

FILED

UNITED STATES COURT OF APPEALS

JUL 11 2011

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LOG CABIN REPUBLICANS, a non-profit corporation,

Plaintiff - Appellee,

v.

UNITED STATES OF AMERICA; LEON PANETTA, Secretary of Defense, in his official capacity,

Defendants - Appellants.

No. 10-56634

D.C. No. 2:04-cv-08425-VAP-E
Central District of California,
Los Angeles

ORDER

LOG CABIN REPUBLICANS, a non-profit corporation,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA; LEON PANETTA, Secretary of Defense, in his official capacity,

Defendants - Appellees.

No. 10-56813

D.C. No. 2:04-cv-08425-VAP-E
Central District of California,
Los Angeles

After reviewing the briefs filed by the parties, it appears to the merits panel that the United States is not prepared to defend the constitutionality of 10 U.S.C. §

654, which provides for the policy concerning homosexuality in the armed forces (i.e., Don't Ask, Don't Tell). The Government argues only that the Don't Ask, Don't Tell Repeal Act of 2010 ("Repeal Act"), Pub. L. No. 111-321, 124 Stat. 3515 (2010), is constitutional. But the district court found § 654, not the Repeal Act, unconstitutional. And § 654 remains the law of the land today, even though it is scheduled to be repealed once certain conditions are satisfied, which, as of the date of this order, has apparently not yet occurred. Therefore, the central issue this court must address on appeal is whether the district court properly held that § 654 is unconstitutional. No party to this appeal has indicated an intention to defend the constitutionality of § 654 or to argue that the constitutionality holding of the district court should be reversed.

The Government, of course, may refrain from defending the constitutionality of "any provision of any Federal statute." 28 U.S.C § 530D(a)(1)(B)(ii) (providing that the Attorney General shall submit a report to Congress outlining his decision to refrain from defending a Federal statute); *see e.g.*, Letter from Attorney General to Speaker of House of Representatives (Feb. 23, 2011), filed as Attachment A to the Motion of Appellee / Cross-Appellant Log Cabin Republicans to Vacate Stay of Injunction, Dkt. No. 107, (May 10, 2011). If the Government chooses not to defend the constitutionality of § 654, however, the court may allow *amicus curiae*

to participate in oral argument in support of constitutionality pursuant to Federal Rule of Appellate Procedure 29(g).

In light of the foregoing,

(1) the Government is hereby ordered to advise the court whether it intends to submit a report to Congress under § 530D(a)(1)(B)(ii) outlining its decision to refrain from defending § 654;

(2) the Government is further ordered, if such report is to be submitted, to advise whether it will do so within such time as to enable Congress to take action to intervene in timely fashion in this proceeding, as provided in § 530D(b)(2);

(3) the parties are ordered to show cause why this case should not be dismissed as moot, either immediately or upon such time as the President certifies that all conditions for the repeal of § 654 set forth in the Don't Ask, Don't Tell Repeal Act have been satisfied.

The responses to this order shall take the form of letters to the court no longer than ten pages or 2800 words, and shall be submitted within ten days of the date of this order.

Parties who are registered for Appellate ECF must file the letter electronically without submission of paper copies. Parties who are not registered

Appellate ECF filers must file the original letter plus seven paper copies.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Beverly Brown
Deputy Clerk