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; LEON E. PANETTA, 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

RESPONSE OF APPELLEE LOG CABIN REPUBLICANS TO SUGGESTION OF MOOTNESS AND MOTION TO VACATE THE DISTRICT COURT JUDGMENT

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I.

INTRODUCTION

On September 20, 2011, the repeal of "Don't Ask, Don't Tell," 10 U.S.C. §654, became effective. On the very day that defendant Secretary of Defense Leon Panetta described as "a historic day for the Pentagon and the nation,"[1] the government came to this Court, seeking to eradicate the district court decision that by the government's own admission prompted and accelerated the repeal. The government should be ashamed to take this step. For the reasons shown below, this Court should deny the government's motion.

II.

BACKGROUND

From the prior motions, merits briefs, and oral argument, this Court is familiar with the background of this case, so we need only highlight a few points.

After years of hard-fought litigation and a contested bench trial, at which a full record was developed, the district court declared unconstitutional the government's policy prohibiting open service by homosexuals[2] in the military, codified at 10 U.S.C. § 654 and its implementing regulations ("Don't Ask, Don't

[1] Stephanie Condon, Defense secretary calls end of DADT "historic", CBS News (Sept. 20, 2011), http://www.cbsnews.com/8301-503544_162-20109024-503544.html; Leon Panetta, Mike Mullen Call DADT End "Historic", The Free Library (2011), http://www.thefreelibrary.com/Leon+Panetta%2c+Mike+Mullen+Call+DADT+End+'Historic'-a01612513690.

[2] We use the term "homosexual" throughout this brief in its broad, inclusive sense, as this Court did in Witt v. Dep't of the Air Force, 527 F.3d 806 (9th Cir. 2008).

Tell" or "DADT"). Specifically, the district court found that Don't Ask, Don't Tell violated both Fifth Amendment due process rights and First Amendment rights and it issued judgment in favor of plaintiff Log Cabin Republicans ("Log Cabin") on Log Cabin's claims for declaratory and injunctive relief.

The government appealed and moved for a stay of the district court's injunction pending appeal, contending that it was likely to prevail on the merits of its contention that the district court erred in finding DADT unconstitutional. On November 1, 2010, this Court granted the motion.

In December 2010, Congress passed the Don't Ask, Don't Tell Repeal Act of 2010 ("Repeal Act"). The Repeal Act provided that repeal of DADT would become effective 60 days after the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff all certified that the military was ready for repeal to be implemented but would remain in full force and effect until then. The legislative history of the Repeal Act shows that the district court's decision played a major role in prompting the repeal of DADT, and the government has admitted as much.[3]

Following passage of the Repeal Act, months passed but the certification did not occur. In May 2011, after the merits briefing was completed, Log Cabin

[3] The Repeal Act "saves the military, as Secretary Gates has said over and over again, from facing an order from a court that forces the military to do this immediately." 156 Cong. Rec. S10, 654 (daily ed. Dec. 18, 2010) (statement of Sen. Lieberman). See also 156 Cong. Rec. S10,690 (statement of Sen. Carper) (daily ed. Dec. 18, 2010) (Repeal Act "implement[s] this repeal of don't ask, don't tell in a thoughtful manner rather than to have the courts force them into it overnight"); id. at S10,659 (statement of Sen. Durbin) ("Congress or the courts. That is the choice."); id. at E2,178 (statement of Rep. Cummings)(nothing that "the courts have become involved" and that "Secretary Gates has warned that judicial repeal will put an administrative burden on the Department of Defense, and has asserted that Congressional action is most favorable"). See Dkt. 115-1 at 8-9 & n.2.

moved to vacate this Court's November 1 stay order, contending that the government had not argued in its merits briefs that DADT was constitutional. On July 6, 2011, this Court granted the motion, finding that the government's briefs "do not contend that 10 U.S.C. §654 is constitutional," and lifted the stay, reinstating the district court's injunction against the enforcement of DADT. Dkt. 111.

On July 14, 2011, the government filed an emergency motion for reconsideration and again requested a stay. On July 15, 2011, this Court reinstated the stay with one very large exception: this Court ruled that the district court's injunction "shall continue in effect insofar as it enjoins appellants from investigating, penalizing, or discharging anyone from the military pursuant to the Don't Ask, Don't Tell policy." The Court also set a schedule for further briefing to conclude by July 22, 2011. Dkt. 117.

On July 22, 2011, the same date as the government's final briefing was due, the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff made the certification. It is hardly a coincidence that they did so on the very day that the government filed its final brief on its motion. Again, this case provided the impetus for this government action by accelerating the long-awaited certification.

On the same date, July 22, 2011, this Court granted the motion for reconsideration but again found that the government "does not contend that 10

U.S.C. §654 is constitutional" and again held that the district court's injunction would continue to enjoin the government from "investigating, penalizing, or discharging" anyone under DADT. Dkt. 124.

This Court conducted oral argument on September 1, 2011, and the parties argued both the merits and the issues of mootness and vacatur.

The 60-day period following certification then passed and the repeal of DADT became effective on September 20, 2011. While the Repeal Act repealed the prior law, it did not enact any legislation expressly allowing open military service by homosexuals. Nor did the government adopt any new regulations allowing open service: it merely modified prior regulations to delete DADT-inspired language.

On September 20, 2011, when repeal became effective, President Obama proclaimed:

- "As of today, patriotic Americans in uniform will no longer have to lie about who they are in order to serve the country they love."
- "Today's achievement is a tribute to all the patriots who fought and marched for change."

- "Today, every American can be proud that we have taken another great step toward keeping our military the finest in the world and toward fulfilling our nation's founding ideals."[4]

In a similar vein, Admiral Mullen, Chairman of the Joint Chiefs of Staff, said:

- "At the heart of the issue for me is the integrity of the institution. . . . Seeing this change is a huge step in the right direction."
- "We are a stronger joint force, a more tolerant joint force, a force of more character and honor" because of repeal.[5]

That same afternoon, while the words of the President, Admiral Mullen, and Secretary Panetta still echoed around our nation, the government filed this motion, "suggesting" that the case is now moot, moving to vacate the judgment, and asking this Court to direct the district court to dismiss Log Cabin's original 2004 complaint. If the government believes that this case is moot, it could simply dismiss its appeal under FRAP 42(b) but it has not done so. Instead, while its leaders proclaim the benefits of repealing DADT, the government is inviting this Court to create the fiction that the district court never found DADT

[4] Statement by the President on the Repeal of Don't Ask, Don't Tell, The White House (Sept. 20, 2011), http://www.whitehouse.gov/the-press-office/2011/09/20/statement-president-repeal-dont-ask-dont-tell.
[5] Condon, supra, note 1; The Free Library, supra, note 1; Justin Duckham, Military Stronger, More Honest In Wake of DADT Repeal, Claims Mullen, Talk Radio News (Sept. 20, 2011), http://www.talkradionews.com/audio/2011/9/20/military-stronger-more-honest-in-wake-of-dadt-repeal-claims.html.

unconstitutional and that this case never existed. For the reasons shown below, this Court should decline that invitation.

III.

THE CASE IS NOT MOOT

The repeal of a statute that a district court had invalidated does not automatically render the case moot. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982) (mootness is "a matter relating to the exercise rather than the existence of judicial power"); Ballen v. City of Redmond, 466 F.3d 736, 741 (9th Cir. 2006); Coral Constr. Co. v. King Cnty., 941 F.2d 910, 927 (9th Cir. 1991) ("Simply put, mootness here is not a jurisdictional issue; rather, we may continue to exercise authority over a purportedly moot case where the balance of interests favors such continued authority.").

While the government can and does cite cases in which legislative repeal of statutes caused mootness, mootness depends on the facts and circumstances of each case. Here, Log Cabin recognizes that the repeal of DADT does moot that portion of the district court's judgment awarding injunctive relief. The declaratory relief portion of the judgment is different, however, and this Court should decide the merits of this appeal on that issue. While a routine application of existing law should decide the standing and scope of injunction issues that have been fully briefed and argued in Log Cabin's favor, the important constitutional law issues

that have also been briefed and argued are of great national importance and warrant a decision by this Court. Two independently sufficient reasons exist why this case is not moot.

A. The Case Is Not Moot Because There Is A Possibility of Further Legislative or Executive Action

Legislation does not render a case moot if there is a possibility of further legislative or executive action. City of Mesquite v. Aladdin's Castle, supra, 455 U.S. at 289; Ballen v. City of Redmond, supra, 466 F.3d at 744; Coral Constr. Co. v. King Cnty., supra, 941 F.2d at 928. In City of Mesquite, the Supreme Court identified the inquiry as whether the likelihood of future violations of the law was so "sufficiently remote" as to make injunctive relief unnecessary. Following City of Mesquite, this Court set out the law as follows:

> One factor to consider on deciding if a case is moot as a result of subsequent statutory amendments is whether the governmental entity is likely to re-enact the offending provision. However, even if the government is unlikely to re-enact the provision, a case is not easily mooted where the government is otherwise unconstrained should it later decide to re-enact the provision.

Coral Construction, supra, 941 F.2d at 928 (citation omitted). In 2006, this Court reaffirmed the principle set out in Coral Construction. Ballen v. City of Redmond, supra, 466 F.3d at 744. The obvious purpose of this principle is to prevent a

situation where a legislative body could reenact a statute without the specter of a prior finding of unconstitutionality.

The government's motion ignores all three of these cases, even though Log Cabin cited them in its July 21, 2011 letter brief to the Court, Dkt. 120-1 at 4, and emphasized the Coral Construction case in its September 1 oral argument. Instead, the government cites Chem. Producers & Distribs. Ass'n v. Helliker, 463 F.3d 871 (9th Cir. 2006), but that case, and Native Village of Noatak v. Blatchford, 38 F.3d 1505 (9th Cir. 1994), on which it relies, analyzed a different exception to mootness – voluntary cessation – that Log Cabin does not argue here.[6]

Declaring this case moot would leave the government unconstrained from reenacting another unconstitutional law prohibiting military service by homosexuals. The Repeal Act did not expressly authorize open service; it merely repealed DADT. The government's newly-modified regulations similarly do not expressly authorize open service. The policy memoranda attached to the government's motion are just that – memoranda – without the force of law and subject to change at any time.

The specter of possible further legislative, executive, or administrative action is entirely possible and hardly remote. After all, the government is **still contending that DADT was constitutional**. It made that argument in its rebuttal

[6] The government also cites Burke v. Barnes, 479 U.S. 361 (1987), and Dep't of Treasury v. Galioto, 477 U.S. 556 (1986), but those cases are distinguishable because in those cases the effects of the repealed laws did not persist, as is the case here, as explained below.

at the September 1 oral argument in response to a direct question from the Court. Its current motion maintains this argument, describing the district court's judgment as "legally flawed." Motion at 10. By treating homosexual service in the military as merely a policy choice, rather than a constitutional requirement, the government signals unmistakably that the current or any future Congress or administration is unconstrained from reinstating DADT or an equivalent ban on homosexual service. Under Coral Construction, therefore, this case is not moot.

In addition, the country has a new and different Congress today than it did when the Repeal Act was passed in December 2010 in a lame-duck session of Congress. The new leadership of the House of Representatives has already expressed a preference for continuing DADT.[7] Furthermore, virtually all of the leading Republican candidates for President have expressed their platform promise to "repeal the repeal."[8] If elected, a new President could either push new DADT

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[7] In July 2011, the House of Representatives approved legislation to block funds for the military's training for DADT repeal. Kim Geiger, In Pentagon vote, House looks to undermine 'don't ask, don't tell' policy, Los Angeles Times (July 8, 2011), http://articles.latimes.com/2011/jul/08/news/la-pn-house-dadt-20110708.

On September 12, 2011, the Chairman of the House Armed Services Committee and the Chairman of its Military Personnel Subcommittee wrote to Secretary of Defense Panetta to request that the repeal of DADT be delayed. Letter from Howard McKeon and Joe Wilson to Leon Panetta (Sept. 12, 2011) *available at* http://www.politico.com/static/PPM41_hasc-mckeonwilson091211.html.

[8] Re: Michelle Bachmann, see Bachmann would reinstate U.S. gay troops ban, The Vancouver Sun (Aug. 14, 2011), http://www.vancouversun.com/entertainment/Bachman+would+reinstate+troops/5253565/story.html?id=5253565; re: Rick Perry, see Dennis Bakay, DADT Repealed: Don't Ask Don't Tell Bites the Dust…For Now, Philly2Philly.com (Sept. 20, 2011), http://www.philly2philly.com/politics_community/the_water_cooler/2011/9/20/47780/dadt_repealed_dont_ask_dont_tell_bites_the_dustf; re: Mitt Romney, see Michelle Garcia, It's Not Over Until It's Over: Log Cabin Heads Back to Court, Advocate.com (Sept. 1, 2011), http://www.advocate.com/News/Daily_News/2011/09/01/Log_Cabin_Heads_Back_to_Court/; see also Republican Presidential Debate, CNN.com (June 5, 2007), http://transcripts.cnn.com/TRANSCRIPTS/0706/05/se.01.html; re:

legislation through a new Congress or implement a new DADT through executive order.

The government argues that these concerns are "purely speculative" but the government's argument is not supported by any evidence. Log Cabin's position is supported by evidence in the trial court record of this country's long history of discrimination against open homosexual service and the materials on this issue previously presented to this Court, to which the government offered no objection or response.[9]

B. The Case Is Not Moot Under the Collateral Consequences Doctrine

Legislation also does not moot a case unless it has "completely and irrevocably eradicated the effects" of the violation. Cnty. of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). A case is not moot when a party continues to sustain collateral consequences, including identifiable concrete legal disabilities, from past operation of a statute. The classic example is in habeas corpus cases. E.g., Carafas v. LaVallee, 391 U.S. 234 (1968) (habeas corpus claims not moot after petitioner released from custody). At least one of the cases cited by the government's motion

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Rick Santorum, see Transcript: Fox News-Google GOP Debate, FoxNews.com (Sept. 22, 2011), http://www.foxnews.com/politics/2011/09/22/fox-news-google-gop-2012-presidential-debate/.

[9] The only other case the government cites on this issue, Summers v. Earth Island Institute, 555 U.S. 488 (2009), Motion at 5, does not support its position. Summers is a standing case, not a mootness case. In that case, an organization attempted to base its standing to challenge any sale by the Forest Service of 190 million acres of forest land on one individual, based on his "desire" to "visit" forests. Id. Not surprisingly, the court found his "some day" intention to visit forests did not amount to the injury required for standing purposes. Id.

recognizes this exception. Pub. Utils. Comm'n v. FERC, 100 F.3d 1451, 1460-61 (9th Cir. 1996).[10]

The same principle applies in other contexts. Super Tire Eng'g Co. v. McCorkle, 416 U.S. 115, 121-22 (1974) (analyzing separately and distinguishing between injunctive relief and declaratory relief; injunction moot, declaratory relief not in case involving striking workers); Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1173-75 (9th Cir. 2002) (also distinguishing between mootness in declaratory relief and injunctive relief contexts).

As previously explained, servicemembers discharged under DADT continue to suffer ongoing collateral consequences as a result of their discharges. Our July 21 letter brief enumerated many concrete, legal, collateral consequences for those discharged with less than honorable discharges. The Repeal Act does not address these consequences of being discharged under an unconstitutional statute.

The government contends that "vast majority" of those discharged under DADT received honorable discharges. Motion at 7. It cites no statistics or other

[10] If the government is suggesting that it is "doubtful" that the collateral consequences doctrine applies because the doctrine was developed only to allow those convicted of crimes to secure reversals if they continue to suffer collateral consequences after serving their sentences, Motion at 6 n.2, it is incorrect. The cited portion of Spencer v. Kemna, 523 U.S. 1, 7-8 (1998), does not so limit the doctrine and the case does analyze whether the individual involved suffered collateral consequences in the parole revocation context. Id. at 14-15. Spencer also indicated that the collateral consequences doctrine could apply where a defendant challenged only his expired *sentence*, as opposed to the *conviction*. Id. at 7, 14. In such a case, the defendant may still prevail if he carries his burden of identifying an ongoing collateral consequence traceable to the challenged portion of the sentence and "likely to be redressed by a favorable judicial decision." Id.; see also United States v. Juvenile Male, 131 S.Ct. 2860, 2864 (2011).

evidence for this statement. The government's own statistics, however, show that a significant number of servicemembers received less than honorable discharges.[11]

Even those honorably discharged suffered collateral consequences of being discharged and the Repeal Act does not rectify their situations either.[12] As a result, these individuals may have claims for back pay, reimbursement, or other relief.[13] For example, severance payments to those discharged under DADT were only ½ of the payment for non-DADT discharges.[14] Amicus briefs on the merits, filed by Lambda Legal, Servicemembers Legal Defense Network, and Servicemembers United also address these and other collateral consequences.[15]

These ongoing harms from less than honorable discharges prevent this case from becoming moot. See Roberts v. Callahan, 321 F.3d 994, 998 (10th Cir. 2003) (dishonorable discharge and forfeited allowances were sufficient collateral consequences to defeat mootness); McAliley v. Birdsong, 451 F.2d 1244, 1245

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[11] From 1994 to 2003, at least 287 service members separated under DADT received "other than honorable" discharges. U.S. General Accounting Office, *Military Personnel: Financial Costs and Loss of Critical Skills Due to DOD's Homosexual Conduct Policy Cannot Be Completely Estimated*, GAO-05-299 (Feb. 23, 2005) at 6-7. From 2004 to 2009, at least 95 service members similarly received "other than honorable" discharges. U.S. General Accounting Office, *Military Personnel: Personnel and Cost Data Associated with Implementing DOD's Homosexual Conduct Policy*, GAO-11-170 (Jan. 20, 2011), at 7. These figures do not include the discharges under DADT in fiscal years 2010 or 2011.

[12] The policy memoranda also specifies that service members discharged under DADT may apply to re-enter our Armed Forces but will receive "no preferential treatment" and will be processed as any other re-accession applicant. Dkt. 128-2 at 5.

[13] The policy memorandum specifically states: "The Department will not authorize compensation of any type, including retroactive full separation pay, for those previously separated under 10 U.S.C. § 654 and its implementing regulations." Dkt. 128-2 at 9.

[14] DoD Instruction No. 1332.29, "Eligibility of Regular and Reserve Personnel for Separation Pay," June 21, 1991 (incorporating change 1, February 23, 1996; amended September 20, 2011). See Dkt. 128-2 at 10, 12. In a lawsuit filed by over 100 former servicemembers about this, the government continues to argue, post-repeal, that they are not entitled to full severance. http://www.politico.com/news/stories/0911/64253.html.

[15] Dkt. 82 at 11; Dkt. 83 at 8; Dkt. 88 at 17, 27.

(6th Cir. 1971) (plaintiff could continue to challenge whether he was unlawfully inducted into Army, though he had been discharged during pendency of appeal); Grubb v. Birdsong, 452 F.2d 516, 517-18 (6th Cir. 1971) ("an undesirable discharge carries with it 'collateral consequences' which … require us to hold that [this case] is not moot"); Boyd v. Hagee, No. 06CV1025 JLS (RBB), 2008 U.S. Dist. LEXIS 12237, at *7 (S.D. Cal. Feb. 19, 2008) ("an undesirable discharge carries with it 'collateral consequences' which … require us to hold that [this case] is not moot").

The government tries to minimize these collateral consequences by suggesting that individual servicemembers are free to seek any relief to which they may be entitled and that three already have filed an action.[16] What is critical, however, is what the government is **not** saying.

The premise of the pending case by three individuals, and any others that may be brought, is that they are entitled to back pay, full severance pay, benefits, or other relief because they were discharged under an unconstitutional statute. If the government has its way, and this case is declared moot and the judgment is vacated, servicemembers discharged under an unconstitutional statute will have to start again from square one and prove, again, that DADT was unconstitutional.

[16] Two of the three individuals, former Air Force Major Michael Almy and former Air Force Sergeant Anthony Loverde, were trial witnesses in this case. The district court opinion and findings of fact and conclusions of law discussed their testimony and service to our country in detail. ER 39-45, 58-62, 111-117, 131-135. Major Almy and Sgt. Loverde are not being represented by counsel for Log Cabin in their individual action.

This case required 7 years of litigation, numerous motions, extensive discovery, extensive pretrial proceedings, and a lengthy trial. The government – which still contends that DADT was constitutional – wants this Court to require the re-litigation of the entire issue of the constitutionality of DADT in such cases.

We are not suggesting that this Court should find that this case is entitled to collateral estoppel effect in subsequent cases arising under DADT. We are suggesting, however, that the Court not allow the government to pretend that this case never existed and that the judgment in this case was never entered. Re-litigating the constitutionality of DADT would be an enormous and unconscionable misuse of judicial resources. That is particularly so because the merits of the constitutional and other issues have been fully briefed and argued and are ready for decision by this Court.

IV.

THE JUDGMENT SHOULD NOT BE VACATED

If this Court agrees with Log Cabin that the case is not moot, then this Court need not reach the government's motion to vacate the judgment. Even if this Court finds that the case is moot, however, it should not vacate the judgment.

A. Vacatur Is Not Automatic

Despite what the government suggests, vacatur and mootness are different issues and mootness does not automatically trigger vacatur. U.S. Bancorp Mortg.

Co. v. Bonner Mall P'ship, 513 U.S. 18, 23-24 (1994).

Vacatur is an "extraordinary" remedy and the party seeking vacatur must show equitable entitlement to vacatur. U.S. Bancorp, supra, 513 U.S. at 26. In that case, the parties had settled pending appeal and the appeal was dismissed as moot. Despite the mootness of the appeal, the Supreme Court declined to vacate the underlying judgment, ruling as follows:

> As always when federal courts contemplate equitable relief, our holding must also take account of the public interest. "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." .... To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would – quite apart from any considerations of fairness to the parties – disturb the orderly operation of the federal judicial system. Munsingwear establishes that the public interest is best served by granting relief when the demands of "orderly procedure," ... cannot be honored; we think conversely that the public interest requires those demands to be honored when they can.

Id. at 26-27 (citations omitted).[17]

The government's motion does not mention this portion of the Supreme Court's holding in U.S. Bancorp, even though Log Cabin cited it previously in its July 21, 2011 letter brief, Dkt. 120-1 at 8, and at the September 1 oral argument.

[17] U.S. Bancorp also concluded that the portion of the Court's opinion in United States v. Munsingwear, 340 U.S. 36 (1950), describing the "established practice" for vacatur, on which the government heavily relies, was dictum. 513 U.S. at 23.

The government mentions the case only in passing. Motion at 9-10. Instead, it cites Camreta v. Greene, 131 S. Ct. 2020 (2011), but the government's quotation from that case omits important language in an ellipsis. The government cites Camreta for its argument that the Court's "established practice" when a case becomes moot on appeal is to dismiss the appeal and vacate the judgment. But the Supreme Court's statement, without the ellipsis, was in full, as follows: "Our 'established' (**though not exceptionless**) practice in this situation is to vacate the judgment below." Id. at 2034-35 (emphasis added). As the Court can readily see, the government intentionally omitted any reference to exceptions to the "established practice." Similarly, the government cites Public Utilities Comm'n v. FERC, 100 F.3d 1451 (9th Cir. 1996), without mentioning that portion of the Court's opinion identifying recognized exceptions to the general rule Id. at 1461.[18]

Here, the government has not shown how vacating this judgment would serve the public interest. It only argues that vacatur is equitable because Log Cabin lacked standing and the district court's injunction was too broad. Motion at 11. These are the same meritless points that were briefed and argued on the merits. The government ignores the important constitutional law issues at the heart of the case. The public interest in resolving, once and for all, any open questions about

[18] The case identified exceptions to "automatic" vacatur where the party seeking appellate relief fails to protect itself or is the cause of subsequent mootness. 100 F.3d at 1461. The government also cites Alvarez v. Smith, 130 S. Ct. 576, 581-82 (2009), without explaining that the Court in that case described its power to vacate a judgment as "flexible," and analyzed whether the party requesting vacatur had voluntarily caused the mootness. The Court held that where such is the case, as it is here, vacatur is not merely due to "happenstance" or the "vagaries of circumstance" and is not appropriate. Id. See also Dilley v. Gunn, below.

the constitutionality of DADT should compel this Court to rule on the merits of these issues and, in any event, to deny vacatur.

Vacatur is inappropriate where the party seeking vacatur caused mootness. Dilley v. Gunn, 64 F.3d 1365, 1370 (9th Cir. 1995). An example of that rule is a case involving pre-DADT regulations regarding homosexuals in the military. Cammermeyer v. Perry, 97 F.3d 1235 (9th Cir. 1996). After the Army forced the Washington National Guard to discharge Col. Cammermeyer after she came out as a lesbian, she challenged her discharge, claiming it had violated her constitutional rights. The district court granted summary judgment in her favor on her equal protection and due process claims, ordered her reinstated, enjoined the defendants from taking any action against her on account of her homosexual status, declared her discharge unconstitutional, and declared the relevant Army regulation unconstitutional as well. Id. at 1236-37. Pending appeal, she was reinstated and Congress passed DADT, rescinding the prior Army regulation. Id. at 1237. The Court found the appeal to be moot but declined to vacate the judgment, citing U.S. Bancorp and noting the absence of any equitable facts sufficient to grant the extraordinary remedy of vacatur. Id. at 1239. This case is no different because the defendant United States of America voluntarily repealed the unconstitutional DADT statute. The same outcome is appropriate.

B. Vacatur Should Be Decided By the District Court

In any event, because factual issues exist, the issue of vacatur should be decided by the district court in the first instance. Chem. Producers & Distribs. Ass'n v. Helliker, supra, 463 F.3d at 879 ("When we cannot by resort to the factual record determine whether mootness was caused by the voluntary action of the party seeking vacatur, this threshold question is left to the district court."); Cammermeyer v. Perry, supra, 97 F.3d at 1239 (remanding to district court to determine equities); Dilley v. Gunn, supra, 64 F.3d at 1371 (remanding for factual determination of whether defendant was responsible for mootness).

C. The Government's Cases Do Not Compel Vacatur

The government argues that this case is a "classic example" of mootness occurring under circumstances in which vacatur is "mandatory." Motion at 10. But the government's cases do not support its contention that vacatur is mandatory when mootness is found; to the contrary, each case was decided on its unique factual circumstances. In Helliker, supra, this Court was able, on the record before it, to find that the Chemical Producers and Distributors Association, a trade organization, did not cause mootness. While it had lobbied for a change in California's pesticide regulations, the California legislature changed the regulations, not the trade association. 463 F.3d at 878-79. Here, the defendant United States of America voluntarily repealed DADT and, according to Helliker,

"Where mootness was caused by 'voluntary action' of the party seeking vacatur, 'we generally remand with instructions to the district court to weigh the equities and determine whether it should vacate its own judgment.'" Id. at 878 (citations omitted).

The cases from other circuits cited by the government are similarly distinguishable. Am. Bar Ass'n v. FTC, 636 F.3d 641 (D.C. Cir. 2011), did not hold vacatur to be mandatory. Citing U.S. Bancorp, it found that defendant FTC did not cause mootness because Congress, not the FTC, passed the legislation that mooted the case. Id. at 649. Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096 (10th Cir. 2010), is also distinguishable because Congress, not the defendant federal agency, passed the legislation rendering the case moot so the agency did not cause mootness. The case also reaffirms the points made here by Log Cabin: vacatur is an equitable question, courts should consider the nature and character of the conditions that caused the case to be moot, and each case must be decided on its particular circumstances. Id. at 1129-30. Nat'l Black Police Ass'n v. Dist. of Colum., 108 F.3d 346, 353 (D.C. Cir. 1997), also did not hold that vacatur was mandatory. It cited U.S. Bancorp and stated that vacatur is an equitable remedy, not an automatic right, and that where mootness results from voluntary action, vacatur should not be granted unless doing so would serve the public interest. Id. at 351. While it happened to conclude that vacatur

was appropriate under the facts and circumstances of that case, it repeated that "vacatur is an equitable remedy and the record in particular cases may militate in favor of denying vacatur." Id. at 354.

V.

CONCLUSION

This case is not moot because the Repeal Act leaves the government unconstrained to violate Americans' constitutional rights again in the future and because DADT continues to have collateral consequences to those undeservedly and illegally discharged under DADT. Even if the Court does find that the case is moot, it should not exercise its equitable power to vacate the district court's judgment because that would not be in the public interest and because the defendant United States of America voluntarily created mootness by enacting the Repeal Act.

While government policies merely come and go, our Constitution endures. So should the district court's declaratory judgment that Don't Ask, Don't Tell was unconstitutional.

Dated: September 28, 2011

WHITE & CASE LLP

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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 RESPONSE OF APPELLEE LOG CABIN REPUBLICANS TO SUGGESTION OF MOOTNESS AND MOTION TO VACATE THE DISTRICT COURT JUDGMENT 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 September 28, 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 September 28, 2011, at Los Angeles, California.

/s/ Dan Woods
Dan Woods