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

SUPPLEMENT TO GOVERNMENT'S CORRECTED EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR RECONSIDERATION OF ORDER LIFTING STAY OF WORLDWIDE INJUNCTION

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SUPPLEMENT TO GOVERNMENT'S CORRECTED EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR RECONSIDERATION OF ORDER LIFTING STAY OF WORLDWIDE INJUNCTION

The government respectfully submits this response to the panel's July 15, 2011, order, in which the panel requested that the government "supplement their motion for reconsideration to address why they did not present in their May 20, 2011, opposition to the motion to lift the stay the detailed information now presented in the motion for reconsideration." July 15 Order 3. In that order, the Court referred to three pieces of information: "the representation that only one servicemember has been discharged under 10 U.S.C. § 654 since the passage of the Repeal Act; the representation that the Secretaries of the Military Departments, Chiefs of the Military Services, and Commanders of the Combatant Commands have recently submitted their written advice regarding the status of their preparation for repeal and ability to satisfy the certification standards set by Congress; and the representation that repeal certification will be presented to the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff in a matter of weeks, by the end of July or early in August." July

15 Order 2.[1]

The additional information was not provided in the government's May 20 filing because the timing of the presentation of the certification decision to senior leaders of the military had not yet been decided, because the submission of written advice had not yet occurred, and because Log Cabin's motion to vacate the stay had focused on other matters, particularly its contention that the government could no longer show a likelihood of success on the merits. The additional information, however, supports granting the government's request for reconsideration of the Court's order lifting the stay. *See* Ninth Cir. R. 27-10(a)(3).

1. The government explained in its May 20, 2011, opposition that the process for implementation of the Repeal Act was "well underway," that there was only a "short period of time until the process for repealing the statute is completed," that the preponderance of the

[1]The government's reconsideration motion explained that "it is expected that the required certification . . . will be presented for decision to the Chairman of the Joint Chiefs of Staff and the Secretary of Defense in late July or early August." Recon. Mot. 3; *see id* at 10. It is expected that, if the Chairman and Secretary certify at that time, the certification decision will promptly be presented to the President.

armed forces were expected to "have been trained by mid-summer," and that the repeal was expected to become "effective later this year." Opp. to Mot. to Vacate Stay 2, 4, 9. But at that time the implementation process had not yet advanced to the point where the government could provide the particular details that were contained in its July 14 motion for reconsideration.

In the nearly two months since the government's May 20 filing, the careful and deliberate process for repeal has proceeded in the manner and according to the time-frame described on May 20. Since the time of the filing on May 20, approximately one million Service members have received training. Hummer July 18 Decl. ¶5. Within the last two weeks, the Secretaries of the Military Departments, Chiefs of the Military Services, and Commanders of the Combatant Commands have submitted their written advice regarding the status of their preparation for repeal and ability to satisfy the certification standards set by Congress. Hummer July 14 Decl. ¶11; Hummer July 18 Decl. ¶4. And it was after May 20 that it became possible to specify a narrow time-frame for the presentation of certification for decision to

the Secretary of Defense and the Chairman of the Joint Chiefs of Staff. Hummer July 18 Decl. ¶4.

In the Repeal Act, Congress made clear that the orderly process for repealing 10 U.S.C. § 654 was to be meaningful, that repeal should not occur until top leaders of the military could certify that the necessary policies and regulations were in place, and that their implementation would be consistent with military necessity. *See* Repeal Act § 2(b)(2)(C), 124 Stat. at 3516. Consistent with Congress's direction, the Department of Defense's process for implementing repeal has been thorough and ongoing. Hummer July 18 Decl. ¶4. The completion of each step has enabled the Department to update plans and expectations for timing of the remaining steps.

2. With regard to discharges, the government's January motion to hold this appeal in abeyance after enactment of the Repeal Act explained that the Secretary of Defense had implemented a new and more rigorous process for evaluating discharges under § 654. Abeyance Mot. 3 (attached). Under the new process, any discharge under § 654 now must be approved at the highest levels of the Department of

Defense. *Id.*; *accord* Hummer July 18 Decl. ¶6.

The government did not understand Log Cabin's motion to vacate the stay to contend that significant numbers of Service members had been discharged after enactment of the Repeal Act. As a result, the government did not in its May 20 filing provide details regarding the number of discharges.

As of the time of the government's May 20 filing, the new procedures had resulted in only one discharge after enactment of the Repeal Act, although some discharge proceedings were in process. As the Court's July 15 order notes, the government's motion for reconsideration explains that one Service member has been discharged since enactment of the Repeal Act, and that Service member requested expedited processing of that discharge. Hummer July 14 Decl. ¶¶13, 16; Hummer July 18 Decl. ¶6. To date, any other Service members who have been approved for discharge since passage of the Repeal Act are those who, despite being advised about enactment of the Repeal Act, have continued to press for their own separation. Hummer July 18 Decl.¶6.

In short, discharge proceedings for Service members under § 654 now follow the more rigorous process established last fall that requires additional review, and that process would continue to govern any discharge proceedings until repeal becomes effective.

3. In its motion, Log Cabin focused on urging the Court to vacate the stay on the ground that the government had abandoned its defense of the constitutionality of § 654 as it currently exists. Mot. to Vacate Stay 1, 5-11 (attached). Although Log Cabin reiterated its earlier arguments that staying the district court's injunction would cause ongoing harm, including the continuation of discharge proceedings, *see* Mot. to Vacate Stay 15, a prior motions panel of the Court had already concluded that the balance of hardships warranted a stay, particularly in light of the Supreme Court's practice of granting a stay pending appeal when a district court declares an Act of Congress unconstitutional on its face. *See* ER 300-303. Log Cabin's motion did not argue that implementation of the Department's new, more rigorous process for evaluating discharges had somehow shifted the balance of hardships in its favor; that despite the new, more rigorous process

there was a significant number of discharges that had shifted the balance of hardships; or that there were any deficiencies in the repeal process that had done so. The government's May 20 opposition thus focused on demonstrating that the government has not in fact abandoned its defense of the constitutionality of the currently applicable statutory scheme, nor its other grounds for likely success on the merits. Opp. to Mot. to Vacate Stay 5-11; *see* Recon. Mot. 12-19.

This Court lifted the stay in part because it concluded that the circumstances and balance of hardships had changed. July 6 Order 2. The government's emergency motion for reconsideration has responded to this and other points in the Court's order, and accordingly has provided the Court with additional information concerning the repeal process and specificity concerning discharges. Reconsideration is warranted based on, among other things, the additional facts set forth in the motion for reconsideration, which as the Court's order partially granting a temporary stay notes, were not before the Court when it lifted the stay on July 6.

4. The government's May 20 opposition to the motion to vacate

also noted that, "[o]nce repeal becomes effective later this year," "this case and controversy will become moot," Opp. to Mot. to Vacate Stay 9, and cited the acknowledgment of that fact by the panel that had granted the initial stay in this case. *Id.* (citing ER 303 (Order granting stay Nov. 1, 2010)). The government explained that the expected mootness of this case supports denial of Log Cabin's request in the alternative to expedite oral argument, *id; see also* Abeyance Mot. 8, and that point is also set forth in the letter brief attached to the reconsideration motion.

CONCLUSION

For the foregoing reasons, as well as for the reasons advanced both in the government's reconsideration motion and in the letter brief attached to that reconsideration motion, the Court should reconsider its decision to lift the stay pending appeal, reinstate that stay, remove the case from the oral argument calendar, and permit the orderly process for repealing § 654 to resume.

Respectfully submitted,

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JULY 2011

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing supplement to the government's emergency reconsideration motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on July 18, 2011.

I certify as well that on that date I caused a copy of this supplement to the government's 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.

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/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 the 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. This declaration supplements the information provided in my declaration of July 15, 2011.

4. As of May 20, the careful and deliberate process of preparing for repeal, including training the force and preparing policy revisions, had not yet reached a point where there was sufficient information for Service leadership to make an informed assessment of their readiness for repeal, an assessment that would be critical to any decision to certify.

   a. Thus, as of May 20, the Secretary had not yet received the advice of the Secretaries of the Military Departments, Chiefs of the Military Services, and Commanders of the Combatant Commands regarding the status of their preparations for repeal and ability to satisfy the certification standards set by Congress. Those reports were received in the last two weeks.

   b. For the same reason, there was no anticipated date, as of May 20, for presenting certification for the decision of the Secretary of Defense and Chairman of the Joint Chiefs of Staff.

   c. The deliberate process that has been underway has now advanced to the point where we anticipate presenting certification to the Secretary of Defense and Chairman of the Joint Chiefs of Staff for their decision by late July or early August.

5. The pace of training began to accelerate rapidly in April, and since May 15, approximately 1,000,000 Service members have received training regarding the repeal of § 654.

6. In October 2010, the Under Secretary of Defense for Personnel and Readiness communicated that the Secretary of Defense had ordered that no discharges under § 654 should occur "without the personal approval of the secretary of the military department involved, and only in coordination with [the Under Secretary of Defense for Personnel and Readiness] and the General Counsel of the Department of Defense." That new process has been in place ever since. As mentioned in my previous declaration, only one Service member has been discharged under § 654 since passage of the Repeal Act, and that Service member requested an expedited discharge, notwithstanding the passage of the Repeal Act. To date, any other Service members who have been approved for discharge since passage of the Repeal Act are those who, despite being advised about the enactment of the Repeal Act, have continued to press for their own separation.

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

Executed this 18th day of July, 2011.

Steven A. Hummer

Major General, United States Marine Corps

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

MOTION TO HOLD APPEALS IN ABEYANCE

Defendants-Appellants/Cross-Appellees the United States *et al.* hereby move to suspend the briefing schedule and to hold these appeals in abeyance in light of the enactment of the Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321 (Repeal Act) (Attachment 1).

1. This case is a facial challenge to the constitutionality of 10 U.S.C. § 654, the statute entitled "Policy concerning homosexuality in the armed forces." Section 2(f) of the Repeal Act provides that, upon the effective date established by Section 2(b), 10 U.S.C. § 654 is stricken from the Code. The Section (b) effective date provision indicates that the repeal "shall take effect 60 days after the date" on

which the President transmits to Congress a certification by the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff that a number of requirements have been met. In light of this newly enacted legislation, suspension of the briefing schedule in this case and an order holding the appeals in abeyance is appropriate pending the certification process and effective date of the statute. If the Court grants this relief, the government will advise the Court within 90 days as to the status of the certification process set forth in the Repeal Act.

2. Plaintiff Log Cabin Republicans brought this suit in 2004 claiming that § 654 and its implementing regulations are facially invalid because they violate the First Amendment, as well as the rights to substantive due process and equal protection.

3. Following a trial, the district court held § 654 unconstitutional on its face as a violation of due process and the First Amendment. The court then entered a permanent worldwide injunction barring the United States and the Secretary of Defense, as well as their agents, servants, officers, employees, attorneys, and all persons acting in participation or concert with them or under their direction or command,

"from enforcing or applying" § 654 "and implementing regulations, against any person under their jurisdiction or command." Judgment and Permanent Injunction ¶ 2 (Doc. Ent. 252, Oct. 12, 2010). The court also ordered the government "immediately to suspend and discontinue any investigation, or discharge, separation, or other proceeding, that may have been commenced under the" statute and its implementing regulations. *Id.* at ¶ 3.

4. Following the district court's decision, the Secretary ordered that "to further ensure uniformity and care in the enforcement" of § 654, "no military member shall be separated pursuant to 10 U.S.C. § 654 without the 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." Memo. from Secretary of Defense (Oct. 21, 2010) (Attachment 2). The government also sought a stay of the district court injunction and filed a notice of appeal. On October 20, 2010, this Court issued a temporary stay of the injunction, while it gave

full consideration to the government's stay motion and Log Cabin's response.

5. On November 1, 2010, this Court (O'Scannlain and Trott, JJ.; W. Fletcher, J., dissenting in part) granted the government's motion for a stay pending appeal. In doing so, the Court noted, *inter alia*, the government's representation that giving the district court's injunction "immediate worldwide effect" would "seriously disrupt ongoing and determined efforts by the Administration to devise an orderly change of policy." Stay Order 2. The Court further noted the government's position that "successfully achieving this goal will require . . . the preparation of orderly policies and regulations to make the transition" and that "a precipitous implementation of the district court's ruling will result in 'immediate harm' and 'irreparable injury' to the military." *Id.* In addition, the Court relied upon the government's determination that "a successful and orderly change . . . will not only require new policies, but proper training and the guidance of those affected by the change," and the Court found persuasive the government's position that "'[t]he district court's injunction does not permit sufficient time for such

appropriate training to occur, especially for commanders and service-men serving in active combat.'" *Id.* at 2-3. The Court ultimately concluded that "the public interest in ensuring orderly change of this magnitude in the military . . . strongly militates in favor of a stay." *Id.* at 6.

6. On November 12, 2010, the Supreme Court denied Log Cabin's application to vacate the stay pending appeal, with no recorded dissent. 2010 WL 4539545 (Justice Kagan not participating).

7. The parties then jointly moved in this Court to establish an expedited briefing schedule and argument. This Court partially granted that motion on December 1, 2010, in an order making the government's opening brief due January 24, 2011, Log Cabin's answering brief due February 22, and the government's reply brief due March 8.

8. As noted above, on December 22, 2010, the President signed into law the Don't Ask, Don't Tell Repeal Act of 2010. Echoing the concerns that this Court expressed in staying the appeal, the Act establishes an orderly process for repeal that is contingent on a

certification by the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff that three conditions have been met: First, that they have each "considered the recommendations contained in the report [of the Department of Defense's Comprehensive Review Working Group[1]] and the report's proposed plan of action"; second, "[t]hat the Department of Defense has prepared the necessary policies and regulations to exercise the discretion provided by the" Repeal Act; and finally, "[t]hat the implementation of [these] necessary policies and regulations . . . is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces." Repeal Act § 2(b).

Repeal of § 654 will become effective 60 days after the date on which the certification process set forth in Section 2(b) of the Repeal Act is complete. Until such time, the Repeal Act expressly provides that § 654 "shall remain in effect." Repeal Act § 2(c).

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

Upon passage of the Repeal Act, the Secretary of Defense pledged that "[t]he Department will immediately proceed with the planning necessary to carry out this change carefully and methodically, but purposefully." Memo. from Secretary of Defense (Dec. 22, 2010) (Attachment 3). The Secretary stated that he and the Chairman of the Joint Chiefs of Staff will "approach this process deliberately and will make such certification only after careful consultation with the military service chiefs and our combatant commanders, and when [they are] satisfied that the conditions for certification set out in the statute have been met." *Id.* The Secretary also "endorse[d] the recommendations of the Comprehensive Review Working Group, which will provide the road map for a successful implementation." *Id.*

9. In granting a stay pending appeal, this Court recognized the necessity of an orderly process in the Executive and Legislative Branches regarding any repeal of § 654. Since that time, that process has been proceeding in a timely manner in both Branches. This Court should now suspend the briefing schedule and hold the case in abeyance to allow that process to continue to completion.

10. The enactment of the Repeal Act, while it has left § 654 in place until the effective date of the new law, has resulted in a significant change of law, effectively legislating the orderly process that this Court's stay of the injunction allows to take place. Judicial economy, and respect for determination by the political branches that the orderly process mandated by the Repeal Act is necessary and appropriate to ensure that military effectiveness is preserved are compelling reasons for holding the briefing in abeyance while the orderly process is allowed to proceed to completion. Indeed, if the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff make the certification contemplated by the Repeal Act, the challenge to § 654 will be moot, and the completion of the review process mandated by the Repeal Act may make it unnecessary to ever consider the impact of the enactment of the Repeal Act on the basis for the decision below.

11. The government is prepared to advise the Court within 90 days as to the status of the certification process.

12. Counsel for the government contacted counsel for Log Cabin Republicans, Dan Woods, to advise him of this motion. Mr. Woods stated that Log Cabin Republicans would oppose this motion.

For the foregoing reasons, this Court should order further proceedings in these appeals held in abeyance.

Respectfully submitted,

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DECEMBER 2010

--H.R.2965--

H.R.2965

One Hundred Eleventh Congress

of the

United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday,

the fifth day of January, two thousand and ten

An Act

To amend the Small Business Act with respect to the Small Business Innovation Research Program and the Small Business Technology Transfer Program, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Don't Ask, Don't Tell Repeal Act of 2010'.

SEC. 2. DEPARTMENT OF DEFENSE POLICY CONCERNING HOMOSEXUALITY IN THE ARMED FORCES.

(a) Comprehensive Review on the Implementation of a Repeal of 10 U.S.C. 654-

(1) IN GENERAL- On March 2, 2010, the Secretary of Defense issued a memorandum directing the Comprehensive Review on the Implementation of a Repeal of 10 U.S.C. 654 (section 654 of title 10, United States Code).

(2) OBJECTIVES AND SCOPE OF REVIEW- The Terms of Reference accompanying the Secretary's memorandum established the following objectives and scope of the ordered review:

(A) Determine any impacts to military readiness, military effectiveness and unit cohesion, recruiting/retention, and family readiness that may result from repeal of the law and recommend any actions that should be taken in light of such impacts.

ATTACHMENT 1

(B) Determine leadership, guidance, and training on standards of conduct and new policies.

(C) Determine appropriate changes to existing policies and regulations, including but not limited to issues regarding personnel management, leadership and training, facilities, investigations, and benefits.

(D) Recommend appropriate changes (if any) to the Uniform Code of Military Justice.

(E) Monitor and evaluate existing legislative proposals to repeal 10 U.S.C. 654 and proposals that may be introduced in the Congress during the period of the review.

(F) Assure appropriate ways to monitor the workforce climate and military effectiveness that support successful follow-through on implementation.

(G) Evaluate the issues raised in ongoing litigation involving 10 U.S.C. 654.

(b) Effective Date- The amendments made by subsection (f) shall take effect 60 days after the date on which the last of the following occurs:

(1) The Secretary of Defense has received the report required by the memorandum of the Secretary referred to in subsection (a).

(2) The President transmits to the congressional defense committees a written certification, signed by the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff, stating each of the following:

(A) That the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff have considered the recommendations contained in the report and the report's proposed plan of action.

(B) That the Department of Defense has prepared the necessary policies and regulations to exercise the discretion provided by the amendments made by subsection (f).

(C) That the implementation of necessary policies and regulations pursuant to the discretion provided by the amendments made by subsection (f) is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces.

(c) No Immediate Effect on Current Policy- Section 654 of title 10, United States Code, shall remain in effect until such time that all of the requirements

and certifications required by subsection (b) are met. If these requirements and certifications are not met, section 654 of title 10, United States Code, shall remain in effect.

(d) Benefits- Nothing in this section, or the amendments made by this section, shall be construed to require the furnishing of benefits in violation of section 7 of title 1, United States Code (relating to the definitions of `marriage' and `spouse' and referred to as the `Defense of Marriage Act').

(e) No Private Cause of Action- Nothing in this section, or the amendments made by this section, shall be construed to create a private cause of action.

(f) Treatment of 1993 Policy-

(1) TITLE 10- Upon the effective date established by subsection (b), chapter 37 of title 10, United States Code, is amended--

(A) by striking section 654; and

(B) in the table of sections at the beginning of such chapter, by striking the item relating to section 654.

(2) CONFORMING AMENDMENT- Upon the effective date established by subsection (b), section 571 of the National Defense Authorization Act for Fiscal Year 1994 (10 U.S.C. 654 note) is amended by striking subsections (b), (c), and (d).

Speaker of the House of Representatives.

Vice President of the United States and

President of the Senate.

END

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

OCT 21 2010

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

SUBJECT: Title 10, U.S.C., § 654

In light of the legal uncertainty that currently exists surrounding the Don't Ask, Don't Tell law and policy, including last week's injunction issued by the District Court in *Log Cabin Republicans* v. *United States*, Case No. CV 04-84425-VAP (C.D. Cal.), and the temporary stay of that injunction issued yesterday by the Court of Appeals, and in order to further ensure uniformity and care in the enforcement of the Don't Ask, Don't Tell law and policy during this period, effective immediately and until further notice, no military member shall be separated pursuant to 10 U.S.C. § 654 without the 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. These functions may not be delegated.

cc:
Chairman of the Joint Chiefs of Staff
Assistant Secretary of Defense for Public Affairs

ATTACHMENT 2

FOR OFFICIAL USE ONLY

THE SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

DEC 22 2010

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Don't Ask, Don't Tell Repeal Legislation

The President has signed into law the Don't Ask, Don't Tell Repeal Act of 2010, which allows for repeal of 10 U.S.C. § 654, the statute establishing the Don't Ask, Don't Tell policy. The legislation provides 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 is prepared to implement repeal in a manner consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces.

It is therefore important that Service members understand that the implementation and certification process will take an additional period of time. Until 60 days have passed after certification, 10 U.S.C. § 654, and its related implementing regulations remain in force and effect. In order to prevent any confusion, I want to be perfectly clear: at this time, there are no new changes to any existing Department or Service policies. It remains the policy of the Department of Defense not to ask Service members or applicants about their sexual orientation, to treat all members with dignity and respect, and to ensure maintenance of good order and discipline. Service members who alter their personal conduct during this period may face adverse consequences.

The Department will immediately proceed with the planning necessary to carry out this change carefully and methodically, but purposefully. I endorse the recommendations of the Comprehensive Review Working Group, which will provide the road map for a successful implementation. This implementation effort will be led by Dr. Clifford Stanley, Under Secretary of Defense for Personnel and Readiness.

As the Chairman of the Joint Chiefs of Staff and I have made clear, we will approach this process deliberately and will make such certification only after careful consultation with the military service chiefs and our combatant commanders, and when we each are satisfied that the conditions for certification set out in the statute have been met.

cc:
Chairman of the Joint Chiefs of Staff
Under Secretary of Defense for Personnel and Readiness
General Counsel of the Department of Defense
Assistant Secretary of Defense for Legislative Affairs
Assistant Secretary of Defense for Public Affairs

OSD 14731-10

CERTIFICATE OF SERVICE

I certify that on December 29, 2010, 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.

I further certify that the following counsel for appellee is a registered CM/ECF user and that service on him and all other counsel registered on the CM/ECF system will be accomplished by the appellate CM/ECF system:

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/s/ Anthony J. Steinmeyer
ANTHONY J. STEINMEYER
Counsel for the Appellants

Case Nos. 10-56634, 10-56813

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LOG CABIN REPUBLICANS,
a non-profit corporation,

Plaintiff-Appellee/Cross-Appellant,

vs.

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

Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
No. CV 04-8425, Honorable Virginia A. Phillips, Judge

MOTION OF APPELLEE / CROSS-APPELLANT LOG CABIN REPUBLICANS TO VACATE STAY OF INJUNCTION

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MOTION TO VACATE STAY OF INJUNCTION

Appellee/Cross-Appellant Log Cabin Republicans, plaintiff below, hereby moves for an order vacating this Court's Order of November 1, 2010 (Dkt. 24), which stayed the district court's October 12, 2010 permanent injunction pending appeal. The motion is based on the grounds that a necessary underpinning of that stay order is now lacking.

To obtain the stay, the government had to show, and promised to show, a likelihood of success on the merits, namely the constitutionality of the "Don't Ask, Don't Tell" statute, 10 U.S.C. § 654. The merits briefing on this appeal was completed on April 28, 2011. The briefing makes clear that the government has abandoned that claim and no longer argues that Don't Ask, Don't Tell is constitutional. Accordingly, the government cannot show a likelihood of success on the merits and there is no basis to stay the district court's judgment. While the stay is in effect, the government remains free to, and does, conduct investigations and discharges, and otherwise violate the constitutional rights of current and prospective members of our armed forces, under an unconstitutional statute.

The order staying the district court's injunction should be vacated. In the alternative, if this motion to vacate is denied, Log Cabin requests that the argument of this appeal be set on an expedited basis. The government opposes this motion.

I.

INTRODUCTION

On October 12, 2010, following a two-week bench trial at which a full record was developed, the district court declared unconstitutional the government's policy prohibiting open service by homosexuals in the military, codified at 10 U.S.C. § 654 and its implementing regulations (hereafter referred to as "Don't Ask, Don't Tell" or "DADT"), and entered an order permanently enjoining the government from enforcing or applying DADT against any person under its jurisdiction or command. The district court found that Don't Ask, Don't Tell violated both servicemembers' Fifth Amendment due process rights and their First Amendment rights to free speech and to petition the government for redress of grievances. The district court's judgment was supported by an 85-page Memorandum Opinion (ER 19-104) and an 84-page set of Findings of Fact and Conclusions of Law (ER 105-188).

The government appealed the district court's judgment on October 14, 2010 and on October 20, 2010 moved for an emergency stay of the judgment pending appeal (Dkt. 3-1). In that emergency motion, the government assured this Court, as it was obliged to, that it was likely to succeed on the merits of its defense of the constitutionality of DADT. The government advanced three arguments in this regard: that DADT was justified under the principle of judicial deference to

Congressional judgment in military affairs; that the heightened scrutiny analysis this Court enunciated in *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008), should not govern a facial constitutional challenge; and that DADT did not violate the First Amendment "because it provides for 'discharge for … conduct and not for speech.'" *Id*. at 9-12. Log Cabin opposed the motion. On November 1, 2010, over a partial dissent by Judge William Fletcher, this Court granted the government's motion for a stay. The Court's order was largely premised on the grounds that the appeal presented "serious legal questions" over the constitutionality of DADT (Dkt. 24, at 3-5).

On appeal, however, the government pursues none of the constitutional arguments it made in its motion for stay. Its opening merits brief (Dkt. 58), filed February 25, 2011, does not argue that any judicial deference should be given to Congress' judgment in passing the Don't Ask, Don't Tell statute itself. Instead, the government argues only for deference to the passage of the Don't Ask, Don't Tell Repeal Act of 2010 (the "Repeal Act") – a statute enacted two months after the district court's judgment invalidating DADT. *Id*. at 38-39. And the other points are not argued at all. The government's brief addresses the constitutionality of DADT only to cite – in a footnote – prior, outdated or non-binding decisions of this and other Circuits sustaining its constitutionality, not to challenge the district court's considered determination here that the statute is facially unconstitutional.

Id. at 40-41. The government's reply brief (Dkt. 104), filed April 28, 2011, is even less attentive to the merits, devoting a total of four lines to simply referring the Court to the portions of its opening brief cited just above. *Id*. at 7-8.

The government's silence on these critical points that led to the issuance of the stay demonstrates that the government can no longer maintain that it is likely to succeed on the merits of its defense of the constitutionality of DADT. A continued stay of the district court's injunction is therefore inappropriate.

II.

ARGUMENT

A. Statutory and Procedural Background

The background and history of the Don't Ask, Don't Tell statute is set forth in the parties' merits briefs on appeal and need not be repeated at length here. To summarize, the statute, 10 U.S.C. § 654, was enacted in 1993. It and its implementing regulations provide that a member of the armed forces "shall be separated" if the member has engaged or attempted to engage in a homosexual act, has stated that he or she is a homosexual, or has married or attempted to marry a person of the same sex. Following the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 562 (2003), which held that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct" and mandated a heightened level of scrutiny of laws regulating such

conduct, Log Cabin Republicans brought a facial challenge to the constitutionality of the statute in 2004.

In July 2010, the district court conducted a two-week bench trial, at which over 20 witnesses, both expert witnesses and former servicemembers affected by DADT, testified, and over 100 exhibits were received in evidence. This was, and remains, the only full trial ever conducted on a facial constitutional challenge to Don't Ask, Don't Tell. The government chose to present no testimony or evidence of its own beyond the legislative history of the statute. Following the trial, in October 2010 the district court entered a judgment and permanent injunction declaring DADT unconstitutional, for violating the Fifth Amendment substantive due process rights, and the First Amendment rights to freedom of speech and to petition the Government for a redress of grievances, of current and prospective United States servicemembers. The government appealed the judgment, and moved in this Court for a stay of the district court's injunction pending appeal. This Court entered that stay on November 1, 2010.

On November 24, 2010, the parties moved jointly (Dkt. 35) to expedite the briefing and argument of this appeal, stipulating that expediting the appeal would shorten the time during which servicemembers faced legal uncertainty and ongoing and potential discharge proceedings under DADT. On December 1, 2010, this Court granted the parties' motion as to expediting the briefing schedule, but denied

without explanation the parties' request to expedite the scheduling of oral argument (Dkt. 36).

In December 2010, Congress passed and the President signed the "Don't Ask, Don't Tell Repeal Act of 2010," Pub. L. No. 111-321, 124 Stat. 3515 (2010). That act provides that DADT would be repealed effective 60 days after written certification by the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff that repeal is consistent with the Armed Forces' standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention. *Id*., § 2(b). Until that certification is made, however, the act provides that DADT remains in effect. *Id*., § 2(c). As of the date of this motion, the written certification has not been made, and DADT continues in full force and effect.

On December 29, 2010, the government moved to "hold these appeals in abeyance" in light of the enactment of the Repeal Act (Dkt. 37). Log Cabin opposed the motion, and this Court denied it on January 28, 2011 (Dkt. 53). Pursuant to the Court's scheduling order then entered, the briefs on the merits were filed and completed on April 28, 2011.

B. An Essential Factor on Which This Court's Stay Was Entered No Longer Exists

To obtain a stay of a district court's injunction pending appeal, the moving party must show each of four factors: (1) a strong showing that he is likely to

succeed on the merits; (2) irreparable injury absent a stay; (3) that issuance of the stay will not substantially injure the other parties; and (4) that the public interest favors it. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). These are the same four factors that must be shown by a party moving for a preliminary injunction, "because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *Nken v. Holder*, ___ U.S. ___, 129 S. Ct. 1749, 1761 (2009). The first two factors are the most critical; and the moving party's likelihood of success on the merits must be strong. It is not enough that the chance of success on the merits be "better than negligible," and more than just a "mere possibility" of relief is required. *Id*.

The government recognized these well-established principles in its motion in this Court for a stay pending appeal (Dkt. 3-1 at 5-6). The government's motion argued vigorously that the government was likely to succeed "in its argument that the district court erred in ruling § 654 unconstitutional on its face."[1] The government made three arguments in support of this factor.

[1] The government also raised arguments challenging Log Cabin's standing to sue and challenging the scope of the district court's injunction. As discussed in section II(D) *infra*, the government cannot show a likelihood of success on these arguments either.

The government argued first that "[i]t is well established that 'judicial deference … is at its apogee' when Congress legislates under its authority to raise and support armies'" (Dkt. 3-1, at 9); it claimed that the district court inappropriately substituted its judgment for that of Congress in enacting DADT. Second, the government argued that by applying the "*Witt* standard" – the heightened-scrutiny analysis set forth in *Witt*, *supra* – the district court improperly "conflated as-applied and facial constitutional analysis," and its decision was "inconsistent with controlling precedent." *Id*. at 10, 11. Finally, the government argued that the district court's finding that DADT violates the First Amendment rights of free speech and right to petition was erroneous because DADT "is not a 'content-based' regulation of speech" and does not overbroadly "infringe on protected speech to a 'substantial' degree 'relative to the statute's plainly legitimate sweep.'" *Id*. at 11, 12.

When it came time for the government to file its merits brief on this appeal, however, it abandoned all of these arguments. Instead, the government's position on appeal is that the statute whose constitutionality this Court should evaluate is not Don't Ask, Don't Tell, the subject of six years of proceedings below and a thorough evaluation at trial, but the later-enacted statute conditionally repealing Don't Ask, Don't Tell but leaving it in place indefinitely while the military designs and implements an "orderly" repeal process (Dkt. 58, at 38-41).

The government no longer argues that judicial deference is owed to Congress' 1993 decision to enact DADT, but instead argues for deference to the 2010 decision to enact conditional repeal. Its brief explicitly frames the argument thus: "the question [is] whether it is constitutional for Congress to leave § 654 in place to facilitate an orderly transition in military policy while the Department of Defense completes the training and preparation needed in advance of repeal." *Id.* at 38. After citing cases discussing the authority of Congress to legislate on military affairs, the government concludes: "It follows … 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." *Id.* at 41. In other words, the government abandons its claim that Congress' 1993 enactment of DADT is entitled to judicial deference.

The government similarly discards its earlier defense of the actual constitutionality of DADT, the heart of this case for the last six years. The government's opening brief merely remarks that past decisions, which it collects in a footnote, have "sustained the constitutionality of § 654 against both substantive due process and First Amendment challenges" (Dkt. 58 at 40). The government offers no record-based argument against the district court's finding here – which, unlike in any of the cases the government cites, was reached after a full trial – that

DADT fails both constitutional challenges. Furthermore, all but one of the cases the government cites in footnote 15 of its brief predate *Lawrence v. Texas*, *supra*, the Supreme Court's seminal decision which altered the legal landscape applicable to this facial challenge.[2] The government no longer contends, as it did when it moved for a stay, that the *Witt* intermediate scrutiny standard does not apply to facial challenges,[3] and does not dispute how *Lawrence* altered the Fifth Amendment due process jurisprudence applicable to DADT. And it makes no argument whatsoever against the district court's findings that DADT violates First Amendment rights to free speech and to petition for redress of grievances. Accordingly, on these points as well, the government has now waived its challenge

[2] The only post-*Lawrence* case cited in the government's brief, *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008), is a First Circuit case which arose on appeal from a motion to dismiss, without the benefit of a full trial record as exists here. The *Cook* court expressly stated that it disagreed with this Court's then-recent decision in *Witt v. Department of the Air Force*, which of course controls in this Circuit, and twice stated that it declined to follow it. *Cook*, 528 F.3d at 45 n.1 and 60 n.10. The government's brief does not mention this.

[3] Indeed, it cannot in good faith make that contention. On February 23, 2011 – two days before filing his opening brief on this appeal – the Attorney General, in a letter to the House of Representatives announcing the Administration's determination not to continue to defend the constitutionality of section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, stated that the position of the Executive Branch is that "classifications based on sexual orientation should be subject to a heightened standard of scrutiny." Letter dated February 23, 2011 from Attorney General Holder to Speaker Boehner, attached as Attachment A, at 5. This position is consistent with this Court's holding in *Witt*, and indicates that the United States disagrees with the contrary holding of *Cook v. Gates*.

to the district court's findings and judgment on the issue of constitutionality, and concedes the unconstitutionality of 10 U.S.C. § 654.[4]

"It is well established in this Circuit that claims which are not addressed in the appellant's brief are deemed abandoned." *Collins v. City of San Diego*, 841 F.2d 337, 339 (9th Cir. 1988). The government's merits briefs attempt to shift the focus of the appeal to the constitutionality of a different statute that is outside the record and never formed part of the proceedings below. By failing to argue for the constitutionality of DADT, the government has abandoned that contention, effectively conceding the unconstitutionality of that statute, conceding that it is not likely to succeed on the merits of its appeal, and nullifying the basis for the stay of the district court's injunction.[5] Even if a "serious legal question" of the

[4] In its answering brief on the merits, Log Cabin Republicans pointed out that the government had abandoned its defense of the constitutionality of DADT by failing to present argument on that issue (Dkt. 79, at 43-44). The government's reply brief merely points back to these same portions of its opening brief, without elaboration (Dkt. 104, at 7-8). That the government consciously declined the opportunity to present reasoned argument in support of a contention of constitutionality is further, and conclusive, proof that it has abandoned any such contention. *See* FRAP 28(a)(9)(A).

[5] It is also noteworthy that the government's appeal challenges only the injunction that the district court entered. The district court's judgment also includes, separate from the injunctive relief it granted, a declaration that DADT infringes the fundamental rights of current and prospective United States servicemembers by violating their Fifth and First Amendment rights. ER 2, ¶ (1). That declaration is the functional equivalent of an injunction since it is presumed that federal officers will adhere to the law as declared by the court. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985). The government makes no argument in its briefs challenging the declaratory judgment, and therefore has not shown and cannot show that it has a likelihood of success on the merits on this point either.

constitutionality of DADT existed at the time this Court entered its stay, no such question now remains on this appeal. The stay should therefore be vacated.

C. The Government Cannot Show a Likelihood of Success on its Other Arguments Either

Though it no longer defends the constitutionality of Don't Ask, Don't Tell, the gravamen of this case, the government does assert two other bases for its appeal. It argues that Log Cabin Republicans lacked standing to bring the case and that the scope of the district court's injunction was overbroad. Neither argument goes to the merits of Log Cabin's claim that DADT is unconstitutional, so we need not address them at length here; but the government has not shown and cannot show a likelihood of success on either of these claims.

As to standing, Log Cabin's answering brief on the merits showed that ample evidence was presented at trial to sustain the district court's factual findings that Log Cabin Republicans had proper associational standing to bring this lawsuit (Dkt. 79, at 20-43). These factual findings are reviewed under a clearly erroneous standard, *San Diego County Gun Rights Commission v. Reno*, 98 F.3d 1121, 1124 (9th Cir. 1996), and are not likely to be disturbed on appeal. The government's briefs entirely omitted to discuss the standard of review, in violation of Ninth Circuit Rule 28-2.5, even ignoring the issue in the reply brief despite Log Cabin's having called the omission to the government's attention in its answering brief

(Dkt. 79, at 24 n.7 and 54). This omission as well signals that the government cannot show a likelihood of success on appeal with regard to its standing argument.

On the other issue the government raises, the scope of the district court's injunction, again the government's merits briefing omits any discussion of the applicable standard of review, but the law is that the scope of an injunction is reviewed under an abuse of discretion standard. *United States v. Laerdal Mfg. Corp.*, 73 F.3d 852, 854 (9th Cir. 1995). The district court found, in another detailed order (ER 4-18), that a military-wide injunction was necessary to accomplish the purpose of the injunction and afford Log Cabin appropriate relief. *See Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987). The government cannot show that it is likely to succeed in showing that to be an abuse of discretion.

D. The Stay Should Be Vacated for Other Reasons as Well

While the unconstitutional Don't Ask, Don't Tell statute remains in place, ongoing harms are visited daily on current and prospective American servicemembers. By its attempt to shift the focus of this appeal, the government ignores the harms resulting from the continuing impact of DADT today and pending appeal. Some of these harms were detailed at the trial and in the district court's findings. Some of these harms are also described in the *amicus curiae* briefs filed by the Servicemembers Legal Defense Network (Dkt. 82); Lambda

Legal Defense and Education Fund, Inc., *et al*. (Dkt. 83); and Servicemembers United (Dkt. 88). In addition, contrary to the government's contention, even if the Repeal Act is consummated with the required executive certifications and the Don't Ask, Don't Tell act is repealed, this case will not be moot, and the district court's judgment and injunction should stand, because absent a constitutional determination by a court, what one Congress does another Congress can undo.

1. DADT remains in effect and is causing ongoing daily harms

While the district court's injunction is stayed and DADT remains in place, investigations and discharges under the statute continue. This is a significant constitutional violation in and of itself, as American servicemembers live under a constant threat that infringes on their Fifth and First Amendment rights. Servicemembers who are discharged cannot re-enlist while the injunction is stayed, which deprives them of a career honorably serving their country and deprives the country of their service, for no valid reason and at risk to our national security.

In addition to those constitutional harms, Don't Ask, Don't Tell has many pernicious day-to-day real-world consequences to American servicemembers and those who wish to be. These harms are not ameliorated by the prospect of repeal on some future date as yet undetermined. Some of those harmful effects were presented in evidence at trial and described in the district court's opinion. In addition, as described in the *amicus* submissions, DADT continues to cause serious

infringements on Americans' liberty. These infringements are continuing even since the stay of the district court's injunction, and include the following:

- DADT – the only law, federal, state, or local, that punishes individuals merely for coming out – not just authorizes, but *requires* discharge (Dkt. 82, at 2-3).

- DADT induces servicemembers not to report sexual harassment and even rape; it requires servicemembers to lie, commanding deceit in an institution built on honor, and leaves servicemembers in constant fear of being "outed," at the cost of their career (Dkt. 82, at 4).

- The government is continuing to process administrative separations of servicemembers under DADT, including for statements made to military therapists in the course of psychiatric counseling (Dkt. 82, at 14-17).

- DADT puts servicemembers in financial peril as the military normally seeks "recoupment" of scholarship and training expenses from individuals discharged under DADT, and will even pursue recoupment through tax impounds, even when those individuals wish to continue to serve and would not have voluntarily quit the military. The military is still pursuing recoupment proceedings since the stay was entered (Dkt. 82, at 17; Dkt. 83, at 13-14).

- Some individuals discharged under DADT receive "Other Than Honorable" discharges, a debilitating stigma that imposes ongoing burdens in civilian life. Even individuals discharged under DADT with Honorable discharges are barred from re-enlistment and that information is disclosed to potential employers who may refuse to hire based on that fact alone (Dkt. 83, at 7-11, 11-13).

- Each branch of the Armed Forces has strict age limits for enlistment and commissioning. Every day that DADT is in force, individuals – both those who wish to join the military for the first time, and those who have been discharged under DADT

> and wish to return – grow older. Some inevitably surpass the age limits, forever "aging out" of eligibility to serve their country; and even those who do not formally "age out" face stalled careers, demotions, repeat training, and stale skills. These age limits, and their inexorable effect on individuals who will be forever barred from service, are completely unaffected by the potential repeal of DADT (Dkt. 88, at 6-11).

2. This case will not become moot even if DADT is repealed

Finally, the continuation of a stay of the district court's injunction cannot be justified on the supposed premise that this case will be moot after certification is given under the Repeal Act and 10 U.S.C. § 654 is repealed. Even assuming that that certification is given, this lawsuit will not then be moot. Mere repeal of a statute that a lower court decision had invalidated does not make the court's decision moot. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). A statutory change will not moot a lawsuit challenging the statute if there is still a possibility of further legislative action. *See Ballen v. City of Redmond*, 466 F.3d 736, 741 (9th Cir. 2006). And while likelihood of reenactment is a factor to be considered in the evaluation of mootness, "even if the government is unlikely to reenact the provision, a case is not easily mooted where the government is otherwise unconstrained should it later desire to reenact the provision." *Coral Construction Co. v. King County*, 941 F.2d 910, 928 (9th Cir. 1991) (citing *City of Mesquite, supra*). Congress remains free at any time to "repeal the repeal" and

reinstate the law, or to impose additional onerous conditions on certification that would effectively prevent certification from taking place.[6]

E. In the Alternative, If This Motion Is Not Granted, the Appeal Should Be Set for Expedited Argument

As long as the district court's injunction is stayed, current and prospective American servicemembers sustain daily infringements of their constitutional rights as the government continues to enforce DADT and investigate and discharge individuals under it. Since the government no longer argues that DADT is constitutional, the best remedy for these ongoing harms is to vacate the stay, as this motion requests.

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[6] Rep. Duncan Hunter, with the support of Rep. Howard McKeon, the Chairman of the House Armed Services Committee, has introduced legislation that would expand the certification requirement. *See* Chris Johnson, *McKeon Backs Legislation to Disrupt 'Don't Ask' Repeal*, Washington Blade (Apr. 19, 2011), http://www.washingtonblade.com/2011/04/19/mckeon-backs-legislation-to-disrupt-to-dont-ask-repeal/. That legislation is scheduled to be considered this week in the House Armed Services Committee. *See* Charles Hoskinson, *'Don't Ask' amendment coming in new defense bill*, Politico (May 10, 2011), http://www.politico.com/news/stories/0511/54644.html. And at least five potential candidates for President – Haley Barbour, Mike Huckabee, Roy Moore, Tim Pawlenty, and Rick Santorum – have publicly stated that as President they would support reinstatement of Don't Ask, Don't Tell. *See* Igor Volsky, *Santorum Pledges to Reinstate Don't Ask, Don't Tell*, Think Progress (Apr. 18, 2011), http://thinkprogress.org/2011/04/18/rick-santorum-reinstate-dadt/; Stephanie Samuel, *Ala. 'Ten Commandments Judge' Mulls Presidential Run*, The Christian Post (Apr. 18, 2011), http://www.christianpost.com/news/ala-ten-commandments-judge-mulls-presidential-run-49884/.

However, if the Court denies this motion, it should expedite the argument of this appeal so that the issue can be resolved on the merits swiftly, and current and prospective servicemembers' constitutional rights may be fully restored without the uncertainty of waiting for a repeal that may be delayed, may never come, or may be reversed by Congressional action. When this Court previously denied the parties' joint request to expedite the appeal, the expectation was that the government would be defending the constitutionality of DADT on appeal. Now that that is no longer the case, this fundamental change in circumstances warrants an expedited argument of the appeal.

III.

CONCLUSION

For all the reasons set forth above, this Court should vacate that portion of its Order of November 1, 2010 which stayed pending appeal the district court's October 12, 2010 order. In the alternative, Log Cabin requests that the argument of this appeal be set on an expedited basis.

Dated: May 10, 2011

Respectfully submitted,

WHITE & CASE LLP

By: /s/ Dan Woods
Dan Woods
Attorneys for Appellee/Cross-Appellant Log Cabin Republicans

CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 633 West Fifth Street, Suite 1900, Los Angeles, California 90071.

I hereby certify that I electronically filed the foregoing MOTION OF APPELLEE / CROSS-APPELLANT LOG CABIN REPUBLICANS TO VACATE STAY OF INJUNCTION 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 May 10, 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 May 10, 2011, at Los Angeles, California.

/s/ Earle Miller
Earle Miller

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Secretary, and the Chairman, is at its zenith.

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

I further certify that the following counsel for appellee is a registered CM/ECF user and that service on him will be accomplished by the appellate CM/ECF system:

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