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July 14, 2011

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

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

Dear Ms. Dwyer:

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

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

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

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

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

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

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

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

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

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

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

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

Once repeal becomes effective, however, this case will be moot. Repeal of a statute moots a facial constitutional challenge to that law. *See, e.g., Burke v. Barnes*, 479 U.S. 361, 363-64 (1987); *Dep't of Treasury v. Galioto*, 477 U.S. 556, 559-60 (1986); *Chem. Producers & Distributors Ass'n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006) (“Because the statutory amendment has settled this controversy, this case is moot.”). This Court has recognized a narrow exception to that rule where “it is ‘virtually certain that the repealed law will be reenacted.’” *Helliker*, 463 F.3d at 878 (quoting *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994)). But there is no reasonable likelihood, much less a virtual certainty, that 10 U.S.C. § 654 will be reenacted after repeal becomes effective.

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

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

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

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

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

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

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

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

Respectfully submitted,

/s/ Henry Whitaker
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cc: Dan Woods (by ECF)
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