EMERGENCY MOTION UNDER CIRCUIT RULE 27-3

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOG CABIN REPUBLICANS Plaintiff-appellee, v. UNITED STATES, et al., Defendants-appellants.	)	Nos. 10-56634, 10-56813

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR RECONSIDERATION OF ORDER LIFTING STAY OF WORLDWIDE INJUNCTION

TONY WEST
Assistant Attorney General

ANDRÉ BIROTTE JR.
United States Attorney

ANTHONY J. STEINMEYER
(202) 514-3388
AUGUST E. FLENTJE
(202) 514-3309
HENRY WHITAKER
(202) 514-3180
Attorneys, Appellate Staff
Civil Division, Room 7256
Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530

CIRCUIT RULE 27-3 CERTIFICATE

(1) **Telephone numbers and addresses of the attorneys for the parties**

a. **Counsel for the Defendants/Appellants**

Anthony J. Steinmeyer (anthony.steinmeyer@usdoj.gov)
(202) 514-3388
August E. Flentje (august.flentje@usdoj.gov)
(202) 514-3309
Henry Whitaker (henry.whitaker@usdoj.gov)
(202) 514-3180
Attorneys, Civil Division, Appellate Staff
Department of Justice
950 Pennsylvania Ave., NW Room 7256
Washington, D.C. 20530

b. **Counsel for Plaintiff/Appellee**

Dan Woods (dwoods@whitecase.com)
(213) 620-7772
Earle Miller (emiller@whitecase.com)
(213) 620-7785
Aaron Kahn (aakahn@whitecase.com)
(213) 620-7751
White & Case LLP
633 West Fifth Street, Suite 1900
Los Angeles, CA 90071-2007

(2) **Facts Showing the Existence and Nature of the Emergency**

The district court on October 12, 2010, permanently enjoined on a worldwide basis the government from enforcing 10 U.S.C. § 654, commonly referred to as the "Don't Ask, Don't Tell" statute, and its

implementing regulations. The government sought an emergency stay pending appeal of that injunction. This Court granted the government a temporary administrative stay to permit the Court sufficient time to consider the government's emergency stay motion. Then on November 1, 2010, the Court granted the government a stay pending appeal, concluding that "the lack of an orderly transition in policy will produce immediate harm and precipitous injury," and that "the public interest in ensuring orderly change of this magnitude in the military . . . strongly militates in favor of a stay." ER 302-303. The Supreme Court denied plaintiff's application to vacate this Court's stay.

Congress in December 2010 enacted the Don't Ask, Don't Tell Repeal Act of 2010, establishing an orderly process for repealing § 654. Congress provided that repeal of § 654 is to be effective 60 days after the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff certify that "the Department of Defense has prepared the necessary policies and regulations" for repeal, and that repeal "is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces." Pub. L. No. 111-321, § 2(b)(2)(B), (C), 124 Stat. at 3516 (2010).

To facilitate an orderly transition, Congress provided for § 654 to apply on an interim basis until repeal becomes effective. *Id.* § 2(c), 124 Stat. at 3516.

On July 6, 2011, the current motions panel of this Court lifted the stay entered by the previous motions panel, based in part on its conclusion that the government was no longer defending the constitutionality of the statute. On July 11, 2011, the merits panel issued an order requesting further information concerning the government's position in this case, and asking the parties to show cause why the case should not be dismissed as moot. Those orders rest on an apparent misunderstanding of the government's position.

The order lifting the stay immediately reimposes the district court's worldwide injunction on the Department of Defense, preempting the orderly process for repealing 10 U.S.C. § 654 that Congress has established, and imposing significant immediate harms on the government. Reconsideration of the panel's decision to lift the stay is necessary to protect the careful and deliberate process created by Congress and signed by the President, in which it empowered the military to make key judgments regarding the implementation and

timing of repeal.

We respectfully request that the Court enter a temporary administrative stay of the injunction while it considers the attached Emergency Motion Under Circuit Rule 27-3 For Reconsideration of Order Lifting Stay of Worldwide Injunction. We respectfully request that the Court act on this request for an administrative stay by the **close of business tomorrow, July 15, 2011**.

(3) **When and How Counsel Notified**

Counsel for plaintiff were notified of this motion by telephone call to Dan Woods on July 14, 2011, and counsel indicated that plaintiff would oppose this motion. This motion is being electronically filed, and in addition a copy of this motion is being sent via electronic mail today to counsel for plaintiff.

/s/Henry Whitaker
Henry C. Whitaker

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR RECONSIDERATION OF ORDER LIFTING STAY OF WORLDWIDE INJUNCTION

The government respectfully requests that the Court reconsider its July 6, 2011, order lifting the stay of the district court's injunction against enforcement of 10 U.S.C. § 654 and its implementing regulations. Although the injunction was entered at the behest of an organization whose claim for to relief rests on the interests of two purported members, only one of whom is even in the military, the injunction extends relief to every member of the military in every part of the world, and it runs directly against every member of the military and every civilian Defense Department employee. As the Court previously concluded in granting the stay, declaring a federal statute unconstitutional, and imposing a worldwide injunction against its enforcement, causes the government the kind of irreparable injury that routinely forms the basis for a stay pending appeal. In granting the stay, the Court also concluded that an abrupt, court-ordered end to § 654 would undermine carefully crafted efforts of the political Branches to bring about an orderly transition in policy.

Since that stay was put in place eight months ago, Congress

enacted the Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3516, and the Armed Forces are moving forward expeditiously to prepare for the repeal of § 654 in a fashion that Congress and the President consider the most effective way possible, and consistent with the Nation's military needs. *See* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. at 3516. The panel's order cuts that process short and overrides the judgments of Congress and the President on a complex and important question of military policy—an area in which "'judicial deference . . . is at its apogee.'" *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 58 (2006) (quoting *Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981)).

The Executive has been diligently implementing the transition that Congress prescribed. To be sure, the transition that Congress prescribed and that The motions panel may not have been aware of the full extent of the implementation when it issued its order. As set forth in the attached declaration by Major General Steven Hummer, United States Marine Corps, who is overseeing the implementation of the

process established by the Repeal Act, it is expected that the required certification—that the military has made the preparations necessary for repeal—will be presented for decision the Chairman of the Joint Chiefs of Staff and the Secretary of Defense in late July or early August. Hummer Decl. ¶11. Indeed, just last week, the Secretaries of the Military Departments, Chiefs of the Military Services, and Commanders of the Combatant Commands submitted their written advice regarding the status of their preparations for repeal and ability to satisfy the certification standards set by Congress. *Id.* In the meantime, a new, more rigorous process was put in place for evaluating discharges under § 654. Hummer Decl. ¶14. Since passage of the Repeal Act, only one Service member has been discharged under § 654, and that individual requested an expedited discharge. Hummer Decl. ¶¶13, 16.

Nevertheless, the harm resulting from the panel's order lifting the stay is real and immediate. By reimposing a worldwide injunction running against every member of the military and administered by a single district judge, the panel's order denies the Department of

Defense the very thing that Congress and the President believed was most likely to bring about effective transition to open military service by gay and lesbian Service members: the ability to exercise their best judgment about the nature and pace of the transition, so as to ensure that the transition is—and is understood by men and women in uniform to be—the product of the military's own, informed choices (and reflecting the choices of the democratically accountable Branches of government), rather than the product of a judicial order. Congress made quite clear that it believed the terms of transition it prescribed were central to the credibility and success of this historic policy change, and to the preservation of maximum military effectiveness. The panel's order, which wrests authority for the transition from the military and places it in the hands of a single district judge, gives no weight to Congress's judgments about the process that is needed to make this transition maximally effective. That step is particularly unjustified at this late stage of the process, in light of the enormous progress the military has made in the months since passage of the Repeal Act, and how close it is to a certification decision.

Moreover, the panel lifted the stay based in part on an apparent misunderstanding of the government's position regarding the constitutionality of § 654. As explained here and in the letter brief the government is filing today in response to a separate order of this Court (copy attached), the government is defending the constitutionality of § 654 as it applies today, following enactment of the Repeal Act. Prior to the Repeal Act, § 654 existed as a stand-alone and permanent bar to open service by gay and lesbian persons. The Repeal Act made § 654 a transitional provision that would be in place only during the orderly process Congress established for repeal. As the government's merits briefs explain, that more limited application of § 654 is fully constitutional.

The panel also misapprehended the significance for this case of the position the government has taken on the constitutionality of the Defense of Marriage Act, which, as the very filing the panel cited makes clear, presents very different issues from the question of military policy at issue here. The panel's misunderstandings warrant reconsideration to permit Congress's orderly procedure for repealing

§ 654 again to control the process for effecting a major change in personnel policies governing 2.2 million men and women in uniform. *See* Ninth Cir. R. 27-10(a)(3).

ARGUMENT

A. The Panel Has Improperly Truncated The Orderly Process Congress Established For Repealing § 654 In The Don't Ask, Don't Tell Repeal Act Of 2010.

1. The panel's decision to revive the worldwide injunction against enforcement of § 654 is contrary to the Supreme Court's consistent practice, recognized by the prior motions panel, of granting a stay pending appeal of an injunction holding unconstitutional and preventing enforcement of an Act of Congress. *See* ER 300 (citing *Bowen* v. *Kendrick*, 483 U.S. 1304 (1987) (Rehnquist, J., in chambers) (noting that "[a]cts 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."); *Turner Broad. Sys., Inc.* v. *FCC*, 507 U.S. 1301, 1302 (1993) (Rehnquist, J., in chambers) (observing that an Act of Congress is "presumptively constitutional" and, "[a]s such, it 'should remain in effect pending a

final decision on the merits by this Court'") (quoting *Marshall* v. *Barlow's, Inc.*, 429 U.S. 1347, 1348 (1977) (Rehnquist, J., in chambers)).[1]

2. The grounds for keeping the stay in place are even stronger today than they were when this Court initially entered the stay. In December 2010, after holding hearings and considering the investigations and conclusions of the Department of Defense's Comprehensive Review Working Group, Congress enacted the Repeal Act. The statute reflects Congress's judgment that repeal needed to be carefully planned and implemented, and that it should occur only after

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[1] *United States* v. *Comstock*, No. 08A863 (Apr. 3, 2009) (order of Roberts, C.J.) ("The presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of applicants in balancing hardships.") (quoting *Walters* v. *National Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers)); *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *Coalition for Economic Equity* v. *Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("it is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined"). Because of this well-recognized harm, "[i]n virtually all of these cases the Court has also granted a stay if requested to do so by the Government." *Bowen*, 483 U.S. at 1304 (Rehnquist, J., in chambers).

the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff certify that "the Department of Defense has prepared the necessary policies and regulations" for repeal, and that repeal "is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces." Pub. L. No. 111-321, § 2(b)(2)(B), (C), 124 Stat. at 3516 (2010). The order lifting the stay circumvents this orderly process in its final and critical stages.

Congress provided for repeal of § 654 mere months after the district court had entered its worldwide injunction against enforcement of § 654; after this Court had stayed that injunction in November 2010, based on its conclusion that a precipitous change would cause significant harm; and after the Supreme Court later that month left this Court's stay undisturbed. Congress enacted the Repeal Act against the backdrop of those court orders maintaining the status quo, repeatedly citing the fact that the Act "saves the military, as Secretary Gates has said over and over again, from facing an order from a court that forces the military to do this immediately." 156 Cong. Rec.

S10,654 (daily ed. Dec. 18, 2010) (statement of Sen. Lieberman).[2] Congress also relied on the report issued in November 2010 by the Department of Defense's Comprehensive Review Working Group. *See* 156 Cong. Rec. S10,651 (daily ed. Dec. 18, 2010) (statement of Sen. Udall); *id.* at S10,659 (statement of Sen. Durbin). As the government's opening brief explained, that report concluded that repeal of § 654 posed a low risk of harming military effectiveness, provided it is implemented in a thoughtful and deliberate fashion. Gov. Br. 10-12; *see* Hummer Decl. ¶¶8-9. And Congress acted only after receiving assurances from the Secretary of Defense that he was "not going to certify that the military is ready for repeal until he is satisfied with the advice of the service chiefs that we have mitigated, if not eliminated, to the extent possible, risks to combat readiness, to unit cohesion and

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[2] *See also* 156 Cong. Rec. S10,690 (statement of Sen. Carper) (daily ed. Dec. 18, 2010) (Repeal Act "implement[s] this repeal of don't ask, don't tell in a thoughtful manner rather than to have the courts force them into it overnight"); *id.* at S10,659 (statement of Sen. Durbin) ("Congress or the courts. That is the choice."); *id.* at E2,178 (statement of Rep. Cummings) (noting that "the courts have become involved" and that "Secretary Gates has warned that judicial repeal will put an administrative burden on the Department of Defense, and has asserted that Congressional action is most favorable").

effectiveness." 156 Cong. Rec. S10,650 (daily ed. Dec. 18, 2010) (statement of Sen. Levin); *see id.* S10,652 (statement of Sen. Webb) (noting assurances by Secretary Gates that "repeal would contemplate a sequenced implementation for the provisions for different units in the military as reasonably determined by the service chiefs, the combatant commanders, in coordination with the Secretary of Defense and Chairman of the Joint Chiefs").

The Department of Defense has worked steadfastly over the last six months to prepare the necessary policies and regulations to effectuate repeal, as required by § 2(b)(2)(B) of the Repeal Act, and to train 2.2 million Service members, including senior leadership, the Chaplain Corps, and the judge advocate community on the implications of repeal. Hummer Decl. ¶18. It is anticipated that certification will be presented to Defense Department senior leadership by the end of July or early in August. Hummer Decl. ¶11. Although enormous progress toward repeal has been made, the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff must still certify that repeal would be "consistent with the standards of military readiness,

military effectiveness, unit cohesion, and recruiting and retention in the Armed Forces." Repeal Act § 2(b)(2)(C), 124 Stat. at 3516. The panel was incorrect to assume that, because the process is far along, the government's interest in adhering to that process is reduced.

Most fundamentally, reinstatement of the injunction fails to preserve the considered judgments of the political Branches about the best way to end § 654. The very point of the process established in the Repeal Act was that a smooth and effective transition would result from decisions by the military leadership, implemented in the manner those military leaders thought most appropriate. Service members are most likely to embrace changes ordered by the highest levels of their chain of command, and accompanied by consistent and credible guidance from their commanding officers. In other words, the "transition will best be implemented if the military 'owns' the process of repeal." Hummer Decl. ¶23.

Reinstatement of the injunction also denies to military commanders and leaders in the field the 60-day period Congress provided after certification to complete the transition before repeal is

effective. That 60-day period is especially important to ensure that leaders—especially those most directly engaged with soldiers, sailors, airmen, and Marines—will have the time they expected to prepare themselves and those under their command for any challenges they may face after repeal. Hummer Decl. ¶22.

Thus, by ordering an immediate lifting of the stay, the Court has not only enjoined an Act of Congress, but has placed itself in competition with the Commander in Chief, acting pursuant to express authorization by Congress, concerning the implementation of this significant change in policy.

B. The Government Argues In Its Appeal That It Is Likely To Succeed On The Merits.

1. The motions panel lifted the stay based on its understanding that the government has abandoned defense of 10 U.S.C. § 654 and hence has no likelihood of success on the merits. That is incorrect. Today, the government is in this case filing a letter in response to an order of the Court requesting further information about the government's position on whether § 654 is constitutional. As that letter explains, in this appeal, the question whether plaintiff is entitled to

prospective relief against enforcement of § 654 turns on the constitutionality of the statute as in effect today, following enactment of § 2(c) of the Repeal Act. Ltr. Br. 1-2; *see Miller* v. *French*, 530 U.S. 327, 347 (2000). When the district court ruled, § 654 existed as a stand-alone, inflexible instrument of permanent military policy. Section 2(c) of the Repeal Act changed § 654 to make it only an interim measure and an integral part of statutory provisions for the complete repeal of § 654 following an orderly process. That change in the law must be given effect on appeal, *see Miller*, 530 U.S. at 347, and it therefore is the constitutionality of § 2(c) of the Repeal Act, making § 654 applicable during an interim period of orderly transition, that is at issue on appeal. The government has consistently argued that it was within Congress's constitutional authority to provide for that orderly process.

As the government explained in its opening brief, "'judicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies." *Rumsfeld* v. *Forum for Academic & Institutional Rights*, *Inc.*, 547 U.S. 47, 58 (2006) (quoting *Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981)). All the courts of appeals

to have addressed the matter before the Repeal Act—including this Court—had sustained the constitutionality of § 654 against both substantive due process and First Amendment challenges, deferring to Congress's judgment that the Act was necessary to preserve military effectiveness. *See* 10 U.S.C. § 654(a)(15). The government argues on appeal in this case that "[i]t follows with even greater force" that Congress constitutionally determined in the Repeal Act that repeal should be made effective when the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff certify that elimination of the policy is consistent with unit cohesion and other elements of military effectiveness—the concerns to which the original enactment of § 654 was addressed—and that § 654 should remain in place in the interim. Gov. Br. 41. During this period, § 654 serves the more limited and plainly valid purpose of maintaining the status quo pending the President's certification and completion of the repeal process to ensure a smooth and successful transition. The government has, in short, defended the constitutionality of the statute as it presently applies—the only relevant issue in this suit for prospective relief. *See id.*; *see also* Gov. Br. 39-41; Reply Br. 7-10.

To the extent the Court believes that the case may present the question whether § 654 as originally enacted was constitutional, that question is moot; that version of the statute has been superseded by § 2(c) of the Repeal Act. Such a view of the case would render it all the more inappropriate for the Court to leave in place a worldwide injunction that effectively interrupts the orderly process for repeal that Congress established in the Repeal Act. *See* Ltr. Br. 5.

2. The panel also based its decision on the fact that "the United States has recently taken the position that classifications based on sexual orientation should be subjected to heightened scrutiny." Order 2 (citing Defs' Br. in Opp. To Motions To Dismiss, *Golinski* v. *U.S. Office of Pers. Mgmt.*, No. 3:10-257 (N.D. Cal. July 1, 2011)). In challenges to the Defense of Marriage Act, 1 U.S.C. § 7, the government has indeed taken the position that heightened scrutiny applies under equal protection principles. As the government's briefs in this appeal explain, however, constitutional scrutiny in the military context is more deferential than in the civilian context. *See* Gov. Br. 39; Reply Br. 7-10. Indeed, in the district court *Golinksi* brief cited by the panel, the government expressly noted that "[c]lassifications in the military

context . . . present different questions from classifications in the civilian context" and that "the military is not involved" in that challenge to the Defense of Marriage Act. Defs' Br. in Opp. at 5 n.4, *Golinski*, No. 3:10-257 (N.D. Cal. July 1, 2011). The government's defense of § 654, as made applicable during this transition period by § 2(c) of the Repeal Act, is thus fully consistent with its position in cases challenging the Defense of Marriage Act. *See Rostker*, 453 U.S. at 70 (rejecting equal protection challenge to male-only draft); *Goldman* v. *Weinberger*, 475 U.S. 503, 507 (1986) (rejecting free exercise challenge to military-uniform policy).

3. Even apart from the constitutional merits, the government's arguments that plaintiff lacks standing and that the district court's sweeping injunction is improper under established principles independently support the likelihood that the government will succeed on its appeal in any event. *See* Gov Br. 26-37, 43-47; Reply Br. 10-23. In dissolving the stay, the panel did not address either of those threshold arguments, but both provide strong, independent support for reversal.

Log Cabin's basis for standing is particularly weak: as the

government's briefs explain, Log Cabin asserts no injury to itself, but only injuries to an "honorary" member of its organization, J. Alexander Nicholson, who has long since left the military, and an unnamed John Doe who has long served in the military without any indication that § 654 has been or will be enforced against him. Gov. Br. 27. Log Cabin does not contend that Nicholson intends to return to the military and, in any event, Nicholson is not a Log Cabin member on whose behalf Log Cabin may sue. Reply Br. 11-14. The government does not know the identity of the second individual, and there is no indication that he is at risk of discharge under § 654 (assuming that he even remains a member of both the military and Log Cabin at this time). Reply Br. 18-19. As a matter of law, neither of those individuals has suffered any cognizable injury that would be redressed by the solely prospective relief sought in this suit.

Moreover, even if plaintiff were able to establish standing to sue on behalf of these two purported members, the district court erred in awarding what was essentially classwide relief in a case that is not a class action. The constitutional judgment of one district court in a case involving one organization suing on behalf of two individuals should not

and cannot have worldwide binding force against the federal government. *See* Gov't Br. 43-47. When a district court entered a similar militarywide injunction in a facial constitutional challenge to the prior, more restrictive permanent military regulations regarding gays and lesbians, the Supreme Court stayed the portion of the injunction that "grant[ed] relief to persons other than" the named plaintiff. *Dep't of Defense* v. *Meinhold*, 510 U.S. 939 (1993). This Court subsequently reversed the district court's decision to enter a militarywide injunction, instead narrowing the injunction to the named plaintiff. *Meinhold v. Dep't of Defense*, 34 F.3d 1469, 1480 (9th Cir. 1994). The Court explained that "[a]n injunction 'should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.'" *Id.* (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979)). As in *Meinhold*, the Court's worldwide and militarywide injunction goes far beyond any relief to which plaintiff could plausibly be entitled on behalf of the single, unnamed member it has been able to identify who is actually in the military. *Id.* Reversal is appropriate on that basis alone, especially since the sweeping injunction bars enforcement of a duly enacted Act of Congress on constitutional

grounds.[3]

CONCLUSION

For the foregoing reasons, the Court should reconsider its decision to lift the stay pending appeal, reinstate that stay, and permit the orderly process for repealing § 654 to resume. We also request that the Court enter a temporary administrative stay of the injunction while it considers this motion.

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[3] Quite aside from the impropriety of extending relief to persons who are not parties to this case, the balance of equities strongly favor the military, and the presumptive constitutionality of an Act of Congress, as against the single unnamed individual who has not shown any likelihood of irreparable injury. And Congress has determined the relevant public interest in § 2(c) of the Repeal Act by determining that an orderly transition is promoted by having § 654 apply on an interim basis pending completion of repeal.

Respectfully submitted,

TONY WEST
Assistant Attorney General

ANDRÉ BIROTTE JR.
United States Attorney

ANTHONY J. STEINMEYER
(202) 514-3388
AUGUST E. FLENTJE
(202) 514-3309
/s/ Henry Whitaker
HENRY WHITAKER
(202) 514-3180
Attorneys, Appellate Staff
Civil Division, Room 7256
Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530

JULY 2011

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing emergency reconsideration motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on July 14, 2011.

I certify as well that on that date I caused a copy of this emergency reconsideration motion to be served on the following counsel registered to receive electronic service. I also caused a copy to be served on counsel via electronic mail.

Dan Woods (dwoods@whitecase.com)
(213) 620-7772
Earle Miller (emiller@whitecase.com)
(213) 620-7785
Aaron Kahn (aakahn@whitecase.com)
(213) 620-7751
White & Case LLP
633 West Fifth Street, Suite 1900
Los Angeles, CA 90071-2007

/s/ Henry Whitaker
Henry C. Whitaker

DECLARATION OF MAJOR GENERAL STEVEN A. HUMMER

I, Major General Steven A. Hummer, declare as follows:

1. I have served in the United States Marine Corps for 37 years and am an active duty Major General.

2. I am currently Chief of Staff of the Repeal Implementation Team, a component of the Office of the Under Secretary of Defense for Personnel and Readiness. The Repeal Implementation Team is responsible for planning, coordination, and implementation of the repeal of 10 U.S.C. § 654, and related policies, consistent with the terms of "The Don't Ask, Don't Tell Repeal Act of 2010" (Repeal Act). This means that I am responsible for coordinating the preparation of the Armed Forces for this very important change in personnel policy.

3. On October 12, 2010, the U.S. District Court for the Central District of California issued a permanent injunction against "enforcing or applying the 'Don't Ask, Don't Tell' Act and implementing regulations" and ordered the government "immediately to suspend and discontinue any investigation, or discharge, separation, or other proceeding, that may have been commenced under the 'Don't Ask, Don't Tell' Act, or pursuant to 10 U.S.C. § 654 or its implementing regulations."

4. On November 1, 2010, the U.S. Court of Appeals for the Ninth Circuit stayed enforcement of the injunction.

5. On December 22, 2010, President Obama signed into law the Repeal Act, which provided a congressionally established process to ensure that § 654 is repealed in an orderly manner consistent with military necessity.

6. On July 6, 2011, a panel of the U.S. Court of Appeals for the Ninth Circuit lifted the November 1, 2010 stay, noting that "the process of repealing Section 654 is well underway, and the preponderance of the Armed Forces are expected to have been trained by mid-summer[]" and that "[t]he circumstances and balance of hardships have changed[.]"

The Path to Certification

7. The Legislative and Executive branches of government concluded, as reflected in passage of the Repeal Act, that implementation of repeal should be done in a careful and deliberate

manner, only after certification by the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff that the post-repeal architecture is consistent with military necessity.

8. The Department of Defense Comprehensive Review Working Group (Working Group) was established by the Secretary of Defense to "understand all issues and potential impacts associated with repeal of the law and how to manage implementation [of repeal] in a way that minimizes disruption to a force engaged in combat operations and other demanding military activities around the globe." Over a nine-month period, the Working Group "solicited the views of nearly 400,000 active duty and reserve component Service members with an extensive and professionally-developed survey, which prompted 115,052 responses—one of the largest surveys in the history of the U.S. military."

9. Based in part on this research, the Working Group provided recommendations for the steps needed before repeal could become effective. My group, the Repeal Implementation Team, has been charged with implementing these recommended steps.

10. In the Repeal Act, Congress also recognized the need for careful planning. The Repeal Act specifies that repeal will take effect 60 days *after* the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff certify that "the Department of Defense has prepared the necessary policies and regulations [to effectuate repeal,]" and that "implementation of necessary policies and regulations . . . is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces."

11. At this time, the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff have not yet certified that repeal is consistent with these standards, though it is anticipated that certification will be presented for their decision in a matter of weeks, by the end of July or early in August. Just last week, the Secretaries of the Military Departments, Chiefs of the Military Services, and Commanders of the Combatant Commands submitted their written advice regarding the status of their preparations for repeal and ability to satisfy the certification standards set by Congress.

12. An immediate injunction would require the Armed Forces to suspend all enforcement of § 654 before the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff have made the certification, and prior to the conclusion of the 60-day period specified by Congress.

Efforts to Ensure Appropriate Enforcement

13. In recent years, and especially since passage of the Repeal Act, the number of discharges under 10 U.S.C. § 654 has fallen significantly. In 2008, 619 discharges occurred; in 2009, that number fell to 428; in 2010, 250 discharges occurred; and so far in 2011, only 1 Service member has been discharged pursuant to § 654. (Data are from the Department of Defense Manpower Data Center.)

14. On October 21, 2010, Secretary Gates issued a memorandum requiring that all separations under § 654 be personally approved by "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."

15. Although the Military Departments have continued to enforce the law as required, they have done so in a way that ensures that discharges only occur after a careful and detailed process.

16. Since passage of the Repeal Act, only one discharge has occurred, and that Service member requested an expedited discharge notwithstanding the Repeal Act.

The Ongoing Efforts of the Department of Defense to Implement Repeal

17. Meanwhile, the orderly process laid out by Congress in the Repeal Act is nearly complete, and proceeding without any significant difficulties.

18. The Department of Defense has worked steadfastly over the last six months to prepare the hundreds of pages of necessary revisions to policies and regulations in connection with repeal, and to train 2.2 million Service members, including separate training for senior leadership, the Chaplain Corps, and the judge advocate community on the implications of repeal. As part of this process, the Department of Defense has undertaken a comprehensive and thorough review of regulations and policies to identify those that require revision, and to ensure that, going forward, policies and regulations will be neutral with respect to sexual orientation. The Repeal Implementation Team, the Services, and the General Counsel of the Department of Defense are completing their review of 89 separate regulations and policies that would be adopted on the effective date of repeal. Implementation of these policies will only occur after certification and repeal of the statute.

19. In addition to regulatory changes, the Department crafted training materials to educate the Force on the impact of repeal. Training of 2.2 million Service members both within the U.S.

and deployed abroad has been ongoing for the last several months, and is nearly, though not yet, complete. As part of the training, the Department was not only providing information to the Force, but also collecting information and feedback from soldiers, sailors, airmen and Marines.

20. It is the general consensus of the Military Departments that this thoughtful and steady approach to educating and preparing the force and revising policies and regulations – in short, the method by which implementation of repeal is proceeding – laid the groundwork for a smooth and orderly transition. As this court's July 6, 2011 opinion notes, the majority of the Force has now received training, though the process of training is ongoing. The necessary policies and regulations have been prepared. The certification process is not complete, but it is in its last weeks.

21. The various measures instituted by the Department of Defense to implement the Repeal Act – including extensive training (and creation of training materials) and revisions of numerous written policies and regulations – have been designed to facilitate a smooth and orderly transition. Imposing an immediate halt to enforcing § 654 would supplant and contradict the judgment of the Department of Defense about the proper sequencing and timing of these measures in preparation for the change in policy.

22. In the Department's judgment, it is important for the messages communicated during training to remain consistent in the last weeks leading up to repeal, and that DoD counsel those leaders, especially those who will have the most direct and regular engagement with soldiers, sailors, airmen and Marines as we implement repeal and transition to a post-repeal environment. As the Working Group Report noted, leadership is the single most critical element of the repeal process. The sequencing and timing of the process was designed to ensure that leaders, including some of the most junior non-commissioned officers, platoon leaders, first sergeants, and squadron commanders, would have time to prepare themselves and those under their command for any challenges they may face after repeal. They were told that they would have 60 days' advance notice before repeal would go into effect to facilitate that process.

23. Another important premise of the Repeal Act and DoD's implementation of it is that Service members see that the military and civilian leadership of the Department of Defense take the lead in implementing the repeal, as Congress intended. The Repeal Act places implementation squarely in the hands of the Department of Defense by conditioning repeal on the certification of senior members of the chain of command. As a result of my 37 years of

experience in the Marines, and the knowledge and experience I have gained through my role as Chief of Staff of the Repeal Implementation Team, I have concluded that transition will best be implemented if the military "owns" the process of repeal. In other words, the premise of the Act, as implemented, is that change from within the organization will be more effective than change imposed from outside the organization.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 14 day of July, 2011.

Steven A. Hummer
Major General, United States Marine Corps

U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, N.W., Rm: 7256
Washington, D.C. 20530-0001

Tel: (202) 514-3180
Fax: (202) 514-8151

July 14, 2011

Ms. Molly Dwyer
Clerk, United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *Log Cabin Republicans* v. *United States*, Nos. 10-56634, 10-56813

Dear Ms. Dwyer:

The government respectfully submits this letter brief pursuant to the Court's July 11, 2011 order, which directed the parties to show cause why this case should not be dismissed as moot, and inquired whether the government intends to report to Congress that it has declined to defend the constitutionality of a federal statute.

1. In questions 1 and 2 of the July 11 order, the Court has asked the government whether it intends to submit a report to Congress under 28 U.S.C. § 530D "outlining its decision to refrain from defending § 654," and if so when. The government does not intend to submit such a report because it has fully defended, and continues to defend, the constitutionality of 10 U.S.C. § 654, as it exists following enactment of the Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010), and therefore a report to Congress is not required under § 530D.

A motions panel of this Court recently lifted the stay pending appeal of the district court's worldwide injunction against enforcement of § 654, based in part on an apparent understanding that the government is not defending the constitutionality of the statute. As explained below, as well as in the attached

motion for reconsideration of the motions panel's decision, that understanding is incorrect.

In the Repeal Act, Congress established a statutory process for repealing 10 U.S.C. § 654. Repeal is effective 60 days after the Chairman of the Joint Chiefs of Staff, the Secretary of Defense, and the President certify that repeal would be consistent with military necessity. Repeal Act, §§ 2(b)(2)(C), 2(c), 124 Stat. at 3516. Until that time, § 654 remains in force by operation of § 2(c) of the Repeal Act, which provides that § 654 "shall remain in effect until such time that all of the requirements and certifications required by" the Repeal Act "are met." *Id.*

Section 2(c) of the Repeal Act does not immediately abrogate § 654, but it nonetheless works a significant and substantive change to that provision. In light of § 2(c), § 654 is now a transitional provision that remains in force only until the Executive Branch completes the repeal process. The Repeal Act entrusts to the President, as Commander in Chief, and to the Secretary of Defense and the Chairman of the Joint Chiefs of Staff the statutory authority to complete that process. After the enactment of the Repeal Act, § 654 serves only to facilitate a smooth and deliberate transition in policy by preserving the status quo while careful and thorough preparations for repeal are made, consistent with the needs of this Nation's military and through the action of the military chain of command.

The question whether plaintiff is entitled to the prospective relief it seeks against enforcement of § 654 turns on the constitutionality of the statute as it exists today following enactment of § 2(c) of the Don't Ask, Don't Tell Repeal Act of 2010. *See Miller* v. *French*, 530 U.S. 327, 347 (2000). Section 2(c) of the Repeal Act changed § 654 to make it only an interim measure and an integral part of an orderly process for repeal of that provision. When the district court ruled, § 654 existed as a stand-alone, inflexible instrument of permanent military policy. That change in the law must be given effect on appeal, *see Miller*, 530 U.S. at 347, and it therefore is the constitutionality of § 2(c), making § 654 applicable during an interim period of orderly transition, that is at issue on appeal. The government has consistently argued that it was within Congress's constitutional authority to provide for an orderly process.

As the government explained in its opening brief, "'judicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies." *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 58 (2006) (quoting *Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981)). Noting that all the courts of appeals to have addressed the matter before the Repeal Act—including this Court—had sustained the constitutionality of § 654 against both substantive due process and First Amendment challenges, the government has argued that "[i]t follows with even greater force that Congress constitutionally determined in the

Repeal Act that an orderly transition in policy justified maintaining the status quo and leaving § 654 in place while the Department of Defense completes the necessary preparations for repeal." Gov. Br. 41; *see also* Gov. Br. 39-41; Reply Br. 7-10. The government is, in short, fully defending the constitutionality of the statute as it presently exists.

To be sure, before enactment of the Repeal Act, the question this case presented—and the question the district court decided—was whether 10 U.S.C. § 654 was constitutional as originally enacted. But that is no longer the question in this case, in which the plaintiff seeks only prospective relief. The government has not addressed the question the district court decided because the statute the district court considered has been changed, fundamentally altering the legal lens through which a Court must evaluate the constitutionality of the statute. Rather, the government has addressed the only question as to which there is any live controversy remaining: whether the statute as it presently exists is constitutional. The question for the Court, and the question that was addressed in the government's briefs, is whether it is constitutional for Congress to maintain the status quo while preparations are underway for smoothly transitioning to a post-§ 654 regime. The government therefore has not "refrain[ed] (on the grounds that the provision is unconstitutional) from defending . . . the constitutionality of any provision of any Federal statute." 28 U.S.C. § 530D(a)(1)(B)(ii). It has, rather, defended the constitutionality of the statute presently in effect.

2. Question 3 of the July 11 order directs the parties to show cause why this case should not be dismissed either immediately or when the President certifies that the conditions for repeal of § 654 have been satisfied. If the sole question before the Court is whether § 654 as originally enacted, and as it existed at the time of trial, is constitutional, then this case is moot, as explained in Section 3 of this letter brief. In the government's view, however, this case is not yet moot, because a live controversy remains regarding the constitutionality of the statute as it now exists. But even that controversy will become moot once repeal of § 654 becomes effective 60 days following the President's certification; and, once this case becomes moot, under the Court's established practice it would vacate the district court's judgment and global injunction, and remand with instructions for the district court to dismiss the complaint.

Although Congress has established a statutory process for repealing § 654, Congress provided for § 654 to remain in effect for the interim period to ensure an orderly, deliberate, and smooth transition in policy. Section 654 is still in effect to that limited extent, and "shall remain in effect" until 60 days after the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff certify that the military has completed the preparations necessary for repeal. 124 Stat. at 3516. Plaintiff's facial constitutional challenge to § 654 remains live until that date.

Once repeal becomes effective, however, this case will be moot. Repeal of a statute moots a facial constitutional challenge to that law. *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. Producers & Distributors Ass'n* 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 Noatak* v. *Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994)). But there is no reasonable likelihood, much less a virtual certainty, that 10 U.S.C. § 654 will be reenacted after repeal becomes effective.

This Court's "established practice" when a case becomes moot on appeal is to "dismiss the appeal as moot, vacate the judgment below and remand with a direction to dismiss the complaint." *Pub. Utilities Comm'n* v. *FERC*, 100 F.3d 1451, 1461 (9th Cir. 1996) (internal quotation marks and citation omitted); *see Camreta* v. *Greene*, 131 S. Ct. 2020, 2034-35 (2011) ("When a civil suit becomes moot pending appeal" the Court's "'established' . . . practice in this situation is to vacate the judgment below" (quoting *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)); *see also Doe* v. *Madison Sch. Dist. No. 321*, 177 F.3d 789, 799 (9th Cir. 1999). Congress's decision to enact the Repeal Act is a classic example of a circumstance that justifies vacatur, preventing the government from securing reversal of the district court's legally flawed worldwide injunction. *See, e.g.*, *Helliker*, 463 F.3d at 879 (noting that vacatur is appropriate where the executive branch's appeal of an adverse decision is mooted by the passage of legislation); *American Bar Ass'n* v. *FTC*, 636 F.3d 641, 649 (D.C. Cir. 2011) (vacating adverse judgment against the Federal Trade Commission because congressional legislation made the case moot); *Rio Grande Silvery Minnow* v. *Bureau of Reclamation*, 601 F.3d 1096, 1131 (10th Cir. 2010); *Nat'l Black Police Ass'n* v. *Dist. of Colum.*, 108 F.3d 346, 353 (D.C. Cir. 1997) (vacatur normally appropriate "when legislative action moots a case and the government seeks vacatur").[1]

The question of mootness and vacatur, however, will not be ripe until 60 days after the certification process concludes, and the Court need not address it at this time. As the government has argued in prior filings, the impending mootness of this case would fully warrant this Court's holding the appeal in abeyance and removing the case from the oral argument calendar.

3. Although, as explained above, the government believes that this case has not yet become moot, the government notes that if the only question before the

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[1]Once repeal occurs, the judgment awarding injunctive and declaratory relief should in any event be vacated on equitable grounds.

Court is whether § 654, as it existed before the Repeal Act, was constitutional, Show Cause Order 2, then the case is indeed moot, and the Court should immediately vacate the district court's judgment, and remand for dismissal of the complaint.

The July 11 order formulates the issue on appeal as "whether the district court properly held that § 654 is unconstitutional," and understands the government as having abandoned defense of § 654. Show Cause Order 2. As explained above, the government disagrees: the application of § 654 was substantially altered by § 2(c) of the Repeal Act. Section 654 now exists only in conjunction with § 2(c), and is a different legal provision from the one the district court examined at trial.

Thus, if the issue before the Court is whether § 654 as it existed before the Repeal Act is constitutional, the case is moot because § 2(c) of the Repeal Act superseded the 1993 enactment that put § 654 in place. The Repeal Act provided that § 654 "shall remain in effect until such time that all of the requirements and certifications required by" the Repeal Act as a prerequisite to repeal of § 654 have occurred. 124 Stat. at 3516. Before enactment of the Repeal Act, by contrast, § 654 had no defined end point, and the Executive Branch lacked statutory authority to alter the policy. Congress effectively transformed § 654 into a short-term preserver of the status quo while the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff determine whether critical military interests could be protected when that status quo is changed. The version of § 654 that the district court struck down no longer exists. The provision is now fundamentally different, and the district court never examined the constitutionality of the current provision.

If the question in this case were whether the district court correctly analyzed the constitutionality of that superseded statute, this case would be moot under the authorities the government has cited above. As the government explains in its attached Motion for Reconsideration, that view of the case would render it all the more inappropriate for the Court to leave in place a worldwide injunction that effectively interrupts the orderly process for repeal that Congress established in the Repeal Act—an Act whose constitutionality (including the constitutionality of keeping § 654 in effect for a transitional period) the district court never considered. Although, in the government's view, the question before this Court on appeal is whether the statute as it presently exists is constitutional, if the Court disagrees, the proper course would be to immediately vacate the district court's judgment and global injunction and remand with instructions to dismiss the complaint.

Respectfully submitted,

/s/ Henry Whitaker
Henry C. Whitaker
Attorney, Appellate Staff
Civil Division

cc: Dan Woods (by ECF)
White & Case LLP
633 West Fifth Street, Suite 1900
Los Angeles, CA 90071-2007