Case Nos. 10-56634, 10-56813

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOG CABIN REPUBLICANS,
a non-profit corporation

Plaintiffs-Appellee/Cross-Appellant,

v.

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

Defendants-Appellants/Cross-Appellees.

APPEAL FROM DISTRICT COURT CASE NO. CV04-8425 VAP(Ex)a

The Honorable Virginia A. Phillips Presiding

BRIEF FOR AMICUS CURIAE THE PALM CENTER IN SUPPORT OF APPELLEE/CROSS-APPELLANT LOG CABIN REPUBLICANS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, counsel for *Amicus Curiae* The Palm Center certifies that:

1. The Palm Center is a research unit of the University of California.

2. The Palm Center has no parent corporation, and no publicly-held corporation owns ten percent or more of The Palm Center.

Dated: April 4, 2011

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Amicus curiae the Palm Center submits this brief in support of appellee/cross-appellant Log Cabin Republicans ("Appellee") and its position on the judgment entered in *Log Cabin Republicans v. United States*, Case No. CV 04-08425-VAP, United States District Court for the Central District of California, on October 12, 2010. All parties have consented, pursuant to FRAP 29, to the filing of this brief. No party's counsel authored any part of this brief. No one other than *amici* and their counsel contributed money to fund the preparation or submission of this brief.

INTEREST OF THE AMICUS CURIAE

The Palm Center is a viewpoint-neutral research institute at the University of California, Santa Barbara that has studied 10 U.S.C. § 654 ("Don't Ask, Don't Tell") and its implementing regulations for the past twelve years. Palm Center scholars have delivered more than 25 invited lectures at military universities, including the U.S. Military Academy at West Point, U.S. Air Force Academy, Army War College, Naval Post Graduate School, Air War University, and National Defense University. Our research has been published in leading journals, including *Parameters*, the official military journal of the Army War College. Three scholars affiliated with the Palm Center, Director Aaron Belkin, Professor Elizabeth Hillman, and former Senior Research Associate Nathaniel Frank,

testified at trial in this case. The United States District Court admitted the majority of the Palm Center's research presented as exhibits during trial.

The Palm Center acknowledges the invaluable contributions and assistance of Palm Researcher and Co-Legal Director Diane H. Mazur in drafting this brief. Professor Mazur served as a United States Air Force officer from 1979 to 1983. She is the Gerald A. Sohn Research Scholar and Professor of Law at the University of Florida's Levin College of Law. She is also a member of the Board of Advisors for the National Institute of Military Justice and a Senior Editor of the *Journal of National Security Law and Policy*. Professor Mazur has written numerous articles on military law and is the author of a book on judicial deference to the military and civil-military relations, A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER (Oxford University Press 2010).

SUMMARY OF ARGUMENT

By constitutional design, all three branches of government share responsibility for civilian control of the military. Congress makes rules to govern and regulate the military, the President serves as the commander in chief of the military, and courts exercise judicial power that extends to all cases arising under the Constitution and federal laws, including cases involving the military. Courts have an obligation to determine whether congressional or executive action is

consistent with the Constitution, notwithstanding the often misrepresented doctrine of judicial deference to military judgments. Judicial deference is very limited in scope and does not disable this Court from fully considering the constitutionality of "Don't Ask, Don't Tell" and any conditional plan for its repeal.

Judicial deference is typically granted only to specific military judgments made in individualized circumstances, not to across-the-board policy choices affecting persons or situations in general. Deference to the general policy choice underlying "Don't Ask, Don't Tell" is therefore overbroad and unwarranted. Furthermore, the doctrine of judicial deference has a shelf life even when applied in appropriate circumstances. In the case of "Don't Ask, Don't Tell," changes in relevant facts and controlling Supreme Court precedent make continued deference improper. The law can no longer be justified on the same factual or legal basis relied on by the government in 1993, and so any deference to that earlier judgment is now obsolete.

ARGUMENT

I. All Three Branches of the Federal Government Share Constitutional Responsibility for Civilian Control of the Military

The Constitution of the United States establishes a system for civilian control of the military that gives all three branches of the federal government

shared authority over the armed services. Under Article I, Section 8, Clauses 12-14, Congress has power to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces. Article II, Section 2, Clause 1 designates the President as the commander in chief of the army and navy of the United States. Finally, under Article III, Section 2, Clause 1, the judicial power that is vested in federal courts extends to all cases arising under the Constitution and the laws of the United States.

The judicial power set out in Article III is stated broadly, without enumeration of any specific subjects, fields, or activities. Unlike the specific grants of congressional power in Article I, which reference the military, taxation, commerce, naturalization, bankruptcy, counterfeiting, and intellectual property, among other subjects, Article III defines judicial power simply, generally, and inclusively: the power extends to *all cases* arising under the Constitution and the laws of the United States. Cases involving the military or service members frequently raise issues of federal constitutional or statutory law. The fact that the Constitution does not specifically mention the military in Article III, however, does not disable federal courts from deciding cases about the military any more than Article III's failure to mention interstate commerce disables courts from deciding cases about the Commerce Clause. The *only* express military exception to the Constitution appears in the Fifth Amendment, which exempts the military's

criminal justice system from the requirement for "presentment or indictment of a grand jury." Otherwise, courts have the same obligation for judicial review in military cases that they have in cases affecting civilians.

II. Courts Typically Defer to Specific Military Judgments Made in Individualized Circumstances, Not to General Policy Determinations of Constitutional Dimension

The doctrine of judicial deference in military affairs is often mischaracterized to mean that the usual constitutional balance of powers among the President, Congress, and the courts does not apply to civilian control of the military. *See generally* Diane H. Mazur, A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER (Oxford University Press 2010) (detailing the harmful effect of exaggerated judicial deference on the constitutional health of civil-military relations). Misleading snippets of judicial opinions are repeatedly offered as short-hand slogans suggesting that courts have no significant constitutional role to play in civilian control, leaving the military's constitutional faithfulness to Congress and the President alone, or to Congress alone, or perhaps even to the military alone. Taken out of context from the circumstances of the cases in which they arise, the slogans exaggerate the proper place of judicial deference in matters involving the military. In isolation, they falsely imply there is something constitutionally suspect when courts interpret and

enforce the Constitution in military contexts. In full context, however, they confirm a more nuanced analysis and application of judicial deference to military and congressional decisions.

An express doctrine of judicial deference to the military is a very recent development, arising after the end of the Vietnam War and the beginning of the all-volunteer military. It was first explicitly stated only thirty years ago in *Rostker v. Goldberg*, 453 U.S. 57 (1981), a decision upholding the exclusion of women from military draft registration. The Court was asked to decide whether excusing women from this fundamental obligation of citizenship was a violation of equal protection of the laws. Both the President and senior military leadership believed there were good military reasons for registering all persons, male or female, whose service and skills might be helpful to the military. Congress disagreed, and the record indicated that a large part of the reason was that Congress believed involuntary military service was culturally inappropriate for women. The Court upheld male-only draft registration, expressly relying on a new doctrine of judicial deference.

The Court's deference, of course, was not to actual military expertise, because the military supported the registration of women. Faced with a difference in judgment between the two political branches of government, the Court simply chose one source of constitutional authority (congressional power to raise armies,

provide navies, and govern and regulate the military) over another source (executive power as commander in chief) as the beneficiary of its deference. It also chose to credit one view of the facts (Congress's conclusion that women would not be helpful in meeting the needs of a draft) and discount the opposing view, but it did so without following the intermediate standard of review normally applied to laws distinguishing between men and women.

Rostker was an outlier in the Court's history of deference in military cases. Both before and after *Rostker*, the Court has typically affirmed specific military judgments made in individualized circumstances, not general policy determinations. *Rostker* itself relied on cases in which the Court declined to second-guess military judgments assigning a drafted psychiatrist to serve as a medical laboratory technician, *Orloff v. Willoughby*, 345 U.S. 83 (1953); choosing weapons and training for the Ohio National Guard after the Kent State shootings, *Gilligan v. Morgan*, 413 U.S. 1 (1973); and finding that an officer had undermined good order and discipline by encouraging enlisted soldiers to refuse assignment to Vietnam, *Parker v. Levy*, 417 U.S. 733 (1974). In each of these cases, any slogan of deference lifted from the opinion would fail to acknowledge how limited and specific the court's deference actually was under the circumstances.

For example, although *Orloff* noted that "judges are not given the task of running the Army," the statement was made in the context of a narrow claim

asking the Court to decide whether one particular servicemember had been assigned military duties that were beneath his educational qualifications. 345 U.S. at 93. Although the Court declined to review individual military duty assignments, the oft-quoted language was never intended to mean that judges are not given the task of enforcing constitutional values within the military.

Gilligan made a similarly general observation that decisions about the composition, training, equipping, and control of a military force "are essentially professional military judgments." 413 U.S. at 10. That is undoubtedly correct, but to offer the statement as a reason courts should never engage in any serious judicial review in a military context is misleading in the extreme. *Gilligan* was a case about whether it was appropriate for courts to essentially take command of the Ohio National Guard and direct its choice of weapons and tactics, not whether it was appropriate for courts to engage in constitutional review of general military personnel policies.

Although the Supreme Court has characterized the military as a "specialized society separate from civilian society," *Parker*, 417 U.S. at 743, it has never characterized the military as a society that is separate from the Constitution. In *Parker*, for example, it upheld the judgment of a court-martial that one recalcitrant doctor had engaged in conduct that was unbecoming of an officer and also prejudicial to good order and discipline. While the Court might defer to individual

determinations related to military discipline and readiness, or to highly technical determinations beyond the Court's expertise, it has typically not deferred to military judgments about the meaning and relevance of the Constitution.

The same holds true after *Rostker*. The Supreme Court has continued to defer to specific military judgments made in individualized circumstances, not to across-the-board policy determinations made with respect to persons or situations in general. In *Chappell v. Wallace*, 462 U.S. 296 (1983), the Court refused to allow service members to bring suit for damages against their superior officers based on constitutional claims of racial discrimination in assignment and promotion. Taking into account the parallel system of remedies available to service members for redress of grievances and the potential that lawsuits could undermine the chain of command, *Chappell* found that additional remedies were unwarranted. However, when the opinion noted Congress's "plenary control" over rights, duties, and responsibilities within the military, it was not meant to suggest that courts lack authority to enforce constitutional protections within the military. The language addressed a far more narrow point, that Congress had broad authority to establish parallel civil and military remedies for constitutional violations. 462 U.S. at 301. *See also Weiss v. United States*, 510 U.S. 163, 177 (1994) (quoting the "plenary control" language of *Chappell* in deciding the similarly narrow issue of whether military judges must have fixed terms of office).

In *Goldman v. Weinberger*, 475 U.S. 503 (1986), the Court rejected an Air Force officer's claim that a regulation concerning the proper wear of headgear had been enforced against him in a way that unduly burdened free exercise of religion. In most circumstances, of course, a rule prohibiting service members from wearing hats indoors does not create a constitutional problem. However, in Captain Goldman's individual and unusual circumstance, the effect of the regulation was to prevent him from wearing a yarmulke in devotion to his religious faith. Relying on the doctrine of judicial deference, however, *Goldman* refused to require the military to make individual exceptions or accommodations for religious reasons. The Court was willing to accept the Air Force's assertion that deviations from uniform dress regulations were inconsistent with good order and discipline, despite the fact that the same regulation permitted individual choice in less weighty matters such as jewelry and hairstyle.[1]

Of all the military judgments at issue in the principal cases on military deference, the uniform dress regulation in *Goldman* may seem on the surface to

[1] Although the Court deferred to military judgment that religious accommodations were inevitably damaging to good order and discipline, Congress reversed the result in *Goldman*, enacting a law that required the military to grant religious accommodations. 10 U.S.C. § 774. Experience has shown the military was wrong in its judgment, and the facts in *Goldman* also suggested a retaliatory motive was in play. The Air Force had allowed Captain Goldman to wear his yarmulke indoors until he testified in a court-martial on the defendant's behalf. *Goldman*, 475 U.S. at 505.

provide the closest parallel to "Don't Ask, Don't Tell." Both arise from policies of general application throughout the military. However, the comparison ends there. Regulation of proper uniform wear is not targeted at certain persons or certain religious practices. It is designed to establish a single standard of conduct for all service members, although like any other rule of general application, it has the potential to impose incidental constitutional burdens. "Don't Ask, Don't Tell," however, is the antithesis of a single standard of conduct. It is targeted directly and comprehensively at gay service members alone, and it establishes starkly different rules for personal relationships and speech based on sexual orientation. For that reason, it is easily distinguishable from the general military judgment to which the Court deferred in *Goldman*.

The Supreme Court has never intended that the doctrine of judicial deference serve as a military exception to the Constitution, although the government has often suggested otherwise. In *Rostker*, the case expressly establishing this doctrine of deference, the Court stated: "None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs." 453 U.S. at 67. We should take the Court at its word.

III. Judicial Deference Must Have a Shelf Life; Changes in Law or Fact Make Continued Deference Improper

In defending the constitutionality of 10 U.S.C. § 654 in *Log Cabin Republicans v. United States*, the government has relied solely on the information available to Congress as it debated and approved the law more than seventeen years ago. From the government's perspective in this case, judicial deference means that the constitutional justification for a law can be frozen in time: if the government was once able to make an evidentiary showing sufficient to meet the appropriate constitutional standard of review, then the law will always remain constitutional, even if that evidentiary showing crumbles or the standard of review changes. This is not an appropriate use of the doctrine of judicial deference.

Rostker v. Goldberg provides the perfect illustration. If the Court were to determine today whether congressional exclusion of women from draft registration was a violation of equal protection of the laws, it would not make sense to defend the exclusion on the basis of fact and law as they existed more than thirty years ago. A court today would correctly assign no weight to *Rostker's* observation that women were of little use to the military in an active draft. Even conceding the

accuracy of that statement when made (which the military did not), the statement is now factually obsolete.[2]

The law of *Rostker* has changed as well. Unlike *Rostker*, which blurred the standard of constitutional review applicable to laws that draw distinctions on the basis of sex, an equal protection challenge today would require the government to demonstrate an "exceedingly persuasive justification" for excluding women from an obligation to defend the nation. *United States v. Virginia*, 518 U.S. 515, 531 (1996).

It would be similarly unhelpful for a court to look to the "Don't Ask, Don't Tell" debate of 1993 in determining the constitutionality of the policy today. Both the facts and the law applicable to a constitutional challenge have changed. The Department of Defense's recently completed study concluded that any risk to military effectiveness arising from repeal of "Don't Ask, Don't Tell" was

[2] Since *Rostker*, Congress has repealed statutes prohibiting assignment of women to combat roles in the Navy and the Air Force, and the Department of Defense has opened ground assignments for women involving combat risks of hostile fire or capture. *See* Direct Ground Combat Definition and Assignment Rule (January 13, 1994). In March 2011, the congressionally appointed Military Leadership Diversity Commission recommended that all remaining combat restrictions be lifted, opening assignments to all qualified persons without regard to sex. *See* From Representation to Inclusion: Diversity Leadership for the 21st-Century Military (March 15, 2011), at 71, available at http://mldc.whs.mil/.

transitory and low.[3] This judgment stands in sharp contrast to the congressional judgment made in 1993 that gay service members "create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. § 654 (a)(15).

The relevant law also stands in sharp contrast. "Don't Ask, Don't Tell" was enacted under the precedent of *Bowers v. Hardwick*, 478 U.S. 186 (1986), a decision that imposed no limits on the ability of government to mark its gay citizens as a class apart. Since 1993, the Court has decided *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003), decisions that, at a minimum, make it more difficult for government to justify legal burdens imposed on gay citizens. It would make no sense to award any degree of judicial deference today to a congressional decision made under a legal standard that has since been overruled.

IV. Exaggerated Judicial Deference in Military Cases Can Undermine the Strength of Civilian Control

It appears from the government's opening brief that it may no longer be defending the constitutionality of "Don't Ask, Don't Tell" as originally enacted.

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[3] Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell" (November 30, 2010), at 3, available at http://www.defense.gov/home/features/2010/0610_gatesdadt/DADTReport_FINAL_20101130%28secure-hires%29.pdf

Instead, the government asks this Court to defer to the congressional plan set in motion for repeal of the policy.[4] The Supreme Court, however, has never granted judicial deference in military affairs to a failure to act, a failure to make a decision, or the passing of responsibility for an act or decision to another branch of government. A minimum requirement for deference has been an actual decision by the military or by Congress on the military's behalf.

It overstates the case to characterize the Don't Ask, Don't Tell Repeal Act of 2010 as an orderly process for repeal. The Act sets no schedule for repeal; it does not even require repeal at any time. Congress is describing as "repeal" a process by which it has passed to the executive branch the final decision concerning when, and whether, the military should permit service without regard to sexual orientation. The current policy will not end until, and unless, the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff conclude that the military is ready to operate without "Don't Ask, Don't Tell" and can do so while meeting the usual standards of military readiness, military effectiveness, unit cohesion, recruiting, and retention. The executive branch can express an expectation that the certifications required by the Act will be made this year, but the Act leaves that decision entirely within executive discretion.

[4] Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (December 22, 2010).

Courts should be cautious in applying judicial deference in circumstances suggesting the doctrine is being used to evade or delay constitutional review. The Secretary of Defense urged Congress to pass the Don't Ask, Don't Tell Repeal Act of 2010 on the basis that this Court would be less likely to invalidate the policy if the decision whether to retain it no longer belonged to Congress, but belonged to the military instead. On December 2, 2010, Secretary of Defense Robert M. Gates made this statement[5] to the Senate Armed Services Committee:

> I believe this is a matter of some urgency because, as we have seen this past year, the judicial branch is becoming involved in this issue and it is only a matter of time before the federal courts are drawn once more into the fray. Should this happen, there is the very real possibility that this change would be imposed immediately by judicial fiat – by far the most disruptive and damaging scenario I can imagine, and the one most hazardous to military morale, readiness and battlefield performance.
>
> Therefore, as Senator McCain said in his opening statement, it is important that this change come via legislative means – that is, legislation informed by the review just completed. What is needed is a process that allows for a well-prepared and well-considered implementation. Above all, a process that carries the imprimatur of the elected representatives of the people of the United States. Given the present circumstances, those that choose not to act legislatively are rolling the dice that this policy will not be abruptly overturned by the courts.

[5] Opening Statement of Secretary of Defense Robert M. Gates on "Don't Ask, Don't Tell," December 2, 2010, *available at* http://www.defense.gov/speeches/speech.aspx?speechid=1525.

The assumption that a federal court would be willing to find a law unconstitutional if the decision whether to repeal it rested with Congress, but would be reluctant to make the very same constitutional judgment if the decision rested with military leadership, requires an unjustifiably broad conception of judicial deference in military affairs. In none of the judicial deference cases decided since *Rostker v. Goldberg* has the Supreme Court suggested that a congressional enactment could be shielded from constitutional review if responsibility for the enactment was moved inside the military.

CONCLUSION

Judicial deference does not bar this Court from assessing the constitutionality of "Don't Ask, Don't Tell" or any conditional plan for its repeal. To grant special deference to the government's desire to extend the life of the policy would violate every controlling principle of the doctrine. Courts should defer only to specific judgments made in individualized circumstances. Courts should defer only when the facts and law underlying the original judgment have not changed. Finally, courts have the weighty obligation to ensure that the doctrine

of judicial deference is not used to evade judicial review or to undermine civilian control of the military under the Constitution.

Dated: April 8, 2011

Respectfully submitted,

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STATEMENT OF RELATED CASES

Amicus Curiae The Palm Center is unaware of any pending related cases before this Court.

Dated: April 8, 2011

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,524 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in size 14 Time News Roman font.

Dated: April 4, 2011

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CERTIFICATE OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 1901 First Avenue, Suite 300, San Diego, California 92101.

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 April 4, 2011

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

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

Executed on April 4, 2011, at San Diego, California.

/s/ *Bridget Jeanne Wilson*
Bridget Jeanne Wilson

AMENDED CERTIFICATE OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 1901 First Avenue, Suite 300, San Diego, CA 92101.

2. I hereby certify that on April 8, 2011, I electronically filed the foregoing document: BRIEF FOR AMICUS CURIAE BY THE PALM CENTER SUPPORTING PLAINTIFF-APPELLEE/CROSS-APPELLANT LOG CABIN REPUBLICANS, Case: 10-56634, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

3. Participants in the case who are registered CM/ECF users have been served by the appellate CM/ECF system.

4. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following non-CM/ECF participants:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 5, 2011 at San Diego, California.

s/ BRIDGET JEANNE WILSON

BRIDGET JEANNE WILSON

AMENDED CERTIFICATE OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 1901 First Avenue, Suite 300, San Diego, CA 92101.

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