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VIA ECF FILING

July 21, 2011

Ms. Molly C. 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 of America et al.*
Nos. 10-56634, 10-56813

Dear Ms. Dwyer:

Appellee/cross-appellant Log Cabin Republicans ("Log Cabin") submits this letter brief in response to this Court's July 11, 2011 Order directing the parties to show cause why this case should not be dismissed as moot.

I. This Case Is Not Moot Now.

There is no question that the Don't Ask, Don't Tell statute, 10 U.S.C. § 654 ("DADT"), is still in full force and effect today. Section 2(c) of the Don't Ask, Don't Tell Repeal Act, Pub. L. No. 111-321, 124 Stat. 3515 (2010), explicitly says so:

> 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.

Therefore, regardless what may happen in the future, American servicemembers today remain subject to investigations and discharges under DADT and its implementing regulations, solely because of their sexual orientation; their only protection is the district court's injunction against such actions, so long as it is not stayed by this Court. Log Cabin's members, and all members of the military, retain today a live controversy with the government over their constitutional rights.

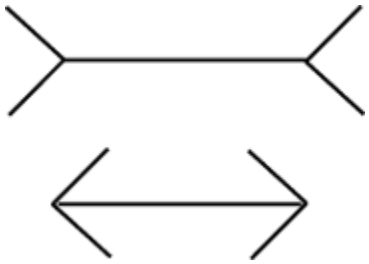
The government's July 14, 2011 letter brief (and its pending motion for reconsideration of this Court's July 6, 2011 order lifting the stay of the district court's judgment) contorts both logic and the law to pretend that by virtue of the passage of the Repeal Act, section 654 is "significant[ly] and substantive[ly] change[d]" (Dkt. 114-1, at 2) and "is a different legal provision from the one the district court examined at trial" (*Id*. at 5). That is plainly not so. As it stands today, section 654 is the law of the land just as it was at the time of trial, and when the district court entered its judgment. The statute is not "in effect to [a] limited extent," nor is it "superseded." Unless its operation is enjoined, it continues today to work its pernicious consequences on current and prospective American servicemembers.

At least one enlisted member of the Air Force had administrative discharge proceedings initiated against him, on the basis of "homosexual conduct," as recently as June 9, 2011. Those proceedings were suspended on July 8, due to this Court's July 6 order, but the government specifically stated that the suspension "does not terminate the discharge action. Rather, this action will suspend processing of [the servicemember's] case until further notice." *See* Memorandum for A1C Justin Dailey dated July 08, 2011, Attachment A hereto.

The Court should reject the government's argument that, because of the passage of the Repeal Act, section 654 is now merely an "interim" or "transitional" law, a "short-term preserver of the status quo," exempt from constitutional scrutiny. If a provision of law is unconstitutional – as the district court found this one to be – it makes no difference if the provision is formally codified, or appears only in the Statutes at Large, or has a sunset clause. If the government's argument were accepted, Congress would be free to enact any unconstitutional law it pleased, so long as it provided that the law would expire at some point in the future. The Constitution does not permit such a thing.

The government's position in its response to the Court's order to show cause is that the question of the constitutionality of section 654 "as it existed before the

Repeal Act," and as analyzed by the district court, is moot now because that statute is now "fundamentally different." But section 654, as it exists today, is no more "fundamentally different" from what it was seven years ago when this lawsuit commenced than the line segments in this familiar optical illusion are fundamentally different from each other:



The two line segments are of course of equal length, and the provisions of section 654 are in every respect identical today to what they were when the district court rendered its judgment. The controversy over its constitutionality is in no way moot today. The government's argument is as much a legal illusion as the above is an optical illusion.

II. The Case Will Not Be Moot After Certification.

Preliminarily, Log Cabin notes that certification by the President that the conditions for repeal of section 654 have been satisfied has not occurred and may never occur. The government has only claimed (Dkt. 115-2, 118-2) that the question of certification will be presented to the Chairman of the Joint Chiefs and the Secretary of Defense by late July or early August 2011, but says nothing about whether or when those individuals might agree to certification. If and when they and the President sign the required certifications, the Repeal Act imposes a 60-day delay. Therefore, under no circumstances will repeal of section 654 be effective before oral argument on this appeal is heard on September 1, 2011, and it will likely not occur before the Court rules on the appeal. Accordingly, Log Cabin agrees with the government (Dkt. 114-1, at 4) that the question whether this case will be moot if and when such certification takes place is not yet ripe for decision.

The district court's judgment (ER 1-3) had two parts. Paragraph 1 awarded declaratory relief, declaring that DADT infringes the fundamental rights of current and prospective servicemembers and violates their Fifth Amendment due process rights and their First Amendment rights of freedom of speech and petition. Paragraphs 2 and 3 awarded injunctive relief, enjoining the government from

enforcing or applying DADT and its implementing regulations, and ordering it to suspend and discontinue investigation and discharge proceedings.

If the President transmits the certification specified in § 2(b)(2) of the Repeal Act, then (barring further Congressional action) 60 days later section 654 will be stricken from the United States Code and the repeal will be effective. At that time, the injunctive relief awarded by the district court would become moot.

However, the government completely ignores the declaratory relief included in the district court's judgment. Apart from a passing reference in a footnote, its July 14 letter brief does not even acknowledge that such relief was entered, much less discuss the effect of that judgment on the issue of mootness; indeed, the brief mistakenly asserts that Log Cabin "seeks only prospective relief" in this case (Dkt. 114-1, at 3). Because individuals who were discharged under DADT during the 17 years that statute has been in effect continue to this day to sustain identifiable collateral consequences from their unconstitutional discharges, a substantial controversy continues to exist between the parties that will not be removed by repeal and the case will not then be moot.

"[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). But not every change of circumstance during the pendency of a case moots the controversy; and it is not a categorical rule, as the government contends in its July 14 letter brief, that "[r]epeal of a statute moots a facial constitutional challenge to that law." No case, so far as Log Cabin is aware, so holds in such stark terms.

To the contrary, courts have recognized that the mere repeal of a statute that a lower court decision had invalidated does not automatically make the court's decision moot. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). A statutory change does 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" of

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

Just this month, the House of Representatives approved legislation to block funds for the military's training for DADT repeal.[1] Previously, a congressman had introduced legislation that would expand the certification requirement. And at least eight potential Republican candidates for President – Michelle Bachmann, Haley Barbour, Newt Gingrich, Mike Huckabee, Roy Moore, Tim Pawlenty, Mitt Romney, and Rick Santorum – have publicly stated that as President they would support reinstatement of DADT. Given the very real possibility that a new Administration and Congress after the 2012 elections – or even the current Congress, which has a much different complexion from the Congress that passed the Repeal Act – could reinstate DADT, only a decision of this Court affirming the district court's declaratory judgment can conclusively drive a stake through the heart of the policy.

The Supreme Court has articulated a two-factor analysis for determining when a case challenging a statute or practice becomes moot: mootness may result if "(1) it can be said with assurance that 'there is no reasonable expectation …' that the alleged violation will recur … and [¶] (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (emphasis added; citations omitted). In this Circuit, the first *Davis* factor is even more stringent: defendants must show that "subsequent events [have] made it absolutely clear that the allegedly wrongful behavior [cannot] reasonably be expected to recur." *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004) (rejecting government's argument that "impending mootness" counsels against deciding the constitutional issue). The government cannot meet either prong of this test.

Moreover, "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice," *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 185 (2000) (*citing City of Mesquite*), particularly when the defendant's cessation is in response to a lawsuit. The government has admitted that the Repeal Act was enacted in response to this lawsuit, in an effort to avoid a court decision invalidating DADT. *See* Dkt. 115-1, at 8-9.

[1] http://articles.latimes.com/2011/jul/08/news/la-pn-house-dadt-20110708.

The cases cited by the government holding that a case becomes moot when a challenged statute or practice is repealed arose in circumstances where there were no continuing effects of the challenged statute. Thus, for example, where a statute barring one category of individuals (former mental patients) from purchasing firearms but not another category (ex-felons) was amended to provide an administrative remedy for the first category, an equal protection challenge to the statute was deemed moot because there were no continuing consequences to those individuals (*Dept. of the Treasury v. Galioto*, 477 U.S. 556, 559-60 (1986)). Where a statute, even if enacted, had expired by its own terms, a suit by members of Congress to declare that it had not been effectively pocket-vetoed by the President was deemed moot (*Burke v. Barnes*, 479 U.S. 361, 363-64 (1987)). Where a state law conflicted with a federal regulatory statute but was then amended to be consistent with the federal law, a trade association's pre-emption claim became moot since the amended statute provided "everything the Association hoped to achieve" (*Chemical Producers and Distributors Assn. v. Helliker*, 463 F.2d 871, 876 (9th Cir. 2006)).

But the result is different when the effects of the challenged statute or practice persist after its repeal or cessation, and a party continues to sustain collateral consequences from the past operation of the statute. When those collateral consequences include identifiable, concrete legal disabilities, the party's claim is not moot even after the challenged action has concluded. *Carafas v. LaVallee*, 391 U.S. 234, 237-38 (1968) (petition for habeas corpus not moot even after expiration of sentence, since petitioner remained subject to civil disabilities including not being able to engage in certain businesses, losing the right to vote and to serve as a juror, etc.).

In such a case, the effects of the past application of an unconstitutional statute are not "completely and irrevocably eradicated." Injured parties therefore retain a cognizable interest in redressing those consequences and a declaration of unconstitutionality maintains the live nature of the controversy. When "challenged governmental activity … is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts … a substantial adverse effect on the interest of the petitioning parties," a court must decide the merits of a claim for declaratory relief. *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 121-22 (1974); *accord*, *Biodiversity Legal Foundation v. Badgley*, 284 F.3d 1046, 1054 (9th Cir. 2002) (if "there remains a substantial controversy between parties who have adverse legal interests and that the controversy is of sufficient immediacy and

reality to warrant declaratory relief," court has a duty to decide the declaratory relief claim even if injunctive relief has become moot).

The effects of DADT on American servicemembers who were discharged under the statute have not "evaporated or disappeared." Servicemembers whose discharges were not Honorable continue to suffer demonstrable ongoing collateral consequences which, if this case were to be deemed moot and the district court's declaration of unconstitutionality vacated, would be unredressable.

For example, among other consequences, servicemembers discharged with any discharge of lesser grade than Honorable – including a General discharge – lose their entitlement to educational assistance both under the Montgomery GI Bill and through the Department of Veterans Affairs (38 U.S.C. §§ 3011, 3311), and lose their eligibility for civil service retirement credit (5 U.S.C. §§ 8331-32). Those discharged with the grade of Other Than Honorable also lose the right to interment in national cemeteries (38 U.S.C. § 2402), civil service preference (5 U.S.C. §§ 2108, 3309-16, 3502, 3504), and naturalization benefits (8 U.S.C. § 1439-40), and may be disqualified for numerous Veterans Administration benefits including medical care, hospitalization, and even a burial flag and headstone (38 U.S.C. §§ 5303, 3103, 2301; 10 U.S.C. § 8744; 30 C.F.R. § 3.12). They may not re-enlist or be recommissioned as an officer (10 U.S.C. §§ 508, 3258). The military may pursue, and has pursued, "recoupment" from them of scholarship and training expenses, even through tax impounds. These are severe legal disabilities and consequences such as these have been noted by the courts: "The recipient of [an OTH] discharge may be deprived of virtually all Veterans' benefits and he may encounter substantial prejudice in civilian life." *Pickell v. Reed*, 326 F. Supp. 1086, 1090 (N.D. Cal. 1971); *see also Fairbank v. Schlesinger*, 533 F.2d 586, 600 (D.C. Cir. 1975) (honorable discharge is precondition to reenlistment). The "brooding presence" of these collateral consequences causes live ongoing adverse effects and the Repeal Act makes no provision for reclassification of discharges.

Even those servicemembers who were discharged under DADT with Honorable discharges may have been assigned a reenlistment code rendering them ineligible to reenlist. That is the case, for example, for one of the witnesses at trial, Air Force Major Michael Almy, who was honorably discharged under DADT after 17 years of exemplary service, but whose discharge certificate (DD-214) bears the reentry code "NOT APPLICABLE." Trial Ex. 112, Attachment B hereto.

Such individuals, discharged under an unconstitutional statute, may well wish to assert claims for reinstatement and back pay. The Repeal Act likewise does not provide for such relief, so it does not remedy the consequences of the unconstitutional statute. Those claims may be foreclosed if the case is deemed moot and the district court's judgment is vacated. These individuals should have the benefit of the district court's declaratory judgment to support such claims.

Vacatur is an "extraordinary remedy," available only to appellants who "demonstrate … equitable entitlement" to it. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 26 (1994). Even when a case does become moot on appeal, vacatur of the lower court judgment is inappropriate "where the appellant by his own act prevents review of the adverse judgment … 'a dissatisfied litigant should not be allowed to destroy the collateral consequences of an adverse judgment by destroying his own right to appeal.'" *Dilley v. Gunn*, 64 F.3d 1365, 1370 (9th Cir. 1995).

This case should not be deemed moot based on a contingent future repeal, and the district court's declaratory judgment should not be vacated. If and when repeal becomes effective, and the question of mootness is ripe for decision, the determination of the factual issues presented by that question should be made in the first instance by the district court.

Respectfully submitted,

WHITE & CASE LLP

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

cc: Henry C. Whitaker, Esq., Department of Justice (via ECF)
All ECF participants

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR ARMAMENT CENTER (AFMC)
EGLIN AIR FORCE BASE FLORIDA

JUL 0 8 2011

MEMORANDUM FOR A1C JUSTIN DAILEY, 46 OSS

FROM: AAC/CC

SUBJECT: Suspension of Administrative Discharge Action

1. On 9 June 2011, I notified you of the initiation of administrative discharge proceedings in accordance with Air Force Instruction 36-3208, *Administrative Separation of Airmen*, paragraph 5.36.2.1. The basis for your discharge action was homosexual conduct. On 20 June 2011, you elected to have your case heard by an administrative discharge board.

2. On 6 July 2011, the Ninth Circuit Court of Appeals ordered the stay of the injunction in the case of Log Cabin Republicans v. Secretary of Defense be lifted. The Court's order enjoins the Air Force from processing service members for separation based on homosexual conduct. In compliance with this judicial order and recent Headquarters Air Force guidance, I have directed all activity on your discharge board be suspended. The suspension of the board proceedings in your case does not terminate the discharge action. Rather, this action will suspend processing of your case until further notice.

3. Questions regarding your rights and the effect of this action should be referred to your detailed Defense Counsel.

CHARLES R. DAVIS, Major General, USAF
Program Executive Officer for Weapons and
Commander

CAUTION: NOT TO BE USED FOR IDENTIFICATION PURPOSES | THIS IS AN IMPORTANT RECORD. SAFEGUARD IT | ANY ALTERATIONS IN SHADED AREAS RENDER FORM VOID

CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY

1. NAME (Last, First, Middle)	2. DEPARTMENT, COMPONENT AND BRANCH	3. SOCIAL SECURITY NUMBER
ALMY, MICHAEL DAVID	AIR FORCE – REG AF	

4a. GRADE, RATE OR RANK	4b. PAY GRADE	5. DATE OF BIRTH (YYYYMMDD)	6. RESERVE OBLIGATION TERMINATION DATE (YYYYMMDD)
MAJ	O4		N/A

7a. PLACE OF ENTRY INTO ACTIVE DUTY	7b. HOME OF RECORD AT TIME OF ENTRY (City and State, or complete address if known)
DAYTON OH	

8a. LAST DUTY ASSIGNMENT AND MAJOR COMMAND	8b. STATION WHERE SEPARATED
606 ACS (AFE)	SPANGDAHLEM AB GERMANY

9. COMMAND TO WHICH TRANSFERRED	10. SGLI COVERAGE	NONE
NOT APPLICABLE	AMOUNT, $400,000	

11. PRIMARY SPECIALTY (List number, title and years and months in specialty. List additional specialty numbers and titles involving periods of one or more years.)

9388 - Communications and Information
13 years 1 month

12. RECORD OF SERVICE	YEAR(S)	MONTH(S)	DAY(S)
a. DATE ENTERED AD THIS PERIOD	1998	Jun	20
b. SEPARATION DATE THIS PERIOD	2006	Jul	21
c. NET ACTIVE SERVICE THIS PERIOD	13	01	02
d. TOTAL PRIOR ACTIVE SERVICE	00	00	00
e. TOTAL PRIOR INACTIVE SERVICE	00	07	20
f. FOREIGN SERVICE	04	08	01
g. SEA SERVICE	00	00	00
h. EFFECTIVE DATE OF PAY GRADE	2003	Jul	01

13. DECORATIONS, MEDALS, BADGES, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED (All periods of service)

Air Force(AF) Achievement Medal; AF Commendation Medal, 2 oak leaf clusters(olc); Joint Service Commendation Medal; Small Arms Expert Marksmanship --SEE REMARKS--

14. MILITARY EDUCATION (Course title, number of weeks, and month and year completed)

Quality Assurance Eval, Base Level, 2 weeks, Mar 96; Air Command & Staff College, 52 weeks, 2004; Squadron Officer School, 8 weeks,--SEE REMARKS--

15a. MEMBER CONTRIBUTED TO POST-VIETNAM ERA VETERANS' EDUCATIONAL ASSISTANCE PROGRAM		YES	X	NO
b. HIGH SCHOOL GRADUATE OR EQUIVALENT	X	YES		NO

16. DAYS ACCRUED LEAVE PAID	17. MEMBER WAS PROVIDED COMPLETE DENTAL EXAMINATION AND ALL APPROPRIATE DENTAL SERVICES AND TREATMENT WITHIN 90 DAYS PRIOR TO SEPARATION	YES	NO
44.5			X

18. REMARKS

ITEM 13: Ribbon/Pistol; Humanitarian Service Medal; AF Training Ribbon; AF Longevity Service Award, 1 olc; Combat Readiness Medal, 1 olc; Armed Forces Expeditionary Medal; National Defense Service Medal, 1 service star; AF Outstanding Unit Award, 2 olc; AF Organizational Excellence Award; Global War on Terrorism Service Medal; Global War on Terrorism Expeditionary Medal; Iraq Campaing Medal; AF Overseas Long Tour Ribbon; Senior Communications and Information Badge. ITEM 14: 1990; USMC Command & Control School, 40 weeks, Jun 04; Datalinks Training, 3 weeks, Aug 02; Basic Communications Training, 20 weeks,-SEE CONTINUATION SHEET-

The information contained herein is subject to computer matching within the Department of Defense or with any other affected Federal or non-Federal agency for verification purposes and to determine eligibility for and/or continued compliance with, the requirements of a Federal benefit program.

19a. MAILING ADDRESS AFTER SEPARATION (Include Zip Code)	b. NEAREST RELATIVE (Name and address - include Zip Code)
	COLONEL(RET) DAVID B ALMY

20. MEMBER REQUESTS COPY 6 BE SENT TO OH DIRECTOR OF VETERANS AFFAIRS	X	YES		NO

21. SIGNATURE OF MEMBER BEING SEPARATED	22. OFFICIAL AUTHORIZED TO SIGN (Typed name, grade, title and signature)
MEMBER REFUSED TO SIGN	BRIAN C. COOK, TSGT, USAF NCOIC, RELOCATIONS

SPECIAL ADDITIONAL INFORMATION (For use by authorized agencies only)

23. TYPE OF SEPARATION	24. CHARACTER OF SERVICE (Include upgrades)	
DISCHARGE	HONORABLE	
25. SEPARATION AUTHORITY	**26. SEPARATION CODE**	**27. REENTRY CODE**
AFI 36-3207	GRB	NOT APPLICABLE

28. NARRATIVE REASON FOR SEPARATION

HOMOSEXUAL ADMISSION

29. DATES OF TIME LOST DURING THIS PERIOD (YYYYMMDD)	30. MEMBER REQUESTS COPY 4 (Optional)
NONE	

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MEMBER-4