IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| LOG CABIN REPUBLICANS<br>Plaintiff-appellee,<br><br>v.<br><br>UNITED STATES, et al.,<br>Defendants-appellants. | ) | Nos. 10-56634, 10-56813 |

**REPLY IN SUPPORT OF GOVERNMENT'S EMERGENCY MOTION FOR RECONSIDERATION OF ORDER LIFTING STAY OF WORLDWIDE INJUNCTION**

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**REPLY IN SUPPORT OF GOVERNMENT'S EMERGENCY MOTION FOR RECONSIDERATION OF ORDER LIFTING STAY OF WORLDWIDE INJUNCTION**

1. The question before the Court is whether to reconsider its granting of Log Cabin's motion to vacate the stay pending appeal that had been duly entered by an earlier motions panel and that the Supreme Court declined to vacate. Log Cabin has failed to meet its heavy burden to show that circumstances have changed in a way that justifies lifting the stay.

Log Cabin does not dispute the facts the government advanced in support of its reconsideration motion, which show that, if anything, the equities have changed in the government's *favor* since this Court originally entered a stay. Although Log Cabin makes a generalized assertion that there is harm to Service members from the continued operation of § 654, Log Cabin Resp. 16-19, Log Cabin does not dispute that only one Service member has been discharged since enactment of the Repeal Act seven months ago and that that member pressed for discharge, nor that the only Service members who have been approved for discharge in that time, by the Secretary of the Service concerned,

are those who have continued to press for their own separation. Hummer July 14 Decl. ¶¶13, 16; Hummer July 18 Decl. ¶6.

During the period that the stay has been in place, Congress has enacted, and the Executive has diligently implemented, an orderly process for repealing § 654. That process is now on the verge of completion. This afternoon, the President will meet with the Secretary of Defense and the Chairman of the Joint Chiefs of Staff about the certification of the repeal of Don't Ask, Don't Tell. We will expeditiously provide the Court with any further information after this meeting concludes. Those facts provide more reason, not less, for leaving in place the stay entered by the prior motions panel. *See* Recon. Mot. 7-19.

2. The Court's order granting Log Cabin's motion to lift the stay should be reconsidered because it is based on "points of law or fact which . . . the court has overlooked," and because "[c]hanges in legal or factual circumstances" warrant reconsideration. Ninth Cir. R. 27-10(a)(3).

Log Cabin suggests that the government's reconsideration motion

presents nothing materially new. Log Cabin Resp. 6-7. But this Court's July 15 order entering a partial temporary administrative stay correctly noted that the government's reconsideration motion presented considerably more detail concerning the progress of the repeal process than before, including the representation that repeal certification was soon to be presented for decision to the Secretary of Defense and the Chairman of the Joint Chiefs of Staff. Hummer Decl. ¶11. Log Cabin does not dispute that the government could not have presented the bulk of those significant facts when it opposed Log Cabin's motion to vacate on May 20, 2011 because they were not known at the time. Moreover, Log Cabin did not seek to vacate the stay based on any deficiencies in the repeal process or any complaint about the number of discharges since repeal. *See* Supp. to Recon. Mot. 2-3, 6-7. Thus, the new facts the government has presented fully justify granting the reconsideration motion.

3. Reconsideration is also warranted because, contrary to Log Cabin's argument, the government has defended and continues to

defend § 654 as it presently applies.[1] The government is also likely to succeed on the merits of its appeal for the further reason that Log Cabin lacks standing to represent even the one anonymous person in the military whom Log Cabin claims as a member, and also because the district court's sweeping worldwide injunction—extending far beyond that purported member—exceeds its remedial authority. Notably, Log Cabin provides no answer to the government's reliance on *Meinhold* v. *Dep't of Defense*, 34 F.3d 1469, 1480 (9th Cir. 1994), in which this Court narrowed a nationwide injunction to apply only to the plaintiff—and that injunction was against the more restrictive predecessor regulations to § 654. This Court did so despite the plaintiff's explicit contention that he was entitled to a nationwide injunction based on the "facial" nature of his constitutional challenge. Appellee's Opposition to

[1] Log Cabin suggests (Resp. at 8-9) that the government has misinterpreted the Attorney General's letter regarding the Defense of Marriage Act and the government's own brief in *Golinski* v. *U.S. Office of Personnel Management*. Log Cabin is mistaken. Footnote 4 of that brief specifically distinguished the military context, which is at issue here. Contrary to the intimation by Log Cabin, the position in the *Golinski* brief and in the filing here concerning the *Golinski* brief are consistent with the Attorney General's February 23, 2011 letter, and represent the position of the United States.

Appellants' Emergency Motion for a Stay at 12, *Meinhold* v. *Dep't of Defense*, 34 F.3d 1469 (9th Cir. 1994).

This Court did not address in its order lifting the stay either the scope of the remedy or the standing arguments we have presented. Each provides an independent basis for reconsideration. And insofar as the balance of equities is concerned, the interest of the single anonymous person in the military—who has not been shown to face any prospect of immediate harm—cannot outweigh the broad and substantial interests of the military in the orderly process of repeal Congress required in the Repeal Act.

4. The government has asked the Court to remove the case from the oral argument calendar pending the certification decision because the case will become moot 60 days after a decision to certify. *See* Ltr. Br. 4; Supp. to Recon. Mot. 8. The government agrees with Log Cabin that the case is not currently moot, and that the mootness question is not yet ripe for decision. But the Court should not alter the normal timeframe and expedite a case which presents a constitutional question that would, in the normal course, become moot before argument and

decision. *See* Opp. to Mot. to Vacate Stay at 9.

Log Cabin concedes that its claims for injunctive relief will become moot (and does not contest that the injunction should be vacated) once repeal occurs, but nevertheless contends that a live controversy will remain after repeal based on "continuing effects" on Service members previously discharged under § 654. Log Cabin Ltr. Br. 4, 6-8. This case is not a class action; accordingly, all else aside, Log Cabin could properly represent and obtain relief only on behalf of its own members. Moreover, Log Cabin has never in this lawsuit sought any sort of retrospective relief on behalf of any individuals—members or not—who were discharged under or otherwise affected by § 654, *see* ER 198 (final pretrial order), 346 (amended complaint), and it cannot do so for the first time on appeal in a letter brief submitted after completion of briefing.

Log Cabin would not have associational standing to seek such relief in any event. *See*, *e.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 515-16 (1975). The declaratory and injunctive relief Log Cabin sought and obtained was solely forward-looking prospective relief and cannot

redress any alleged past injuries. *See, e.g.*, *Mayfield* v. *United States*, 599 F.3d 964, 968 (9th Cir. 2010); Reply Br. 12-13 (citing, among other cases, *City of Los Angeles* v. *Lyons*, 461 U.S. 91, 111 (1983)). Thus, once repeal of § 654 is complete, this case will be moot in its entirety, and Log Cabin cannot rely on the possible impact of § 654 on others who are not before the Court to keep the case alive. *See Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1149-50 (2009).

Although Log Cabin asserts that the claims of individuals discharged under § 654 "may be foreclosed if the case is deemed moot and the district court's judgment is vacated," Log Cabin Ltr. Br. 8, that is not so. To the contrary, one of the principal reasons to vacate a judgment that is moot is to "'clear[] the path for future relitigation of the issues . . . .'" *Alvarez* v. *Smith*, 130 S. Ct. 576, 581 (2009) (quoting *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 40 (1950)). For example, Log Cabin refers to Major Michael Almy, Log Cabin Ltr. Br. 7, but omits that Major Almy has currently pending his own constitutional challenge to his discharge under 10 U.S.C. § 654 seeking individually tailored relief. *See Almy* v. *Dep't of Defense*, No. 3:10-CV-

5627 (N.D. Cal.).

## CONCLUSION

For the foregoing reasons, as well as for the reasons stated in the government's other filings in support of its reconsideration motion, the Court should reconsider its decision to lift the stay pending appeal, reinstate that stay, remove the case from the oral argument calendar, and permit the orderly process for repealing § 654 to be allowed to proceed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing reply in support of the government's emergency reconsideration motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on July 22, 2011.

I certify as well that on that date I caused a copy of this reply in support of the government's emergency reconsideration motion to be served on the following counsel registered to receive electronic service.

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