Case Nos. 10-56634, 10-56813

Per Curiam Opinion (Alarcón, O'Scannlain, and Silverman, JJ.)
filed September 29, 2011

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

PETITION OF APPELLEE LOG CABIN REPUBLICANS FOR PANEL REHEARING OR FOR REHEARING *EN BANC*

Dan Woods (CA SBN 78638)
dwoods@whitecase.com
Earle Miller (CA SBN 116864)
emiller@whitecase.com
Aaron A. Kahn (CA SBN 238505)
aakahn@whitecase.com

WHITE & CASE LLP
633 West Fifth Street, Suite 1900
Los Angeles, California 90071
Telephone: (213) 620-7700
Facsimile: (213) 452-2329

Attorneys for Plaintiff-Appellee/Cross-Appellant Log Cabin Republicans

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I.

INTRODUCTION

For 17 years, the United States maintained a policy of "Don't Ask, Don't Tell" ("DADT"), codified at 10 U.S.C. § 654 and its implementing regulations, prohibiting the open service of homosexuals in the nation's armed forces. On October 12, 2010, the district court entered its judgment declaring Don't Ask, Don't Tell unconstitutional under the Fifth and First Amendments, and enjoining its further enforcement. In December 2010, in direct response to that judgment, Congress passed and the President signed the Don't Ask, Don't Tell Repeal Act of 2010 ("Repeal Act"), Pub. L. No. 111-321, 124 Stat. 3515 (2010). The Repeal Act did not become effective until September 20, 2011.

The government's appeal was argued on September 1, 2011. On that date, all parties agreed that the case was not moot. On September 20, the day the Repeal Act took effect, the government filed a Suggestion of Mootness and Motion to Vacate the District Court Judgment ("Mootness/Vacatur Motion"). Nine days later – barely 18 hours after Log Cabin opposed that motion, and evidently without considering the opposition – the panel issued its *per curiam* opinion, finding that this case became moot when the Repeal Act took effect. The panel vacated not only the district court's judgment but its "injunction, opinions, orders, and factual

findings – indeed, all of its past rulings," declaring them void and with no "precedential, preclusive, or binding effect." Panel Op. at 18580.[1]

The merits panel adopted wholesale the arguments in the government's Mootness/Vacatur Motion, but did not consider the opposition brief that Log Cabin filed, which showed why the case was not moot, and why the district court's declaratory judgment of unconstitutionality should not be vacated even if it was. As a result, the panel reached a preconceived result without fully considering Log Cabin's arguments.

The merits panel did not confine itself to a *per curiam* opinion finding the case moot and directing vacatur. Judge O'Scannlain filed a lengthy special concurrence "about the role *Lawrence v. Texas* … may have in substantive due process challenges," Panel Op. at 18581 (conc. op.), echoing his dissent from the denial of rehearing in *Witt v. Dep't of the Air Force*, 548 F.3d 1264, 1265-76 (9th Cir. 2008) (*Witt II*). The concurrence bluntly criticizes the district court's reasoning, Panel Op. at 18583-84 (conc. op.), but the district court did not misinterpret *Lawrence*; it precisely followed – as it was bound to – the teaching of *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008) (*Witt I*), in which this Court applied *Lawrence* in the context of DADT. Judge O'Scannlain may disagree with *Witt I*, but it is the law of this Circuit and a *per curiam* dismissal and vacatur

[1] A copy of the opinion, Dkt. 130-1, is attached as Appendix A.

of the district court's judgment is an inappropriate vehicle to prevent its application on a broader scale. And if this case were truly moot, the concurrence is an unnecessary advisory opinion.

In the judgment of counsel, the panel's decision overlooked at least two material points of law argued in Log Cabin's opposition to the Mootness/Vacatur Motion: (1) intervening legislation does not automatically render moot a matter litigated to final judgment after trial; and (2) mootness does not automatically compel vacatur of a district court's judgment, and that determination should be made by the district court, not the reviewing court. The panel's hastily-issued opinion did not fully consider Log Cabin's legal arguments on these points. The government was not "deprived of review" by mootness, as the panel opinion held (Panel Op. at 18580): the government abandoned such review when it failed to contend in its merits briefs that DADT was constitutional. The panel also held erroneously that the repeal of DADT "gave Log Cabin everything its complaint hoped to achieve," Panel Op. at 18577 (internal quotation marks omitted), when in fact Log Cabin had "achieved" a judicial declaration of unconstitutionality of DADT, but lost that achievement when the panel vacated it by virtue of that very repeal. Panel rehearing is therefore appropriate under FRAP 40.

In addition, *en banc* rehearing is warranted under FRAP 35 because this proceeding involves a question of exceptional importance. That is not simply due

to the important and recurring issues of mootness and vacatur that the case raises. The exceptional importance arises from its subject matter: the government's ability to discriminate, as a matter of policy, against individuals in military service, merely for exercising their constitutional right to engage in private, consensual intimate association. This is one of the major civil rights issues of our times.

The panel's sweeping, and unnecessary, vacatur order eradicates over a dozen thoughtful district court rulings, including factual findings after a full bench trial. It not only condemns any future servicemember who may claim injury from an unconstitutional discharge under DADT to re-litigate the entire factual basis for this lawsuit, at an enormous cost in judicial resources, but it calls into public question the very validity of the proceedings below, which were held and concluded before the Repeal Act was enacted. Resolution of these issues is vital to public confidence in the adequacy, transparency, and correctness of the judicial process. This is especially true when, as here, the question presented involves the proper role of the judiciary in constraining the unconstitutional acts of Congress and the Executive. When this Court stands against the combined might of the other branches of government, it should ensure that its own authority is at its maximum, to show that it gave this matter the sustained attention it merits. *See Witt II*, 548 F.3d at 1280 (Kozinski, C.J., dissenting from denial of rehearing *en banc*). Rehearing by this Court sitting *en banc* is therefore appropriate.

II.

BACKGROUND

Log Cabin brought this facial challenge to DADT in 2004, in the wake of *Lawrence v. Texas*, 539 U.S. 558 (2003). After a contested bench trial, at which over 20 witnesses testified and a full record was developed, the district court declared DADT unconstitutional, finding that DADT violated both Fifth Amendment due process rights and First Amendment rights of free speech and the right to petition, and issued judgment in favor of Log Cabin on its claims for declaratory and injunctive relief. The district court issued an 85-page memorandum opinion (ER 19), an 84-page set of Findings of Fact and Conclusions of Law (ER 105), and a 15-page order granting an injunction against enforcement of DADT (ER 4).

The government appealed and moved for a stay of the injunction pending appeal, arguing that it was likely to prevail on the merits of its contention that DADT was constitutional. On November 1, 2010, a motions panel (Judges O'Scannlain, Trott, and W. Fletcher) granted the motion. Dkt. 24.

In December 2010, Congress passed the Repeal Act. It 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 that DADT 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. *See* Dkt. 115-1 at 8-9 and n.2.

In May 2011, after the completion of merits briefing, Log Cabin moved to vacate this Court's stay order. On July 6, 2011, a different motions panel (Chief Judge Kozinski and Judges Wardlaw and Paez) granted the motion, finding that the government's briefs "do not contend that 10 U.S.C. §654 is constitutional." It lifted the stay, reinstating the district court's injunction against the enforcement of DADT. The panel also ordered expedited oral argument. Dkt. 111.

On July 14, 2011, the government filed an emergency motion for reconsideration. On July 15, 2011, the motions panel reinstated the stay with one very large exception: the district court's injunction would "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." It also scheduled further briefing to conclude by July 22, 2011. Dkt. 117.

On July 22, 2011, the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff made the certification called for by the Repeal Act. It is no coincidence that they did so on the very day that the government filed its final brief on its motion; this case unquestionably accelerated the long-awaited certification.

On the same date, July 22, 2011, the motions panel granted the government's motion for reconsideration but again found that the government "does not contend that 10 U.S.C. §654 is constitutional" and again ordered that the district court's injunction continue to enjoin the government from "investigating, penalizing, or discharging" anyone under DADT. Dkt. 124.

Before the government filed its motion for reconsideration, on July 11, 2011 the merits panel (Judges Alarcón, O'Scannlain, and Silverman) issued an order directing the government to state whether it intended to defend the constitutionality of DADT, and ordering both parties to show cause why the case should not be dismissed as moot following certification under the Repeal Act. Both parties filed letter responses to the order to show cause and agreed that the case was not moot as of that date. The panel conducted oral argument on September 1, 2011.

The 60-day period following certification then passed and the repeal of DADT became effective on September 20, 2011. That afternoon, the government filed its Mootness/Vacatur Motion. Log Cabin opposed that motion on the afternoon of September 28, 2011, two days earlier than required. The following morning the panel issued its *per curiam* opinion, including the lengthy concurrence by Judge O'Scannlain. That the panel did not consider Log Cabin's opposition is apparent from the timing of the decision, issued a mere 18 hours later.

III.

THE PANEL OVERLOOKED TWO REASONS THAT THIS CASE IS NOT MOOT

The issue of mootness was first raised in the merits panel's Order to Show Cause of July 11, 2011. The parties filed short letter responses but the case was not then moot, and the question of mootness was not yet ripe for decision. Log Cabin's arguments why the case is not moot following repeal were most fully presented in its opposition to the Mootness/Vacatur Motion (Dkt. 129), which the panel did not consider. Rehearing should be granted so that Log Cabin's arguments on the issue of mootness may be fully considered. The district court's declaratory relief judgment is not moot for two independently sufficient reasons, and this Court should decide the appeal on the merits.

A. The Repeal Act Leaves the Government Unconstrained from Further Action

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"); *Coral Construction Co. v. King Cnty.*, 941 F.2d 910, 927 (9th Cir. 1991).

In *City of Mesquite*, the Supreme Court identified the inquiry as whether the likelihood of future violations of the law was "sufficiently remote" as to make

injunctive relief unnecessary: "A case **might** become moot if subsequent events made it **absolutely clear** that the allegedly wrongful behavior could not reasonably be expected to recur." 455 U.S. at 289 n.10 (emphasis added). 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, in *Ballen v. City of Redmond*, 466 F.3d 736, 744 (9th Cir. 2006), this Court reaffirmed this principle, whose purpose is to prevent a legislative body from reenacting a statute without the specter of a prior finding of unconstitutionality.

Declaring this case moot would leave the government unconstrained from enacting another unconstitutional law barring homosexuals from military service. The Repeal Act did not expressly authorize open service; it merely repealed DADT. The government's modified regulations similarly do not expressly authorize open service. And policy memoranda that the government presented to the panel (Dkt. 128-2) lack the force of law and are subject to change at any time. The panel opinion completely ignored the holding of *Coral Construction* that such lack of constraint on the government prevents a finding of mootness.

The specter of further legislative, executive, or administrative action is hardly remote or absolutely certain not to occur. Despite the findings of the motions panel, the government is still contending that DADT was constitutional. It took that position in its rebuttal at oral argument. 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.

This matters because the country has a different Congress today than when the Repeal Act was passed in December 2010. The new House of Representatives leadership has already expressed a preference for continuing DADT, and all of the leading Republican candidates for President have stated at a minimum that repeal of DADT was a mistake and several would act to reinstate DADT.

The panel opinion stated that it would be "speculation" that a future Congress would reenact DADT. Panel Op. at 18578. But it overlooks that absent a decision in this case Congress is unconstrained from doing so. Moreover, any President could ban open service by homosexuals via executive order or Defense Department regulation, as was the case before Congress enacted DADT in 1993.

The panel opinion held that this case was moot because, citing *Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006), "[w]e

cannot say with 'virtual[] certain[ty]'" that DADT would be reenacted. But "virtual certainty" that an unconstitutional statute will be reenacted is far too stringent a test of mootness. Rather, the test under *City of Mesquite* and *Coral Construction* is whether the government is unconstrained from reenacting the statute, and whether the likelihood of future violation is sufficiently remote. To the extent that *Helliker* posits a different test, this Court should grant *en banc* review to clarify the standard.

B. Collateral Consequences Persist

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 habeas corpus cases. *Carafas v. LaVallee*, 391 U.S. 234 (1968). The principle also applies in other contexts. *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 121-22 (1974); *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1173-75 (9th Cir. 2002).

Servicemembers discharged under DADT continue to suffer ongoing collateral consequences as a result of their discharges. Log Cabin's July 21 letter brief enumerated many concrete, legal, collateral consequences that afflict those discharged with less than honorable discharges. The Repeal Act does not address these consequences.

Even those honorably discharged suffered collateral consequences of being discharged and the Repeal Act does not rectify their situations either. For example, severance payments to those discharged under DADT are only half of the corresponding payment for non-DADT discharges. As a result, these individuals may have claims for back pay, reimbursement, or other relief.

These ongoing harms to servicemembers discharged under DADT prevent this case from becoming moot. *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 (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, 2008 U.S. Dist. LEXIS 12237, at *7 (S.D. Cal. Feb. 19, 2008) (same). Log Cabin cited all these cases in its opposition to the Mootness/Vacatur Motion, but in its haste to issue its opinion the panel ignored that opposition. Its cursory discussion of the collateral consequences exception, Panel Op. at 18578, does not address any of these cases, which stand in direct conflict with the panel opinion.

IV.

THE JUDGMENT SHOULD NOT BE VACATED

Even if the panel correctly determined that the case is moot, it should not have vacated the judgment. Vacatur and mootness are distinct issues; mootness does not automatically trigger vacatur. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23-24 (1994).

A. Vacatur Is Not Automatic

Vacatur is an "extraordinary" remedy and the party seeking vacatur must show equitable entitlement to vacatur. *U.S. Bancorp* at 26. In *U.S. Bancorp*, despite the mootness of the appeal following the parties' settlement, the Supreme Court declined to vacate the underlying judgment:

> 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).

The panel opinion departs from the Supreme Court's holding in *U.S. Bancorp*. It cites *United States v. Munsingwear*, 340 U.S. 36 (1950), for the proposition that the "established practice" when a case becomes moot on appeal is to vacate the district court's judgment and remand for dismissal of the complaint. But *U.S. Bancorp* also held that the portion of the *Munsingwear* opinion describing the "established practice" for vacatur was *dictum* and not binding on future cases. 513 U.S. at 23-24. Moreover, in *Camreta v. Greene*, 131 S. Ct. 2020 (2011), the Supreme Court stated that "Our 'established' (**though not exceptionless**) practice in this situation is to vacate the judgment below." *Id.* at 2034-35 (emphasis added). *See also Public Utilities Comm'n v. FERC*, 100 F.3d 1451, 1461 (9th Cir. 1996) (identifying exception to "automatic" vacatur where the party seeking appellate relief is the cause of subsequent mootness). The panel opinion elides the existence of exceptions to the "established practice."

Vacatur is inappropriate where the party seeking vacatur caused mootness. *Dilley v. Gunn*, 64 F.3d 1365, 1370 (9th Cir. 1995). That principle was applied in a closely analogous case involving the pre-DADT regulations regarding homosexuals in the military, *Cammermeyer v. Perry*, 97 F.3d 1235 (9th Cir. 1996). In *Cammermeyer*, the Army forced the Washington National Guard to discharge Col. Cammermeyer after she came out as a lesbian. She challenged her discharge, claiming it violated her constitutional rights. The district court granted her

summary judgment 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, replacing the prior Army regulations. *Id.* at 1237. This Court (Judges B. Fletcher, Kozinski, and Leavy) found the appeal to be moot but declined to vacate the judgment, citing *U.S. Bancorp*. *Id.* at 1239 ("the decision to vacate is not to be made mechanically, but should be based on equitable considerations").

This case exactly parallels *Cammermeyer*: the district court sustained a constitutional challenge to a military regulation, granting both injunctive and declaratory relief; while the case was on appeal Congress changed the law and the regulation was rescinded. As this Court declined to order vacatur in *Cammermeyer*, it should do so here as well.

The panel opinion did not address *Cammermeyer* at all. Moreover, it analyzed causation of mootness exactly backwards. Because the "United States appealed promptly" and filed many motions and briefs arguing against aspects of the district court's judgment, the panel opinion concludes that "[m]ootness … deprived the United States of the review to which it is entitled." Panel Op. at 18579-80. But the panel opinion overlooked two critical facts: as the motions

panel twice noted, the United States did not defend the constitutionality of DADT in its merits briefs; and while the United States was filing motions and briefs in this Court, it was actively repealing DADT so that it could argue that this case had become moot and thereby avoid a judicial determination of the merits. If this case has become moot, it is because the United States caused it to become moot by enacting the Repeal Act, *see Cammermeyer*, 97 F.3d at 1239, not due to the happenstance of events over which it had no control, as the panel opinion suggests.

Finally, vacating the judgment here would not serve the public interest. The panel opinion completely ignored this aspect of the equitable analysis that is appropriate to the decision on vacatur. The public interest in resolving, once and for all, any open questions about the constitutionality of DADT should compel this Court to rule on the merits of these issues and, in any event, to deny vacatur.

B. The District Court Should Decide Vacatur

Because factual issues exist, vacatur should be decided by the district court in the first instance. Again, the panel opinion did not even address Log Cabin's arguments on this point. The normal procedure when an appeal becomes moot through the appellant's own act, and when a factual determination must be made "as equities and hardships vary the balance between the competing values of right to relitigate and finality of judgment," is to leave to the district court the decision

whether to vacate the judgment. *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982).

Though *Ringsby* arose in the context of a settlement while the case was on appeal, the rule applies equally when the appellant renders the appeal moot through any means – such as, for example, by changing the law, as the United States did here. "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.'" *Helliker*, *supra*, 463 F.3d at 878. "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." *Id*. at 879. *See also Cammermeyer*, *supra*, 97 F.3d at 1239 (remanding to district court to determine equities); *Dilley*, *supra*, 64 F.3d at 1371 (same).

V.

CONCLUSION

We are not suggesting that this Court should hold that this case is entitled to collateral estoppel effect in later cases arising under DADT. That is a matter for the district courts in those cases to determine. But the panel opinion goes too far in its mandate to vacate the judgment and every other prior ruling down to the findings of fact, creating the fiction that this case never existed, that the matter was

never tried, and that judgment that DADT is unconstitutional was never entered. It especially goes too far in its imperious directive that neither Log Cabin, nor anyone else, may ever in future use the district court's rulings in any fashion whatever. To thus sow the fields of the law with salt is unnecessary and gratuitous.

If this case is declared moot and the district court's judgment is vacated, servicemembers who claim injury from their discharge under an unconstitutional statute will have to start again from square one and prove, again, that DADT was unconstitutional. Re-litigating the constitutionality of DADT would be a colossal and unconscionable waste of judicial resources. That is particularly so because the merits of the constitutional and other issues have been fully briefed and are ready for decision by this Court.

Because this case implicates the government's asserted right to implement a military policy that would be unconstitutional in any other setting, this case "involves a question of exceptional importance." *Witt II*, 548 F.3d at 1280 (Kozinski, C.J., dissenting from denial of rehearing *en banc*). This Court should grant rehearing *en banc*.

Dated: October 13, 2011

WHITE & CASE LLP

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

CERTIFICATE OF COMPLIANCE

PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing or for rehearing en banc is proportionally spaced, has a typeface of 14 points or more and contains 4,190 words, exclusive of the cover page, the table of contents and table of authorities, this Certificate, and the certificate of service, as measured by the word count function of the Microsoft Word program used to prepare the brief.

/s/ Dan Woods
Dan Woods

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 PETITION OF APPELLEE LOG CABIN REPUBLICANS FOR PANEL REHEARING OR FOR REHEARING *EN BANC* 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 October 13, 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 October 13, 2011, at Los Angeles, California.

/s/ Earle Miller
Earle Miller

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOG CABIN REPUBLICANS, a non-profit corporation,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA; LEON PANETTA, Secretary of Defense, in his official capacity,
Defendants-Appellants.

No. 10-56634

D.C. No. 2:04-cv-08425-VAP-E

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Plaintiff-Appellant,

v.

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Defendants-Appellees.

No. 10-56813

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OPINION

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, District Judge, Presiding

Argued and Submitted
September 1, 2011—Pasadena, California

Filed September 29, 2011

Before: Arthur L. Alarcón, Diarmuid F. O'Scannlain, and Barry G. Silverman, Circuit Judges.

Per Curiam Opinion;
Concurrence by Judge O'Scannlain

COUNSEL

Henry C. Whitaker, Attorney, Appellate Staff, Civil Division, United States Department of Justice, Washington, D.C., argued the cause and filed the briefs for the defendants-appellants/defendants-appellees. With him on the briefs were Tony West, Assistant Attorney General, André Birotte Jr., United States Attorney, and Anthony J. Steinmeyer and August E. Flentje, Attorneys, Appellate Staff, Civil Division, United States Department of Justice, Washington, D.C.

Dan Woods, White & Case LLP, Los Angeles, California, argued the cause and filed a brief for the plaintiff-appellee/plaintiff-appellant. With him on the brief was Earle Miller, Aaron A. Kahn, and Devon A. Myers, White & Case LLP, Los Angeles, California.

OPINION

PER CURIAM:

We are called upon to decide whether the congressionally enacted "Don't Ask, Don't Tell" policy respecting homosexual conduct in the military is unconstitutional on its face.

I

A

In 1993, Congress enacted the policy widely known as Don't Ask, Don't Tell. The policy generally required that a service member be separated from the military if he had engaged or attempted to engage in homosexual acts, stated that he is a homosexual, or married or attempted to marry a person of the same sex. 10 U.S.C. § 654(b) (repealed); *see, e.g.*, Dep't of Def. Instructions 1332.14, 1332.30 (2008).

The nonprofit corporation Log Cabin Republicans brought this suit in 2004, challenging section 654 and its implementing regulations as facially unconstitutional under the due process clause of the Fifth Amendment, the right to equal protection guaranteed by that Amendment, and the First Amendment right to freedom of speech. Log Cabin sought a declaration that the policy is facially unconstitutional and an injunction barring the United States from applying the policy. The district court dismissed the equal protection claim under *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008) (upholding section 654 against a facial equal protection challenge), but allowed the due process and First Amendment challenges to proceed to trial.

After a bench trial, in October 2010 the district court ruled that section 654 on its face violates due process and the First Amendment. The court permanently enjoined the United States from applying section 654 and its implementing regula-

tions to anyone. The United States appealed; Log Cabin cross-appealed the dismissal of its equal protection claim.

B

While the appeal was pending, Congress enacted the Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010) ("Repeal Act"). That statute provides that section 654 would be repealed 60 days after: (1) the Secretary of Defense received a report determining the impact of repealing section 654 and recommending any necessary changes to military policy, and (2) the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff certified that they had considered the report's recommendations and were prepared to implement the repeal consistent with military readiness, military effectiveness, and unit cohesion. Repeal Act § 2(b). The Repeal Act left section 654 in effect until the prerequisites to repeal were satisfied and 60 days had then passed.

The report was issued November 30, 2010, and certification occurred July 21, 2011. Section 654 was thus repealed September 20, 2011.

II

A

[1] Because section 654 has now been repealed, we must determine whether this case is moot. "[I]t is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment" is under review. *Burke v. Barnes*, 479 U.S. 361, 363 (1987). Article III of the United States Constitution "requires that there be a live case or controversy at the time that" a reviewing federal court decides the case. *Id.*

[2] Applying that limitation, the Supreme Court and our court have repeatedly held that a case is moot when the chal-

lenged statute is repealed, expires, or is amended to remove the challenged language. In determining whether a case has become moot on appeal, the appellate court "review[s] the judgment below in light of the . . . statute as it now stands, not as it . . . did" before the district court. *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam); *see Burke*, 479 U.S. at 363.

In *Hall v. Beals*, for example, the Supreme Court deemed moot a challenge to a six-month residency requirement imposed by Colorado for eligibility to vote in the 1968 presidential election. 396 U.S. at 46-48. After the district court rejected the challenge and the Supreme Court noted probable jurisdiction, the Colorado legislature reduced the residency requirement to two months, which the plaintiffs would have met at the time of the 1968 election. *Id.* at 47-48. The case was moot because, "under the statute as . . . written" when the Supreme Court reviewed the district court's judgment, "the appellants could have voted in the 1968 presidential election." *Id.* at 48. Similarly, in *United States Department of the Treasury v. Galioto*, after the Supreme Court had noted probable jurisdiction to review a ruling that federal firearms legislation unconstitutionally singled out mental patients, the case became moot because Congress amended the statute to remove the challenged language. 477 U.S. 556, 559-60 (1986). And in *Burke v. Barnes*, where several congressmen challenged the President's attempt to "pocket-veto" a bill, the Supreme Court deemed the case moot because the bill expired by its own terms before the Court could rule on the case. 479 U.S. at 363. As in cases dealing with repealed legislation, the Court "analyze[d] th[e] case as if [the plaintiffs] had originally sought to litigate the validity of a statute which by its terms had already expired." *See id.*

[3] Following the Court's lead, we have routinely deemed cases moot where "a new law is enacted during the pendency of an appeal and resolves the parties' dispute." *Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1181 (9th Cir. 2006) (Qwest's challenge to ordinances rendered moot by amend-

ment exempting Qwest from ordinances); *see Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 875-78 (9th Cir. 2006) (case moot where amendment eliminated challenged part of pesticide registration law); *Martinez v. Wilson*, 32 F.3d 1415, 1419-20 (9th Cir. 1994) (case moot where, after injunction was issued, statute was amended to eliminate challenged factors used by the State of California in distributing funds under the Older Americans Act). Under these precedents, when a statutory repeal or amendment gives a plaintiff "everything [it] hoped to achieve" by its lawsuit, the controversy is moot. *Helliker*, 463 F.3d at 876.

[4] This suit became moot when the repeal of section 654 took effect on September 20. If Log Cabin filed suit today seeking a declaration that section 654 is unconstitutional or an injunction against its application (or both), there would be no Article III controversy because there is no section 654. The repeal, in short, gave Log Cabin "everything" its complaint "hoped to achieve." *Helliker*, 463 F.3d at 876. There is no longer "a present, live controversy of the kind that must exist" for us to reach the merits. *Hall*, 396 U.S. at 48.

B

Log Cabin concedes that "the injunctive relief awarded by the district court [has] become moot" due to the repeal, but contends that its quest for declaratory relief is live under either of two exceptions to mootness.

We are not persuaded. When a statutory repeal or amendment extinguishes a controversy, the case is moot. There is no exception for declaratory relief. *See Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1514 (9th Cir. 1994) ("Declaratory relief is unavailable where [a] claim is otherwise moot . . . ."); *Pub. Utils. Comm'n of State of Cal. v. FERC*, 100 F.3d 1451, 1459 (9th Cir. 1996) (same).

In any event, no exception to mootness applies here. Log Cabin notes that generally "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." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). But voluntary cessation is different from a statutory amendment or repeal. Repeal is "usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed." *Helliker*, 463 F.3d at 878. Cases rejecting mootness in such circumstances "are rare and typically involve situations where it is virtually certain that the repealed law will be reenacted." *Id.* (emphases omitted); *see, e.g.*, *City of Mesquite*, 455 U.S. at 289 & n.11 (City admitted that it intended to reenact "precisely the same provision" that it had repealed after the district court's adverse judgment); *Ballen v. City of Redmond*, 466 F.3d 736, 741 (9th Cir. 2006) (statutory amendment "adopted only as an interim regulation in response to the district court's summary judgment ruling"); *Coral Constr. Co. v. King Cnty.*, 941 F.2d 910, 928 (9th Cir. 1991) (district court had upheld the challenged ordinance, allowing the County to "reenact its earlier ordinance" "without the spectre of a prior finding of unconstitutionality").

We cannot say with "virtual[ ] certain[ty]," *Helliker*, 463 F.3d at 878, that the Congress that passed the Repeal Act—or a future Congress whose composition, agenda, and circumstances we cannot know—will reenact Don't Ask, Don't Tell. We can only speculate, and our speculation cannot breathe life into this case.

A second exception to mootness applies when a party faces "collateral consequences" from a challenged statute even when the statute is repealed. Log Cabin cites several benefits that discharged service members may have lost as a result of their separation. But because these missed benefits are not legal penalties from past conduct, they do not fall within this exception. *Qwest*, 434 F.3d at 1182; *Pub. Utils. Comm'n*, 100 F.3d at 1461 ("the collateral consequences must be *legal*").

III

Having determined that this case is moot, we must "direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106.

[5] The "established" practice when a civil suit becomes moot on appeal is to vacate the district court's judgment and remand for dismissal of the complaint. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Vacatur ensures that "those who have been prevented from obtaining the review to which they are entitled [are] not . . . treated as if there had been a review." *Id.* It "prevent[s] an unreviewable decision 'from spawning any legal consequences,' so that no party is harmed by what [the Supreme Court has] called a 'preliminary' adjudication." *Camreta v. Greene*, 131 S. Ct. 2020, 2035 (2011) (quoting *Munsingwear*, 340 U.S. at 40-41).

To be sure, in the rare situation "when mootness [does] not deprive the appealing party of any review to which [it] was entitled," reviewing courts have left lower court decisions intact. *Camreta*, 131 S. Ct. at 2035 n.10. Vacatur thus may be unwarranted when the losing party did not file an appeal or settled the case. *See id.* (citing *Karcher v. May*, 484 U.S. 72, 83 (1987), and *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994)). In each circumstance, the losing party "voluntarily forfeit[s] his legal remedy by the ordinary process[ ] of appeal" and thus "surrender[s] his claim to the equitable remedy of vacatur." *U.S. Bancorp*, 513 U.S. at 25.

[6] That is not the situation before us. The United States did not forfeit the appellate review to which it was entitled. After the district court entered its judgment and injunction, the United States appealed promptly, moved our court to stay the district court order, filed two merits briefs disputing the judgment and relief ordered, moved to reinstate the stay of the

injunction after this court briefly lifted it, filed a letter brief reiterating its arguments against the district court's judgment and injunction, and at oral argument made clear that it still advances all of its arguments against the district court's judgment and injunction. Mootness has thus deprived the United States of the review to which it is entitled. Vacatur is proper. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 74 (1997) (holding that vacatur was proper because, "when the mooting event occurred," the Arizona Attorney General was pursuing his "right to present argument on appeal").

[7] We therefore vacate the judgment of the district court. *Burke*, 479 U.S. at 365 (vacating and remanding to dismiss complaint); *Helliker*, 463 F.3d at 880 (same); *Martinez*, 32 F.3d at 1420. Because Log Cabin has stated its intention to use the district court's judgment collaterally, we will be clear: It may not. Nor may its members or anyone else. We vacate the district court's judgment, injunction, opinions, orders, and factual findings—indeed, all of its past rulings—to clear the path completely for any future litigation. Those now-void legal rulings and factual findings have no precedential, preclusive, or binding effect. The repeal of Don't Ask, Don't Tell provides Log Cabin with all it sought and may have had standing to obtain. (We assume without deciding that Log Cabin had standing to seek a declaration that section 654 is unconstitutional and an injunction barring the United States from applying it to Log Cabin's members. *See Arizonans for Official English*, 520 U.S. at 66-67 (court may assume without deciding that standing exists in order to analyze mootness).) Because the case is moot and the United States may not challenge further the district court's rulings and findings, giving those rulings and findings any effect would wrongly harm the United States.[1]

[1]In light of our disposition, we deny the United States' Suggestion of Mootness and Motion to Vacate the District Court Judgment filed September 20, 2011.

On remand, the district court will dismiss the complaint forthwith.

VACATED AND REMANDED WITH DIRECTIONS TO DISMISS.

O'SCANNLAIN, Circuit Judge, concurring specially:

I fully concur in the court's opinion. The repeal of Don't Ask, Don't Tell has mooted this case, and our opinion properly vacates the district court's judgment, injunction, rulings, and findings.

I write separately because our inability to reach the merits may leave uncertainty about the role *Lawrence v. Texas*, 539 U.S. 558 (2003), may have in substantive due process challenges. Although Congress spared us the need to reach the merits in this case, other such challenges will come to the courts. Because "guideposts for responsible decisionmaking" on matters of substantive due process are "scarce and open ended," *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992), I think it useful to explain how courts should approach the application of *Lawrence* in appropriate cases.

I

The Supreme Court has emphasized its "reluctan[ce] to expand the concept of substantive due process." *Collins*, 503 U.S. at 125. To confine that concept to its proper bounds, the Court has developed an "established method" of substantive due process analysis that comprises two primary features. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

First, the Court requires "a 'careful description' of the asserted fundamental liberty interest." *Glucksberg*, 521 U.S. at 721; *see Reno v. Flores*, 507 U.S. 292, 302 (1993); *Collins*,

503 U.S. at 125. In crafting such descriptions, the Court has eschewed breadth and generality in favor of narrowness, delicacy, and precision.

In *Washington v. Glucksberg*, for example, the Court framed the issue before it as "whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so." 521 U.S. at 723. The Court rejected capacious formulations of the asserted right, such as "the right to choose a humane, dignified death" or "the liberty to shape death." *Id.* at 722 (internal quotation marks omitted). Similarly, in *Cruzan v. Director, Missouri Department of Health*, the Court formulated the interest at stake as a "right to refuse lifesaving hydration and nutrition," 497 U.S. 261, 279 (1990), rather than as a "right to die." So too in *Reno v. Flores*, where the Court described the interest at issue as "the alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution." 507 U.S. at 302. Again, the Court rejected more general articulations of the alleged right, such as "the 'freedom from physical restraint' " and "the right to come and go at will." *Id.*

Second, the Court examines whether that carefully described right is "deeply rooted" in our Nation's history, legal traditions, and practices or in supporting case law. *Glucksberg*, 521 U.S. at 721 (internal quotation marks omitted); *see Collins*, 503 U.S. at 126-29 (examining "the text [and] history of the Due Process Clause"); *Cruzan*, 497 U.S. at 269-77 (examining the common law and contemporary case law); *see also Flores*, 507 U.S. at 303 (observing that no court had ever held that there was a constitutional right of the sort alleged). In *Glucksberg*, for example, the Court examined those sources for evidence of "a right to commit suicide with another's assistance." 521 U.S. at 724; *see id.* at 710-19,

723-28. Coming up empty-handed, the Court concluded that this "asserted 'right' . . . is not a fundamental liberty interest protected by the Due Process Clause." *Id.* at 728.

The Court has imposed these dual limitations on substantive due process analysis to preserve the judiciary's proper role in the constitutional structure. "[E]xtending constitutional protection to an asserted right or liberty interest . . . to a great extent[ ] place[s] the matter outside the arena of public debate and legislative action." *Glucksberg*, 521 U.S. at 720. Whenever the Court expands the concept of substantive due process, moreover, it risks "subtly transform[ing]" the liberty protected by the due process clause to "the policy preferences of the Members of th[e] Court." *Id.*

In short, when confronted with assertions of new fundamental rights, rather than invite innovation the Court has counseled caution. The Court has developed a trusted method reflecting that caution. And while the Court has on occasion departed from its established method, it has not licensed lower courts to do so. *See Witt v. Dep't of Air Force*, 548 F.3d 1264, 1273 (9th Cir. 2008) (O'Scannlain, J., dissenting from denial of rehearing en banc). Most important, when a right is not rooted in our constitutional text, traditions, or history, our authority as judges is at its end. We must then leave the task of identifying and protecting new rights where the Constitution leaves it—with the political branches and the people. *See Glucksberg*, 521 U.S. at 720.

II

A

Against this established legal background, the district court in this case reasoned as follows: Fundamental rights trigger heightened judicial scrutiny. *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 911 (C.D. Cal. 2010). *Lawrence v. Texas* "recogniz[ed] the fundamental right to 'an autonomy

of self that includes freedom of thought, belief, expression, and certain intimate conduct.' " *Id.* (quoting 539 U.S. at 562). Log Cabin's challenge to Don't Ask, Don't Tell implicates that same fundamental right. *Id.* Therefore, Don't Ask, Don't Tell must withstand heightened scrutiny. *Id.*

This is not the "established method" of substantive due process analysis. Indeed, this analysis was tantamount to a conclusion that the Supreme Court in *Lawrence* rejected its own settled approach and established a sweeping fundamental right triggering heightened scrutiny regardless of context. On that unsupported foundation, the district court subjected 10 U.S.C. § 654 to heightened scrutiny.

The Supreme Court's cases instruct that departures from the constitutional text must be narrow, carefully considered, and grounded in the Nation's history, traditions, or practices. *See supra* Part I. The district court's decision followed none of those instructions. Departing from settled practice was particularly improper in this case, which involved a facial constitutional challenge to a federal statute. Judging the constitutionality of an Act of Congress is "the gravest and most delicate duty" that federal courts are called upon to perform. *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (internal quotation marks omitted). Proper respect for Supreme Court precedents, for a considered congressional policy, and for the traditions and history of our country required the district court to apply the tried and trusted method of substantive due process analysis.

B

Log Cabin's due process challenge required the district court to begin by "carefully formulating the interest at stake." *Glucksberg*, 521 U.S. at 722. Because Log Cabin alleged that 10 U.S.C. § 654 violates substantive due process, this first step calls for examining the statutory language, *see Glucks-*

berg, 521 U.S. at 723.[1] Taking close account of that language, a substantive due process challenge to section 654 presented the question whether the due process clause protects the right of a member of the armed forces to do any of the following without being discharged: (1) to engage in, to attempt to engage in, or to solicit another to engage in homosexual acts

[1]As relevant, section 654 provided:

> A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:
>
> (1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—
>
> (A) such conduct is a departure from the member's usual and customary behavior;
>
> (B) such conduct, under all the circumstances, is unlikely to recur;
>
> (C) such conduct was not accomplished by use of force, coercion, or intimidation;
>
> (D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and
>
> (E) the member does not have a propensity or intent to engage in homosexual acts.
>
> (2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.
>
> (3) That the member has married or attempted to marry a person known to be of the same biological sex.

10 U.S.C. § 654(b).

without demonstrating that such conduct is (to simplify for brevity) unusual for the service member, uncoerced, and non-disruptive to the military; (2) to state that he is a homosexual or bisexual and also to engage in, to attempt to engage in, to have the propensity to engage in, or to intend to engage in homosexual acts; or (3) to marry or to attempt to marry a person known to be of the same biological sex. Put simply, the substantive due process question raised by Don't Ask, Don't Tell was whether a service member possesses a right to serve in the military when he is known to engage in homosexual conduct or when he states that he is a homosexual.

Having carefully described the asserted right, the next question is whether the right is manifested in our Nation's history, traditions, or practices. A trusted guide for this analysis is past decisions of the courts, which have repeatedly approved the very actions that Log Cabin contends are unconstitutional. As our court recognized in 1997, "[f]or nearly twenty years we have upheld the constitutionality of the military's authority to discharge service members who engage in homosexual acts." *Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997); *see id.* at 1425-27 (summarizing cases). Affirming a discharge under section 654 in *Philips*, we observed that "this court has consistently held that regulations of the nature at issue here . . . are constitutional" and noted that "[e]very other circuit to address this issue is in accord, upholding against constitutional challenge the authority of the military to discharge those members who engage in homosexual conduct." *Id.* at 1427 & n.12 (emphasis omitted) (citing decisions of the Second, Tenth, D.C., and Federal Circuits); *see, e.g.*, *Thomasson v. Perry*, 80 F.3d 915, 927-31, 934 (4th Cir. 1996) (en banc); *Dronenburg v. Zech*, 741 F.2d 1388, 1397-98 (D.C. Cir. 1984).

Courts have rejected such challenges on equal protection as well as due process grounds. *See, e.g.*, *Able v. United States*, 155 F.3d 628, 635-36 (2d Cir. 1998); *Richenberg v. Perry*, 97 F.3d 256, 260-62 (8th Cir. 1996)*; Steffan v. Perry*, 41 F.3d

677, 686-87 (D.C. Cir. 1994) (en banc); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989). Such equal protection decisions are instructive here: The mere focus on equal protection rather than on due process in such cases confirms that the right asserted here has not been viewed as part of the liberty protected by due process. *See Flores*, 507 U.S. at 303 ("The mere novelty of . . . a claim is reason enough to doubt that 'substantive due process' sustains it."). Moreover, "substantive due process and equal protection doctrine are intertwined for purposes of equal protection analyses of federal action" because the Fifth Amendment's equal protection guarantee is grounded in its due process clause. *Philips*, 106 F.3d at 1427 (internal quotation marks omitted).

These decisions, all of them recent by historical standards, span the Nation and belie any claim that the right asserted by Log Cabin is deeply rooted in our history or traditions. Indeed, "the alleged right certainly cannot be considered so rooted in the traditions and conscience of our people as to be ranked as fundamental" when no court had held (until the district court did here) that there is such a fundamental constitutional right. *Flores*, 507 U.S. at 303 (internal quotation marks omitted).

C

The district court in this case never contended that the right asserted by Log Cabin has deep roots in our history, tradition, or practices, nor in a line of cases stretching an appreciable distance into the past. Rather, the linchpin for the district court's ruling was the Supreme Court's decision just eight years ago in *Lawrence*.

Lawrence held that the liberty interest protected by the due process clause prohibits states from criminalizing private homosexual conduct by consenting adults. 539 U.S. at 578. Nothing in *Lawrence* establishes a general fundamental right to engage in homosexual conduct. *See, e.g., Muth v. Frank*,

412 F.3d 808, 817 (7th Cir. 2005) ("*Lawrence* . . . did not announce . . . a fundamental right, protected by the Constitution, for adults to engage in all manner of consensual sexual conduct . . . ."); *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004) ("[I]t is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right.").

Indeed, far from establishing a broad interest, the Supreme Court in *Lawrence* struck down with marksman-like precision an outlier criminal statute and expressly emphasized the limitations of the liberty interest guiding its holding:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

539 U.S. at 578; *see Lofton*, 358 F.3d at 815 ("*Lawrence*'s holding was that substantive due process does not permit a state to impose a criminal prohibition on private consensual homosexual conduct."). The case did not address the military context, did not establish a right to continued employment for those engaged in proscribed conduct, and did not address how homosexual conduct might be addressed outside a criminal context. The opinion does not prescribe heightened scrutiny. These limitations make clear that *Lawrence* does not establish that a member of the armed forces has a constitutionally protected right to engage in homosexual acts or to state that he or she is a homosexual while continuing to serve in the military.

To be sure, *Lawrence* contained broad language on personal autonomy. *See, e.g.*, 539 U.S. at 562 ("Liberty protects

the person from unwarranted government intrusions into a dwelling or other private places. . . . Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."). But this broad language does not constitute "the careful[ ] formulation" of "the interest at stake" in this case and cannot, under Supreme Court precedent, be "transmuted" into the new fundamental right claimed by Log Cabin. *Glucksberg*, 521 U.S. at 722, 726. In the end, careful application of the Supreme Court's "established method" in substantive due process cases shows that *Lawrence* did not establish *any* fundamental right—let alone any right relevant to the Don't Ask, Don't Tell policy in the military.

D

Because *Lawrence* does not change the scrutiny applicable to policies regarding personnel decisions in the military, section 654 should have been upheld if it was "rationally related to legitimate government interests." *Glucksberg*, 521 U.S. at 728. When enacting section 654, Congress put forth the legitimate interests of military capability and success (among others), *see, e.g.*, 10 U.S.C. § 654(a)(6)-(7), (13)-(15), and Congress could have rationally concluded that the statute served that interest, as reflected in the considerable evidence before it, *see Philips*, 106 F.3d at 1422-23; *Thomasson*, 80 F.3d at 922-23. If we had been able to reach the merits in this case, I would have been obliged to vote to reverse.[2]

[2]So too for the district court's holding that Don't Ask, Don't Tell on its face violates the First Amendment. I do not address this ruling at length because it was little more than a follow-on to the district court's due process ruling. The district court's substantive due process analysis focused on section 654(b)(1), which concerns homosexual acts, whereas its First Amendment analysis looked to section 654(b)(2), which concerns statements made by service members. The district court concluded that if the "acts prong" in section 654(b)(1) violates substantive due process, then the limitation on speech in section 654(b)(2) "necessarily fails as well" under the First Amendment because that provision limits speech in support of an

III

"[J]udicial self-restraint requires" federal courts "to exercise the utmost care whenever we are asked to break new ground" in the field of substantive due process. *Flores*, 507 U.S. at 302 (internal quotation marks omitted). This note of caution is especially important in cases such as this one, where moral and personal passions run high and where there is great risk that "the liberty protected by the Due Process Clause [will] be subtly transformed into the policy preferences" of unelected judges. *Glucksberg*, 521 U.S. at 720. The Constitution entrusts to "public debate and legislative action" the task of identifying and protecting rights that are not rooted in our constitutional text, history, or traditions. *Id.* This case involves precisely such a right, and legislative action achieved the goals pursued in this lawsuit. That was the proper resolution: although Log Cabin had every right to bring this suit, only Congress—not the courts—had the authority under our Constitution to vindicate Log Cabin's efforts here.

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unconstitutional objective. 716 F. Supp. 2d at 926. As already explained, in my view the substantive due process challenge could not have succeeded here.

Moreover, the district court's ruling squarely conflicted with our own decision just fourteen years ago in *Holmes v. California Army National Guard*, which rejected the argument that section 654(b)(2) violates the First Amendment. 124 F.3d 1126, 1136 (9th Cir. 1997). The district court believed that *Holmes*'s "foundations . . . all have been undermined by *Lawrence*," 716 F. Supp. 2d at 926, even though *Lawrence* did not involve the First Amendment and did not even transform the doctrine it *did* involve (due process). *Lawrence* could hardly be taken to undermine the established principle that the First Amendment does not prohibit the use of speech as evidence of the facts admitted. *See Holmes*, 124 F.3d at 1136. Because section 654(b)(1) has a plainly legitimate sweep, section 654(b)(2) may constitutionally be used to identify those within that sweep. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (First Amendment facial challenge requires a showing that "a substantial number of [the challenged statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep") (internal quotation marks omitted).

In this highly charged area, we constitutionally inferior courts should be careful to apply established law. Failure to do so begets the very errors that plagued this case. That failure culminated in a ruling that invalidated a considered congressional policy and imposed a wholly novel view of constitutional liberty on the entire United States. The Supreme Court's cases tell us to exercise greater care, caution, and humility than that. Indeed, our constitutional system demands more respect than that. When judges sacrifice the rule of law to find rights they favor, I fear the people may one day find that their new rights, once proclaimed so boldly, have disappeared because there is no longer a rule of law to protect them.