9) to that challenge. At trial below, the Government had the opportunity to demonstrate that the discrimination required by DADT continues to serve military needs, but it did not put forward *any* evidence that discrimination against gay servicemenbers furthers any valid public policy objective. The only "evidence" the Government introduced was DADT's legislative history, which, at most, reflects perceptions almost two

decades old and by its very nature says nothing about the current military. Nor did the Government rebut any of the Plaintiff's evidence that not only is DADT not needed today, but also it is counterproductive.

In *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008), the Supreme Court noted the disagreement among the Justices with respect to the proper standard for a facial constitutional challenge to a statute. In concluding that "a facial challenge must fail where a statute has a 'plainly legitimate sweep,'" *id*., the Court explained that facial challenges are generally "disfavored" because: (i) they risk the "premature interpretation of statutes on the basis of factually barebones records," *id*. at 450; (ii) courts should neither anticipate questions of constitutional law nor formulate a rule broader than required by the facts to which it is to be applied, *id*.; and (iii) facial challenges threaten to short circuit the democratic process by preventing laws from being implemented in a manner consistent with the Constitution. *Id*. at 451. Plaintiff's facial challenge in this case is justiciable because these concerns are not present here.

First, there is no risk of a "premature interpretation of statutes on the basis of factually barebones records." The record before the District Court was robust and had been developed over 15 years of the application of DADT. The Government's application of DADT is clear, and the Government's interpretation

of DADT's meaning is not at issue in this case. With years of Government enforcement of DADT behind us as context, Plaintiff's challenge does not suffer from the risk of speculation or premature interpretation.

Second, the District Court neither anticipated questions of constitutional law nor formulated a rule broader than is required by the facts. The constitutional issues regarding DADT are well-defined, and the District Court focused specifically on the relevant inquiry of whether the statute impermissibly infringed upon substantive due process rights with regard to a protected area of individual liberty. Engaging in a careful and detailed review of the facts presented to it at trial, the District Court properly concluded that the Government put forward no persuasive evidence to demonstrate that the statute is a valid exercise of congressional authority to legislate in the realm of protected liberty interests. *See Log Cabin*, 716 F. Supp. 2d at 923. Hypothetical questions were neither presented nor answered in reaching this decision.

Third, the facial challenge here does not threaten the democratic process by preventing laws from being implemented in a manner consistent with the Constitution. As the District Court properly determined, the constitutional defect of the statute is that it infringes on important constitutional liberties without any adequate justification because it does not further the goals it purports to achieve. Thus, a facial challenge is particularly appropriate because the

constitutional defects in DADT do not rest upon the Government's implementation of DADT with respect to individual servicemembers. DADT is either constitutional, thereby barring gay Americans from serving, or it is unconstitutional, thereby allowing gays to serve.

The constitutional harms of DADT have been so sweeping that it would truly be impractical to require every person affected to bring suit. In addition to the almost 14,000 servicemembers discharged, DADT has prevented countless openly gay citizens from enlisting in the military and has caused substantial harm by deterring gay servicemembers from reporting other significant conduct violations. An "as applied" challenge would not add any case-specific facts that would shed light on the required constitutional analysis.

The Government does not dispute the District Court's conclusion that DADT does not have a "plainly legitimate sweep." *Log Cabin*, 716 F. Supp. 2d at 894-95. Supposedly enacted to promote unit cohesion and military readiness, DADT has been proven to be without legitimacy for its failure to support either of these goals. The judiciary's role is vital to ensure that Congress does not overstep its bounds when abrogating protected liberty interests and should not be compromised by the application of non-jurisdictional "prudential" concerns that are inapplicable to this lawsuit.

C. *Witt* Does Not Preclude A Facial Challenge to DADT

In *Witt*, this Court established the standard for an as-applied challenge to DADT. The *Witt* Court said nothing that would preclude a facial challenge, and the *Witt* standard of review did not itself depend on the particular facts of Major Witt's discharge under DADT. Moreover, the cases relied upon by *Witt* do not hold that a plaintiff is precluded from presenting sufficient evidence to demonstrate that a statute is unconstitutional on its face due to its infringement of substantive due process rights. *See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 447 (1985); *Sell v. United States*, 539 U.S. 166, 180 (2003).

The kind of balancing test endorsed by *Witt* as the proper standard for determining the constitutionality of DADT has been employed in other facial challenges under the substantive due process doctrine. In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 898 (1992), the Supreme Court used an "undue burden" standard to strike down as facially invalid a statute that required a woman to notify her spouse that she was seeking an abortion. The Supreme Court noted that the statute might impose the "undue burden" on only a small number of women, but it did not require each of those women to bring suit individually to demonstrate the statute's unconstitutionality. *See id.* at 894-95. The plaintiffs demonstrated that the statute violated due process rights, and the Court held that it was facially unconstitutional. *Id.*

Plaintiff's facial challenge to DADT is both permissible and appropriate. Plaintiff presented evidence at trial that permitted the District Court to engage in the appropriate balancing test between the protected liberty interests of servicemembers harmed by DADT and the government's interest in perpetuating discrimination as a means to a legitimate government objective. The Government bore the burden to demonstrate the necessity of its discriminatory practice in the face of Plaintiff's challenge, *Witt*, 527 F.3d. at 819, but failed to meet that burden. Based on the record before it, the District Court correctly concluded that DADT is facially unconstitutional.

D. The District Court Properly Applied the *Witt* Standard

In evaluating DADT's consistency with substantive due process, the District Court properly applied *Witt* by considering (i) the presence of a legitimate state interest, (ii) whether DADT significantly furthers that interest and (iii) whether the statute is necessary to significantly further that interest. The Government has not criticized the application of this standard to a facial challenge and has not proposed any other standard by which to determine DADT's constitutionality.

The District Court found that DADT is not necessary to advance the Government's stated interests. Among the bases for this finding is the statement of the President, the Commander-in-Chief of the armed forces, that DADT "'doesn't

contribute to our national security…. [R]eversing this policy [is] the right thing to do [and] is essential for our national security.'" *Log Cabin*, 716 F. Supp. 2d at 953 (quoting President Obama).

The gratuitous and unnecessary quality of the constitutional harm that DADT imposes is evident when viewed in the context of other provisions of military law that regulate conduct that may interfere with unit cohesion and that are, by themselves, more than adequate to achieve the goals that its defenders claim DADT was supposed to further. For example, Article 134 of the Uniform Code of Military Justice prohibits "all disorders and neglects to the prejudice of good order and discipline in the armed forces, [and] all conduct of a nature to bring discredit upon the armed forces." 10 U.S.C. § 934 (2010). This article prohibits intimate conduct detrimental to unit cohesion and readiness. *See Manual for Courts-Martial United States*, Part IV ¶¶ 62(c)(2), 83(b)(5) (2008 ed.).

Further, Article 125 of the Uniform Code of Military Justice prohibits sodomy by homosexual and heterosexual servicemembers. Military courts have limited Article 125 in recognition of the liberty interests at stake under *Lawrence*, but where the acts at issue have the effect of disrupting unit cohesion or military readiness, it may still be applied. *United States v. Marcum*, 60 M.J. 198, 206-07 (C.A.A.F. 2004) (where the conduct at issue is within the liberty interests protected by *Lawrence*, the court determines whether there are "additional factors relevant

solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest").

Therefore, the military may still protect unit cohesion under its existing laws and regulations *without DADT*. There is simply no need for DADT's sweeping prohibition on the service of openly gay servicemembers.[11]

E. The Repeal Act's Enactment Supports the District Court's Judgment

The Government seeks to wield the Repeal Act as a sword to attack the District Court's judgment against DADT (*see* Gov. Br. at 37-43). But regardless of the scope of any corresponding injunctive relief, the District Court rendered a valid declaratory judgment that DADT is unconstitutional, and the Repeal Act does not alter DADT so as to cure its constitutional defects.

The Government's brief does not assert that deference is owed to the legislature's decisionmaking in enacting DADT. In any event, after the enactment of the Repeal Act, any deference due in this case is respect for the fact that Congress has now deemed DADT unnecessary to our national defense. *See Northwest Austin Mun. Util. Dist. No. One v. Holder*, 129 S.Ct. 2504, 2512 (2009) (Voting Rights Act "imposes current burdens and must be justified by current

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[11] Pandering to individuals who do not wish to serve with gays is not a legitimate government objective. *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

needs"); *United States v. Carolene Prods.*, 304 U.S. 144, 153 (1938) ("statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist").

Nor has this case become moot by enactment of the Repeal Act. As set forth above, many SLDN clients, as well as untold others, continue to have their careers and livelihoods jeopardized by the continuing violation of their constitutional rights under DADT. These constitutional harms will not have been redressed even after the effective date of the Repeal Act. The declaratory judgment of the District Court, to which no substantive argument in opposition has been made on appeal, should be upheld.[12]

POINT III

THE DISTRICT COURT PROPERLY HELD THAT DADT VIOLATES THE FIRST AMENDMENT

The Government's brief on appeal does not challenge the District Court's correct conclusion that DADT improperly imposes content-based regulation of speech and therefore violates the First Amendment. The District Court applied the rule of *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 643 (1994), in holding that "a law that by its terms 'distinguish[es] favored speech from

[12] For the reasons stated in Plaintiff's brief on appeal, the Repeal Act does not establish that the District Court abused its discretion in enjoining DADT's enforcement.

disfavored speech on the basis of the ideas or views expressed [is] content based.'" *Log Cabin*, 716 F. Supp. 2d at 924. Laws that chill constitutionally protected speech are presumptively invalid and must withstand the strictest constitutional scrutiny. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116, 118, 123 (1991). Here, the Government does not deny that DADT chills constitutionally protected speech by restricting "'freedom of thought, belief, *expression*, and certain intimate conduct.'" *Log Cabin*, 716 F. Supp. 2d at 967 (quoting *Lawrence*, 539 U.S. at 562 (emphasis in opinion below)).

The District Court properly concluded that although this Court held that DADT did not violate the First Amendment in *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1997), the "rational basis" scrutiny applied in that case is incompatible with the Supreme Court's later decision in *Lawrence*, and thus, applied a more stringent standard.[13] As summarized by the District Court, by requiring a servicemember's discharge if he or she "'has stated that he or she is a homosexual or bisexual, *or words to that effect*,'" DADT imposes a content-based restriction on speech. *Log Cabin*, 716 F. Supp. 2d at 926, 968 (quoting DADT). The restriction is content-based because a servicemember may permissibly state that he is heterosexual, whereas he is discharged for stating that he is gay. The

[13] In *Witt*, this Court adopted the same approach, modifying *Holmes*, in holding "that *Lawrence* requires something more than traditional rational basis review." 527 F.3d at 813.

District Court made the following undisputed findings of fact, amongst others, supporting its conclusion that DADT is a content-based restriction on speech:

- Fact 178: The Act denies servicemembers the right to speak about their loved ones while serving their country in uniform.
- Fact 179: The Act results in the discharge of servicemembers for including information in a personal communication from which an unauthorized reader might discern their homosexuality.
- Fact 180: The Act prevents servicemembers from talking openly about everyday personal matters.
- Fact 181: DADT chills servicemembers' ability to bring violations of military codes of conduct to the attention of the proper authorities.
- Fact 183: DADT prevents servicemembers from openly joining organizations that seek to change the military's policy on gay and lesbian servicemembers; it also prevents them from petitioning the Government for redress of grievances.[14]

The District Court acknowledged that even though DADT is a content-based regulation, "regulations of speech in a military context will survive

[14] This finding speaks to the obstacles faced by current servicemembers to join this or other lawsuits to challenge DADT, substantiating the necessity that associational litigants such as Plaintiff have standing to challenge the statute.

Constitutional scrutiny if they 'restrict speech no more than is reasonably necessary to protect the substantial government interest.'" *Log Cabin*, 716 F. Supp. 2d at 927 (*quoting Brown v. Glines*, 444 U.S. 348, 355 (1980)). Even applying this standard, the District Court's findings of fact plainly support its conclusion that DADT is "far broader than is reasonably necessary." *Id*. Congress' enactment of the Repeal Act and the recent comments of Attorney General Holder confirm that the Government has no substantial interest in regulating a soldier's disclosure of his or her sexual orientation.

CONCLUSION

The District Court's decision should be affirmed and the stay issued by this Court should be lifted.

Dated: March 31, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because, according to the word count of Microsoft Word 2003, it contains 6,631 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman font.

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STATEMENT OF RELATED CASES

Servicemembers Legal Defense Network is unaware of any pending related cases before this Court, other than the Government's appeal, *Witt v. Dep't of the Air Force*, No. 10-36079, to this Court of the District Court's judgment ordering the reinstatement of Major Margaret Witt to the United States Air Force after holding DADT unconstitutional in a decision rendered on September 24, 2010, on remand from this Court's earlier decision in *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008).

CERTIFICATE OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is Two Embarcadero Center, Suite 1410, San Francisco, California 94111.

I hereby certify that 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 on March 31, 2011.

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

Executed on March 31, 2011, at San Francisco, California.

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.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ K. Lee Marshall
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